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THE  
FEDERAL REPORTER.

VOLUME 64.

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CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS OF APPEALS AND CIRCUIT  
AND DISTRICT COURTS OF THE  
UNITED STATES.

PERMANENT EDITION.

DECEMBER, 1894—FEBRUARY, 1895.

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FEDERAL REPORTER, VOLUME 64.

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE  
CIRCUIT AND DISTRICT COURTS.

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<sup>1</sup>Commissioned January 21, 1895.

<sup>2</sup>Resigned January 21, 1895.

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**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**UNITED STATES CIRCUIT COURTS OF APPEALS AND THE**  
**CIRCUIT AND DISTRICT COURTS.**

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**SMITH v. ATCHISON, T. & S. F. R. CO. et al.**

(Circuit Court, D. Kansas, First Division. October 30, 1894.)

No. 7,154.

1. **CIRCUIT COURTS—JURISDICTION—ACT AUG. 13, 1888—WAIVER OF PRIVILEGE.**  
The exemption of a party under the act of congress of August 13, 1888, from being sued in the circuit court, in a district other than that of his residence, is a personal privilege, and may be waived.
2. **SAME—JOINDER OF RESIDENT AND NONRESIDENT DEFENDANTS.**  
Where several defendants, who might be sued either separately or together, are joined in one suit, brought in the circuit court, in a district of which only a part of them are residents, the jurisdiction of the circuit court depending only on diverse citizenship, the defendants who reside in the district where suit is brought cannot move to dismiss, on the ground of want of jurisdiction, under the act of congress of August 13, 1888, and the nonresident defendants can only move to dismiss as to themselves, not as to the whole proceeding.

Bill by William Palmer Smith, a citizen of New Jersey, against the Atchison, Topeka & Santa Fe Railroad Company, a Kansas corporation, Edward Wilder and others, citizens and residents of Kansas, B. P. Cheney and others, citizens and residents of Massachusetts, J. A. Blair, a citizen and resident of New York, and D. B. Robinson, a citizen and resident of Illinois. The Kansas defendants and defendants Cheney, Blair, and Robinson move to dismiss for want of jurisdiction.

A. L. Williams, Benj. F. Tracy, Henry Wollman, Newman Erb, and M. Summerfield, for complainant.

Robert Dunlap, A. A. Hurd, and Gleed, Ware & Gleed, for defendants.

**FOSTER**, District Judge. The jurisdiction of the court is challenged in limine by all the defendants, both resident and non-resident, who have been served with process. The status of the parties with regard to citizenship may be stated briefly as follows:

The complainant is a citizen of the state of New Jersey. Several of the defendants, to wit, Holliday, Gleed, Severy, Wilder, and the Atchison, Topeka & Santa Fe Railroad Company, are residents and citizens of the state of Kansas. Several of the defendants are citizens of the state of Massachusetts, while others are citizens of the state of New York and of other states. The jurisdiction of this court is predicated on the diverse citizenship of the parties plaintiff and defendant, and therefore it comes under the provision of the act of 1888 limiting and defining the districts in which the suit may be brought, to wit, either in the district where the complainant resides, or the district of the residence of the defendant. These motions to dismiss are not made by the nonresident defendants alone, nor to dismiss as to them only, but are motions of the resident defendants and three nonresident defendants, to wit, B. P. Cheney, of Massachusetts, James A. Blair, of New York, and D. B. Robinson, of Illinois, to dismiss the entire proceedings for want of jurisdiction. The bill is brought to enjoin the defendants, who are alleged to be stockholders of the Atchison, Topeka & Santa Fe Railroad Company, and in control and management of the stockholders' meeting, from preventing this complainant casting his votes as a large stockholder of over 2,000 shares, under what is known as the "Cumulative System," for the choice of directors, as provided by the statutes of Kansas of 1876 and 1881. He charges in the bill that the defendants have combined together to defeat his rights in this behalf, and seeks to enforce his rights to vote his stock, and have the votes counted in the manner indicated, thus securing a representation for the minority stockholders in the board of directors. This suit was brought in the district where the railroad corporation has its existence, and where the annual meeting of the stockholders is held.

The questions presented by these motions are: First. Can the nonresident defendants challenge the jurisdiction of the court except so far as they individually are concerned? Second. Can the parties defendant who are citizens of Kansas object to the jurisdiction of the court, because other defendants are noncitizens of this district?

I have no doubt that the nonresident defendants may object to being sued in this district, and, so far as they are concerned, the suit must be dismissed as to such objecting defendants. They are sued as individuals, as stockholders; and the complainant invokes the aid of the court to control and restrain the action of the defendants, not as officers of the corporation, but as stockholders and individuals, in control of the stockholders' meeting.

I am equally as well persuaded that the defendants who are citizens of Kansas cannot object to the jurisdiction of the court on behalf of the nonresident defendants, or because such parties are made defendants. So far as they are concerned, this court has jurisdiction, and the joining of the other defendants in the suit does not affect that jurisdiction as to them. If the complainant's bill showed the other defendants to be necessary parties, the case might be otherwise; but, in a proceeding against several wrongdoers, the plaintiff may at his election proceed against any or all of them, and

those who are properly made defendants cannot object because others are omitted. It has been repeatedly decided that the exemption of a party from being sued in a district other than that of his residence, under the act of 1888, is only a personal privilege, which he may waive by proceeding with the merits of the case. So, these nonresidents may submit or object to this jurisdiction, as they may prefer. If they submit, they are bound by the judgment of the court; but, if they object, they must be dismissed hence, with their costs.

The defendants rely chiefly in support of their motion on the case of *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303. In that case the plaintiffs were copartners, one a citizen of the state of Missouri, the other a citizen of Arkansas, and the defendant a citizen of Texas. The supreme court held that the suit could not be maintained in Missouri against the objection of the defendant. Both the plaintiffs in that case were necessary parties. There could be no severing of their interests. Whether the converse of that case would hold good we need not discuss, for it is not involved here. We have, however, a case decided by the United States circuit court of California (*Rawitzer v. Wyatt*, 40 Fed. 609) wherein it was held that a copartnership might be sued in any district where one or more of the defendants reside. But these defendants are not copartners or joint obligors, and I do not consider that any one of them is a necessary party to these proceedings against the others.

In a later case in the supreme court (*Railway Co. v. McBride*, 141 U. S. 131, 11 Sup. Ct. 982) the court held this was a jurisdictional question only so far as the nonresident defendant chose to make it so. In that case the court uses this language:

"Still, the right to insist upon suit only in the one district is a personal privilege, which he may waive, and he does waive it by pleading to the merits. In *Ex parte Schollenberger*, 96 U. S. 369, 378, Chief Justice Waite said: 'The act of congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive.'"

The case of *Jewett v. Trust Co.*, 45 Fed. 801, is very much on all fours with this case. The plaintiff was a citizen of the state of Massachusetts, and brought his suit in the circuit court of Vermont against a corporation of Vermont and a corporation of the state of New York. The Vermont corporation moved to dismiss, because the other defendant was not a citizen of that state. The court overruled the motion, and stated the rule as follows:

"The other defendant might have objected to being sued in this district, but this defendant is sued in the district whereof it is an inhabitant, and has no ground to complain of that place. Full jurisdiction of suits in which there is a controversy between citizens of different states is given to the circuit courts at the beginning of section 1 of the Acts of 1887 and 1888. Exemption from suit out of the district of inhabitancy is personal to a defendant, and may be waived. *Ex parte Schollenberger*, 96 U. S. 369."

There are several other cases cited in support of this construction of the law, among which are *McBride v. Plow Co.*, 40 Fed. 162; *Norris v. Steamship Co.*, 37 Fed. 279.

It follows from what has been said that these motions to dismiss as to the nonresidents Cheney, Blair, and Robinson must be sustained, and as to the defendants, citizens of Kansas, they must be overruled. It is so ordered, to which ruling said last-named defendants duly except.

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UNITED STATES v. MORGAN.

(Circuit Court of Appeals, Eighth Circuit. September 24, 1894.)

No. 432.

CIRCUIT COURT OF APPEALS—JURISDICTION.

The United States have a right to appeal to the circuit court of appeals from an adverse judgment in the circuit court in a suit by a clerk of a district court to recover his fees under act March 3, 1887.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

This was an action by William Morgan against the United States to recover his fees as clerk of the district court for the eastern district of Missouri. From a judgment for plaintiff, defendant appealed. The appellee now moves to dismiss the appeal.

Joseph Dixon and Eleneious Smith, filed brief in support.

William H. Clopton and Walter D. Coles, filed brief against.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The appellee, William Morgan, moves to dismiss this appeal on the ground that this court has no jurisdiction to review the judgment below, because the case is not brought here by writ of error. The judgment from which the appeal is taken was rendered in a suit brought by the appellee to recover from the United States his fees as clerk of the district court for the eastern district of Missouri under the provisions of the act of congress entitled "An act to provide for the bringing of suits against the government of the United States," approved March 3, 1887 (24 Stat. c. 359, p. 505; 1 Supp. Rev. St. p. 559). In support of this motion the appellee cites the decision of the circuit court of appeals in the fourth circuit in *U. S. v. Fletcher*, 8 C. C. A. 453, 60 Fed. 53. Prior to the passage of the act of March 3, 1887, the court of claims had exclusive jurisdiction of suits of the nature of that upon which this judgment is based. Rev. St. § 1059. The only provision for a review of the judgments rendered in such suits was contained in section 707 of the Revised Statutes, which reads as follows:

"An appeal to the supreme court shall be allowed on behalf of the United States from all judgments of the court of claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court as provided in section one thousand and eighty-nine."

The first, second, ninth, and tenth sections of the act of March 3, 1887, are as follows:

"Be it enacted," etc., "that the court of claims shall have jurisdiction to hear and determine the following matters: First. All claims founded upon

the constitution of the United States or any law of congress, except for pensions, or upon any regulation of the executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable. Provided, however, that nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims,' or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, department, or commission authorized to hear and determine the same. Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the government in said court: provided, that no suit against the government of the United States, shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made.

"Sec. 2. That the district courts of the United States shall have concurrent jurisdiction with the court of claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All causes brought and tried under the provisions of this act shall be tried by the court without a jury."

"Sec. 9. That the plaintiff or the United States, in any suit brought under the provisions of this act shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained. The modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects, and as near as may be, to the statutes and rules of court governing appeals and writs of error in like causes.

"Sec. 10. That when the findings of fact and the law applicable thereto have been filed in any case as provided in section six of this act, and the judgment or decree is adverse to the government, it shall be the duty of the district attorney to transmit to the attorney general of the United States certified copies of all the papers filed in the cause, with a transcript of the testimony taken, the written findings of the court, and his written opinion as to the same; whereupon the attorney general shall determine and direct whether an appeal or writ of error shall be taken or not; and when so directed the district attorney shall cause an appeal or writ of error to be perfected in accordance with the terms of the statutes and rules of practice governing the same: provided, that no appeal or writ of error shall be allowed after six months from the judgment or decree in such suit. From the date of such final judgment or decree interest shall be computed thereon, at the rate of four per centum per annum, until the time when an appropriation is made for the payment of the judgment or decree."

The act of March 3, 1891, creating the circuit courts of appeals provided that: "The review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the supreme court of the United States, or in the circuit courts of appeals hereby established, according to the provisions of this act regulating the same" (section 4), and then provided that the circuit courts of appeals established by the act should exercise appellate jurisdiction to review by appeal or by writ of error final decisions of the circuit courts in suits of the nature of that at bar. Section 6. 26 Stat. c. 517, p. 826; 1 Supp. Rev. St. p. 901.

It may be conceded that a writ of error is the proper process for the review of an action at law in the absence of legislation specifying

ing any other method of review, and that the action on which this judgment is based is in the nature of an action at law. It is worthy of notice, however, that the act of March 3, 1887, expressly provides the course of procedure from the inception of this suit to its conclusion. It provides in section 5 that the plaintiff shall file his petition, that it shall be verified, what it shall state, and the prayer it shall contain. In section 2 it provides that all causes brought and tried under it shall be tried by the court without a jury, and in section 7 that the court shall file a written opinion in the cause, which shall set forth the specific findings by the court of the facts therein, and the conclusions of the court upon all questions of law involved in the case, and shall render judgment thereon. An appeal is certainly not an inconvenient nor an inappropriate method of reviewing a judgment on the record that such a procedure preserves. But we are not left to arguments from convenience or expediency here. Actions against the government cannot be maintained under the common law. They are the creatures of the statute that permits them to be, and must be governed and limited by its provisions. The law in force when the act of 1887 was passed expressly granted to the United States the right to review by appeal every judgment against them in actions of the nature of that at bar. Rev. St. § 707, *supra*. The act of 1887, the primary object of which was to give to the circuit and district courts concurrent jurisdiction with the court of claims over this and all other actions specified in section 1 of the act, expressly provides in section 4 that the right of exception and appeal in all proceedings under that act shall be governed by the law then in force. As the law then in force gave the United States this right to review all judgments in actions of the nature of that before us by appeal, this provision, in our opinion, not only failed to deprive them of that right, but expressly reserved it to them. It goes without saying that if the United States had this right of appeal from such judgments to the supreme court after the act of 1887, they have the right to appeal from them to this court under the act creating it. In our opinion, that right exists, and this court has jurisdiction to review the judgment below on this appeal. *U. S. v. Davis*, 131 U. S. 36, 9 Sup. Ct. 657; *Strong v. U. S.*, 40 Fed. 183. The motion to dismiss the appeal is denied.

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UNITED STATES v. GREENWALD et al.

(District Court, N. D. California. November 8, 1894.)

No. 3,010.

1. FEDERAL COURTS—POWERS—REMOVAL OF PRISONER FROM PENITENTIARY TO COUNTY JAIL.

Rev. St. §§ 5541, 5542, provide that, where a person convicted of an offense against the United States is sentenced to imprisonment for more than one year, the court which sentenced him may order the sentence executed in any state jail or penitentiary in the district or state, the use of which is allowed for that purpose by the state legislature, and that, where any such person is sentenced to imprisonment and confinement to hard



labor, the court may order the sentence executed in any state jail or penitentiary in the district or state, etc. *Held*, that such court has no power, after the expiration of the term in which such sentence is imposed, to order the removal of the prisoner from a state prison to a county jail.

2. SAME—POWER OF ATTORNEY GENERAL.

Rev. St. § 5546, provides that the place of imprisonment may be changed in any case when, "in the opinion of the attorney general," it is necessary to the prisoner's health, or when, "in his opinion," the place of confinement is not secure, or the treatment is cruel, or improper, etc. *Held*, that the power of removal in such cases is in the hands of the attorney general, and not in the courts.

In re application for the removal of the prisoner, Louis Greenwald, from the state penitentiary at San Quentin, Cal., to a county jail. Application denied.

Thos. D. Riordan, for the motion.

Chas. A. Garter, U. S. Atty.

MORROW, District Judge. This is an application filed October 16, 1894, for the removal of Louis Greenwald from the state prison at San Quentin, Marin county, Cal., to a county jail. Greenwald was sentenced by this court on June 5, 1894, to imprisonment for the term of six years, for the offense of conspiring with E. W. McLean, George Wichman, George N. Thomas, John H. Voss, Fred Miller, A. Svenson, Harry Mensig, Charles Josselyn, and others, to commit the crime of smuggling opium into the United States, which sentence was to be executed in the state penitentiary at San Quentin, Cal. This sentence the prisoner is now serving. It was imposed in the February term of this court, which expired July 1, 1894. The application is made by the wife of the prisoner, and is based upon representations as to his precarious health, it being alleged that the prisoner is suffering from a chronic asthmatic affection, which is aggravated by his close confinement and the prison discipline to such an extent that, it is averred, he may not live to serve out his full term. The allegations of the petition are supported by the certificates of three physicians, one of them being the resident physician at the state prison. It is claimed, therefore, that the prisoner is being subjected to cruel and unusual punishment. The certificate of N. R. Harris, United States secret service agent, is also produced, certifying that since his imprisonment the prisoner has given important information to the government, which has very materially assisted the efforts of the treasury department in detecting counterfeiters, and persons feloniously imitating the coinage, and making and uttering of false coins. By section 5541, Rev. St. U. S., it is provided that, in every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by the legislature of the state for that purpose. Section 5542 provides that, in every case where any criminal convicted of any offense against the United States is sentenced

to imprisonment and confinement to hard labor, it shall be lawful for the court to order the same to be executed in any state jail or penitentiary within the district or state where such court is held, etc. I do not entertain any doubt that under these sections I could order the prisoner's removal from the state prison at San Quentin to the state prison at Folsom, which, by the act of April 15, 1880 (St. Cal. 1880, p. 67), was made a state penitentiary of equal degree and grade to that at San Quentin, and where the prison discipline would be the same. But I do not think that it is within my power, after the expiration of the term of court in which the sentence was imposed, to order the removal of the prisoner to a county jail,—a place of incarceration for the punishment of minor offenses, and the custody of transient prisoners, where the ignominy of confinement is devoid of the "infamous character" which an imprisonment in a state jail or penitentiary carries with it, and which is regarded as a part of the punishment. The discipline in a county jail in this state is not the same as enforced in either of the state prisons, and such a change of imprisonment would virtually result in lessening the prisoner's punishment, and involve the exercise of authority vested exclusively in the executive department. *Ex parte Wells*, 18 How. 314.

Section 5546 is also cited in favor of the granting of the application. All that can be said about its provisions is that, if it be applicable to the present facts, the power of changing the place of imprisonment is specifically vested in the attorney general. That part of the section which is material to the petition for removal reads as follows:

"And the place of imprisonment may be changed in any case, when, in the opinion of the attorney general, it is necessary for the preservation of the health of the prisoner, or when, in his opinion, the place of confinement is not sufficient to secure the custody of the prisoner, or because of cruel or improper treatment: provided, however, that no change shall be made in the case of any prisoner on the ground of the unhealthiness of the prisoner, or because of his treatment, after his conviction and during his term of imprisonment, unless such change shall be applied for by such prisoner, or some one in his behalf."

I think that the power of removal, in a case such as this, is to be found, if at all, in the hands of the attorney general of the United States. The application must therefore be denied.

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#### HULBERT v. RUSSO et al.

(Circuit Court, S. D. New York. October 13, 1894.)

#### REMOVAL OF CAUSES—PARTY UNDER STAY IN STATE COURT.

The New York Code of Civil Procedure provides (section 779) that all proceedings of a party in default for nonpayment of costs of a motion shall be stayed until payment of such costs. *Held*, that such provision does not prevent the removal of the case to the federal court by a party in default of nonpayment of motion costs, who complies with the provisions of the federal statutes, and who has not secured in the state court a benefit which he should not be allowed to repudiate.

This is a suit by Edwin J. Hulbert against Mario Russo and Giovanni Zanardo, instituted in the state court, and was removed to this court by defendants. Heard on motion to remand.

John L. Wilkie, for plaintiff.

C. J. Simpson and Edmund C. Brown, for defendant Russo.

J. E. M. Bowen, for defendant Zanardo.

LACOMBE, Circuit Judge. To give to section 779 of the New York Code the effect contended for would be practically to amend the federal statute by adding to the paragraph authorizing non-resident defendants to remove cases into the federal circuit court the clause: "Provided, that at the time when removal papers are filed said defendants are not in default by reason of nonpayment of any motion costs imposed by the state court." It is hardly to be believed that the state legislature intended this, and, if it did, it is entirely clear that its enactment was inoperative to curtail the right of removal secured by the federal statute. The doctrine of waiver does not apply to such a case as this. Defendant has complied with the provisions of the federal statute. He has applied at the proper time, in the prescribed manner, and upon sufficient papers. He has done nothing in the state court whereby he has secured some benefit which should estop him from repudiating his former action, as did the defendant in *Bank v. Smith*, 13 Blatchf. 224, Fed. Cas. No. 6,035. His failure to comply with the order of the state court may leave him, after removal under a stay in this court, as he would be if still in the state court, but it cannot deprive him of the right secured to him by the federal statute, so long as its provisions are complied with. The technical objections to the papers are unsound. Motion to remand denied.

WESTERN UNION TEL. CO. v. POE, State Auditor, et al.

ADAMS EXP. CO. v. SAME.

(Circuit Court, S. D. Ohio, E. D. November 7, 1894.)

1. FEDERAL COURTS—FOLLOWING STATE DECISIONS—VALIDITY OF LOCAL STATUTE.

Where a federal court decides, on demurrer, that a state statute, the validity of which has never been passed upon by the highest court of the state, is in violation of the constitution of such state, and afterwards, but before a final decree is entered in the federal court, the state supreme court decides that such statute is constitutional, the federal court will reverse its former ruling in deference to the decision of the state court.

2. TAXATION—TELEGRAPH AND EXPRESS COMPANIES—NICHOLS LAW—VALIDITY.

Rev. St. Ohio, § 2778a, known as the "Nichols Law," relating to taxation of telegraph and express companies, is not in violation of Const. Ohio, art. 12, § 2, which requires all property to be taxed by a uniform rule. *State v. Jones* (Ohio) 37 N. E. 945, followed. 61 Fed. 449, 470, overruled.

Separate bills by the Western Union Telegraph Company and the Adams Express Company against Ebenezer Poe, auditor of the state of Ohio, and others, for injunctions, in which there were decrees

pro confesso. Defendants move to set aside the decrees, for a rehearing of demurrers to the bills, and to dissolve the temporary injunctions. Motions for rehearing granted, and decrees set aside.

Brown & Wells and Ramsey, Maxwell & Ramsey, for complainants.  
John K. Richards, Atty. Gen., and Thos. McDougall, for respondents.

Taft, Circuit Judge. In these two cases the bills sought to enjoin the collection of a tax imposed upon the telegraph company and the Adams Express Company, under an act of the Ohio legislature, known as the "Nichols Law." A restraining order was issued against the defendants, who were the board of appraisers appointed under the act to enforce its provisions. The contention in the bill in each case was that the Nichols law was void, because it violated the constitution of Ohio and the constitution of the United States. Demurrers were filed to the bills, and on the issue raised by them the constitutionality of the Nichols law was argued. On April 23, 1894, this court filed opinions holding that the law was in violation of that clause of the constitution of Ohio which requires that all property shall be taxed by a uniform rule. See 61 Fed. 449, 470. A short time thereafter, the supreme court of Ohio gave judgment in a mandamus proceeding in which it sustained the validity of the Nichols law, and held that it was not in conflict with the constitution of Ohio. *State v. Jones*, 37 N. E. 945. The opinion was not handed down until late in July last. In September, the complainants took decrees pro confesso on their bills, the defendants not having answered. The defendants now come into court, and make three motions: First, that the decrees pro confesso be set aside (Accompanying this motion is an affidavit showing that the defendants have a good defense on the facts, and that their delay in answering was because they intended to file a motion for rehearing in this case, based on the decision of the supreme court of Ohio). Second, a motion for a rehearing of the demurrer; and, third, a motion for the dissolution of the injunction. The chief controversy on these motions is whether this court should reverse its rulings with reference to the Nichols law, because of the subsequent opinion of the supreme court of Ohio. Strenuous objection is made to the granting of the motion because of the character of the suit in which the ruling of the supreme court of Ohio was made. An affidavit is filed to show that the suit was collusive, and that both sides of the controversy were conducted and controlled by counsel for defendants. The facts appear to be as follows: The present suits were two of half a dozen which were brought in this court for the same purpose by different express companies and the telegraph company. Among them was a suit brought by the National Express Company. The argument on demurrer in all the suits was heard in December of 1893, and the case was reargued by order of the court on the 23d of March of this year. When the reargument was ordered, the court dismissed the case of the National Express Company, as not involving a sufficient amount to give it jurisdiction. As soon as the

bill of the National Express Company was dismissed, the attorney general of Ohio, with his associate counsel, Mr. McDougall, took steps to procure the immediate hearing of a test case before the supreme court of Ohio; and for this purpose it was arranged with the auditor of Lucas county that he should refuse to put upon the tax duplicate the amount returned to him by the board of appraisers under the Nichols act to be levied against the National Express Company. A proceeding in mandamus was then begun in the supreme court of Ohio to compel the auditor to enter the amount assessed on the duplicate. An answer was drawn by the attorney general to be filed by the auditor, raising the issue of the constitutionality of the Nichols law, and making its alleged invalidity the ground for his refusal. For this purpose the attorney general procured Mr. D. K. Watson, a lawyer of Columbus, and formerly an attorney general of the state, formally to sign his name to the answer of the auditor as his counsel. He then invited Mr. Maxwell, the counsel for the complainant companies in this court, to appear in the supreme court in behalf of the auditor of Lucas county in the litigation thus begun, and to present to the supreme court the considerations upon which he relied to show that the law was invalid. Counsel for complainants, in this court, refused to take part in the hearing of the case in the supreme court of Ohio, but made a motion to dismiss the same in that court, on the ground that the proceeding was a collusive one, and involved a moot question, because, as shown by affidavit, the National Express Company had, without controversy, tendered and paid the amount assessed against it, to the auditor of Lucas county. The supreme court overruled the motion to dismiss the case, and proceeded to the hearing. As Mr. Maxwell refused to appear on behalf of the auditor of Lucas county in the supreme court of Ohio, Mr. D. K. Watson was regularly employed to represent him, and the cause was heard upon printed briefs and oral argument. A considered opinion has been handed down by the supreme court, and will appear in the official reports of that court as its judgment upon the question of the validity of the Nichols law under the constitution of Ohio.

In passing upon the question originally, this court expressed its embarrassment and hesitation in pronouncing a state law to be invalid because in violation of the state constitution, in advance of a decision by the supreme court of the state. It was fully conceded in that opinion that the supreme court of Ohio was the ultimate tribunal to decide the validity of the state law under the state constitution. This was emphatically laid down by the supreme court of the United States in *Pelton v. Bank*, 101 U. S. 143, 144. The supreme court of the state has now decided that the Nichols law is constitutional. The case before the court, though the court has overruled a demurrer to the bill, on the ground that the Nichols law is invalid, is nevertheless still pending in court, and no final decree has been entered therein. It seems to me manifest that it is the duty of this court to reverse its former ruling, and make it harmonize with that of the tribunal which has ultimate authority on the subject.

But it is said that the judgment of the supreme court of Ohio was procured by collusion. The facts do not bear out the claim. The

opinion of that court was a considered opinion, after full argument and the filing of printed briefs. The case was a test case brought before the court in a summary way, as many such constitutional questions are brought there, and full opportunity was given for argument by counsel interested to invalidate the law. It is doubtless true that the cause was hurried by counsel for the state, because it was properly thought that a decision by the supreme court of the state—the ultimate tribunal upon such questions—would be much more satisfactory for purposes of administering the law throughout the state than any judgment which this court could give. All the facts tending to show the friendly character of the mandamus proceeding and the made-up feature of the case were known to the supreme court of Ohio, but that court held that it was not a moot case, and that it was one calling for consideration by them. A due respect for the judgments of the supreme court of Ohio makes it indelicate in this court to question the propriety of such a ruling in respect of a case plainly within its jurisdiction. It is pressed upon me that to change my ruling to accord with a subsequent decision of the supreme court of Ohio is to make this court nothing but a tribunal for the registering of the decrees of the supreme court of Ohio. It is the highest duty of a judge or of a court, when shown that its judgment previously expressed is erroneous, to reverse its former ruling, if that be within its power. The question upon which the demurrer turned in this case, as it was argued by counsel and decided by the court, was whether the Nichols law was in violation of the constitution of Ohio. This court thought that it was, for the reasons stated in the opinion filed. Since that time the supreme court of Ohio has decided differently, and that decision is controlling as the law of the state, whether this court be convinced of the correctness of the reasoning in that opinion or not. The decision by the supreme court of Ohio that the Nichols law is constitutional makes it so, for all practical purposes.

Counsel for complainants contends that his clients are entitled to the independent judgment of this court upon the constitutionality of the law. They are; but that judgment must be based on the controlling authorities which come to the knowledge of the court before its final judgment is entered. In certain exceptional cases it is true that the federal courts do not feel bound to follow the decision of the supreme court of the state construing a state law or constitution. When the issue in a circuit court of the United States concerns transactions between individuals entered into on the faith of a particular construction of a state law or constitution, and the circuit court enters a decree sustaining the validity of such construction, all before the supreme court of the state has expressed any opinion on the point, the supreme court of the United States will not reverse the decree of the court below, if it otherwise approves it, simply because meantime the state court has given the law or the constitution a different construction. This was the principle in *Burgess v. Seligman*, 107 U. S. 32, 2 Sup. Ct. 10. Nor, when transactions have been entered into by individuals on the faith of a certain construction which has been given to a state statute or con-

stitution by the supreme court of the United States, will that court change its opinion because, subsequent to the transactions involved, the state supreme court has taken a different view. This was the case in *Carroll Co. v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539. Nor, when different constructions have been given to a statute or a constitution by a state court, are the federal courts bound to follow the later decisions, if thereby contract rights which accrued under earlier rulings will be injuriously affected. This principle is established in *Douglass v. County of Pike*, 101 U. S. 677; *Supervisors v. U. S.*, 18 Wall. 71; and *Rowan v. Runnels*, 5 How. 134. But the case at bar calls for the application of no such principle. Here is not involved the validity or construction of a law on the faith of which individuals have made contracts, advanced money, or incurred liability. We have here simply a tax law fixing the obligation of artificial persons of a certain class to contribute to the support of the state. In respect of such a law, it would be anomalous and absurd to have a diversity of rulings between the state and the federal courts. The intolerable result of such a diversity would be that companies who could invoke the jurisdiction of the federal courts would not pay the tax, while all those who could not invoke that jurisdiction would be compelled to pay it. There is nothing in the decisions of the supreme court of the United States which gives the slightest warrant for supposing that, in the case of a state tax law, it would not follow the decision of the state supreme court, whenever rendered, and however divergent from its own views the conclusion, provided no federal question was involved. In the *State Railroad Tax Cases*, 92 U. S. 575, 617, 618, the circuit court of the United States held that a tax law of Illinois was invalid, because in violation of the state constitution. Before the cases reached the supreme court of the United States, on appeal, the supreme court of the state decided that the law was valid. The circuit court decree was accordingly reversed. It is true that in that case the supreme court of the United States concurred with the state court on the merits, but Justice Miller used this language:

"But, if for no other reason, we should reverse the decrees of the circuit court in these cases because the same questions involving the considerations urged upon us here have been decided by the supreme court of the state of Illinois, in a manner which leads to the reversal of these. \* \* \* As the whole matter, then, concerns the validity of a state law, as affected by the constitution of the state, that question and the other one of the true construction of that statute belong to the class of questions in regard to which this court still holds, with some few exceptions, that the decisions of the state courts are to be accepted as the rule of decision for the federal courts. It is, nevertheless, a satisfaction that our judgment concurs with that of the state court, and leads us to the same conclusions."

In *Bauserman v. Blunt*, 147 U. S. 647, 13 Sup. Ct. 466, *Moore v. Bank*, 104 U. S. 625, and *Green v. Neal's Lessee*, 6 Pet. 291, the supreme court reversed the ruling of the circuit court as to the effect of a state statute of limitation, solely because, after the decision by the circuit court, the supreme court of the state had given the statute a different construction. In *Stutsman Co. v. Wallace*, 142 U. S. 293, 12 Sup. Ct. 227, a case involving the construction of the tax laws

of the territory of Dakota, the supreme court of the territory took one view. The case was carried to the supreme court of the United States for review. Meantime the territory had become a state, and the state supreme court, in another case, differed with the ruling of the territorial court. The federal supreme court thereupon reversed the judgment of the territorial court, in deference to the decision of the state court. See, also, *Suydam v. Williamson*, 24 How. 427, and *Fairfield v. County of Gallatin*, 100 U. S. 47. For the reasons given, the motions for a rehearing must be granted.

We come now to the question whether, if the Nichols law is valid under the Ohio constitution, the demurrers to the bills must be sustained, and the injunction dissolved. The validity of the law under the federal constitution cannot be seriously impeached. The only question is whether the facts averred in the bill do not make a case for enjoining the defendant appraisers, on the ground that their assessment is not in accordance with the Nichols law, as it is construed by the state supreme court. In the opinion already rendered in these cases (61 Fed. 463) it was said:

"Certain it is that courts will not permit injustice to be done to a class of taxpayers by a law which is so worded as to mean one thing to the courts when its validity is attacked, and another thing to the taxing officers when they come to enforce it. Either the law means what the officers construe it to mean, and its validity is to be tested on that construction, or they are to be enjoined from enforcing it except as the courts shall construe it."

This question has not been argued in the light of the supreme court decision, and I will hear counsel on Saturday, November 10th, at 10 o'clock, if they desire to be heard. The clerk will make the proper entries, setting aside the decrees pro confesso, and granting the motion for a rehearing.

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BARNES v. POIRIER et al.

(Circuit Court of Appeals, Eighth Circuit. October 22, 1894.)

No. 462.

PUBLIC LANDS—SOLDIERS' ADDITIONAL HOMESTEAD RIGHTS—ASSIGNABILITY.

The right given by Rev. St. § 2306, to a soldier who had theretofore entered, under the homestead laws, less than 160 acres, to enter enough more to make up 160 acres, is assignable before entry, there being no restrictions as in the homestead act. 57 Fed. 956, affirmed.

Appeal from the Circuit Court of the United States for the District of Minnesota.

Suit by Camille Poirier and others, executors of John J. Costello, against Francis A. Barnes, to quiet title. Decree for plaintiffs. 57 Fed. 956. Defendant appeals.

D. H. Twomey, for appellant.

Alfred Jacques (Theo. T. Hudson, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. Is the right to land additional to a homestead granted by section 2306 of the Revised Statutes assignable before the additional land is entered? This is the only question



it is necessary to decide in this case. It arises in this way: February 10, 1888, Louisa Dryer, who was entitled to enter 120 acres of land under that section, made an irrevocable power of attorney to James A. Boggs to take possession of, sell, and convey any land she might acquire thereunder, and to retain for his own use the rents and profits of the land and the proceeds of its sale. January 5, 1888, she entered the land in question in this case under that section, and on the same day Boggs conveyed it under his power. The appellees derive their title from this conveyance. In 1890, Louisa Dryer died, and the claim of appellant rests upon deeds of this land which he obtained from her heirs after her decease. The land is vacant and unoccupied, and the appellees obtained a decree in the court below quieting the title to it in themselves. *Pourier v. Barnes*, 57 Fed. 956. The appellant insists that this decree was wrong, because the power of attorney to Boggs was in effect an assignment of the right of Louisa Dryer to enter the land, and as such was "in contravention of the laws of the United States, against public policy, and void." If it be conceded that the power was in effect an assignment, what statute or public policy does it contravene? Restraints upon alienation are not favored by the law. The modern rule is that one may do what he will with his own, unless prohibited by a positive statute, or restrained by a manifest public policy. It goes without saying that the assignment of this right before entry must be sustained unless it is thus clearly prohibited. The right of entry carries with it the right of immediate sale and disposition, in the absence of such a prohibition. It is not contended that there is any statutory prohibition of such an assignment. The contention is that the right to this additional land under section 2306 is a part of the original homestead right granted by sections 2289-2291, 2304, 2305, Rev. St., and that, because the assignment of that right before the entry of the land was contrary to public policy and void, the assignment of the right of entry under section 2306 is so. A careful comparison of these sections utterly fails to sustain this proposition. Sections 2289-2291, 2304, 2305, under which original homesteads might be entered, required each beneficiary to make affidavit, when he filed his application to enter the land, that his application was made for his exclusive use and benefit, and that his entry was made for the purpose of actual settlement and cultivation, and not for the use or benefit of any other person. They also required that he should prove, before he entered the land, that he had actually resided upon and cultivated this homestead for at least one year after he made his application, and that when he finally entered it he should make affidavit that he had not alienated any part of it. Inasmuch as he could not enter this original homestead after he had assigned or conveyed his right to any part of it, or agreed to assign or convey that right, without committing perjury, the courts uniformly held that such an assignment or conveyance before entry was against public policy and void. *Anderson v. Carkins*, 135 U. S. 483, 10 Sup. Ct. 905. But section 2306, which grants the

right to land additional to the homestead, under which the land here in question was entered, requires no affidavit of nonalienation or of any other fact, no settlement, no occupation, no cultivation of the land which it grants, either before or after entry. If the requirements of settlement, occupation, and improvement before entry and of an affidavit of nonalienation at the time of the entry manifest a public policy to prevent the assignment of the right to the original homestead before entry, it is difficult to see why the absence of all of these requirements as to the entry of the land additional to the homestead does not as clearly indicate a public policy to permit the assignment of that right as soon as it is acquired. The fact that in the same act of congress residence, cultivation, improvement, and an affidavit of nonalienation, were made conditions precedent to the exercise of the right to the original homestead, and none of these conditions were attached to the absolute grant of the right to the land additional to the homestead (17 Stat. c. 85, §§ 1, 2, p. 49; Rev. St. §§ 2304-2306), leads with almost compelling force to the conclusion that the policy of the nation was to leave the sale and disposition of the latter right entirely unrestrained. A glance at the history of the legislation that is now codified in the sections of the Revised Statutes to which we have referred makes this conclusion irresistible.

In 1862 congress passed an act the title of which well expressed its purpose, viz. "An act to secure homesteads to actual settlers on the public domain" (12 Stat. c. 75, p. 392; Rev. St. § 2289 et seq.). The purpose of that act was twofold,—to grant to every loyal citizen of suitable age, and to every one of such age who had declared his intention to become a citizen, a homestead from the public domain, and to secure the speedy and permanent settlement and cultivation of the vast tracts of rich but vacant lands then held by the government. To accomplish this purpose, congress granted by this act to each of the beneficiaries named in it the right to enter 160 acres of the government lands that were subject to pre-emption at \$1.25 an acre, or 80 acres of those subject to pre-emption at \$2.50 an acre, on these conditions: That when he filed his application to enter the land he should make an affidavit that the application was made for his exclusive use and benefit, and that his entry was made for the purpose of actual settlement and cultivation, and not, either directly or indirectly, for the benefit of any other person or persons whomsoever; that no certificate or patent should issue for this land until five years after the filing of this application; that before he finally entered the land he should prove by two credible witnesses that he had resided upon and cultivated it for the term of five years immediately succeeding the filing of the affidavit aforesaid; and that he should at the time of his final entry make affidavit that no part of it had been alienated. Ten years later, in 1872, congress passed "An act to enable honorably discharged soldiers and sailors their widows and orphan children to acquire homesteads on the public lands of the United States" (17 Stat. c. 85, p. 49; Rev. St. § 2304 et seq.). The first section of that act granted to each of its beneficiaries, "on compli-

ance with the provisions of" the homestead act of 1862, and the acts amendatory thereof, as modified by that act, 160 acres of the public lands "to be taken in compact form according to the legal subdivisions, including the alternate reserved sections of public lands along the line of any railroad or other public work," allowed each beneficiary six months after locating his homestead to commence his settlement and improvement, and provided that the time which he had served in the army or navy should be deducted from the time required by the act of 1862 to perfect his title, but declared that no patent should issue to any homestead settler who had not resided upon, improved, and cultivated his homestead for a period of at least one year. It is common knowledge that the alternate reserved sections of the public lands along the lines of the railroads and public works referred to in this act had been generally subject to pre-emption at \$2.50 per acre, so that the soldiers and sailors who had exercised their homestead rights upon these lands under the act of 1862 prior to 1872 could not have acquired more than 80 acres of this valuable land thereunder. Without another grant to them, the result would have been that those who had not exercised this right could acquire 160 acres of this land under the first section of the act of 1872, while those who had already entered their homesteads upon these lands would have been limited to a grant of 80 acres. To give to the earlier homesteaders equal privileges with the later, and to grant, as far as possible, the like rights and privileges to all the soldiers and sailors, their widows and orphans, the second section of the act of 1872 provided as follows:

"Sec. 2. That any person entitled under the provisions of the foregoing section to enter a homestead, who may have heretofore entered under the homestead laws a quantity of land less than one hundred and sixty acres, shall be permitted to enter *under the provisions of this act, so much land as* when added to the quantity previously entered shall not exceed one hundred and sixty acres."

By the act of June 8, 1872 (17 Stat. c. 338, p. 333), this section was so amended that the clause in italics above was made to read, "under the provisions of this act so much land contiguous to the tract embraced in the first entry as." But it was found that this amendment, in many, if not in most, cases, nullified the grant, because the earlier homesteader could not then find any public land contiguous to his first entry; and by the act of March 3, 1873 (17 Stat. c. 274, p. 605), the homesteader was relieved from entering the additional land "under the provisions of this act," and from entering a tract "contiguous to the tract embraced in the first entry," and the section was so amended as to read in legal effect as it now appears in section 2306, Rev. St., viz.:

"That any person entitled under the provisions of section twenty-three hundred and four to enter a homestead, who may have heretofore entered under the homestead laws a quantity of land less than one hundred and sixty acres shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres."

This brief review of the legislation which has resulted in the existing provisions of the homestead law clearly shows that the

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purpose and policy which inspired the grants in sections 2289-2291, 2304, 2305 were the very opposite of those which inspired that in section 2306. The purpose of the former was to induce the permanent settlement of the donee upon, and the continued occupation and cultivation by him of, the land granted. Hence the requirements of settlement, cultivation, and occupation for a long period of time before entry, and of the affidavit of the homesteader at the time of final entry that he had not alienated any of the land, and hence the inevitable conclusion that any sale or contract of sale of the right to enter the land or of the land to be entered under these sections was an evasion of one of the main purposes of the act, and was against public policy and void. *Anderson v. Carkins*, supra. But the beneficiary of the grant under section 2306 had already selected, settled upon, cultivated, and acquired his homestead from the public domain, and was presumably in the occupation of it before that grant was made. The purpose of the grant under that section surely was not to induce him to abandon his homestead, and make a new settlement on the new grant. It was rather to reward him for the services he had already rendered as a soldier in suppressing the Rebellion, and as a farmer in establishing his home upon, cultivating, and occupying that portion of the public domain he had already entered as his homestead. Hence it was that no settlement, no cultivation, no occupation, no affidavit of nonalienation, no affidavit at all was made a condition precedent to the enjoyment of the benefits of this grant or to the entry of the additional land under this section. The beneficiary was left free to select this additional land from any portion of the vast public domain described in the act, and free to apply it to any beneficial use that he chose. It was an unfettered gift in the nature of compensation for past services. It vested a property right in the donee. The presumption is that congress intended to make this right as valuable as possible. Its real value was measured by the price that could be obtained by its sale. The prohibition of its sale or disposition would have made it nearly, if not quite, valueless to a beneficiary who had already established his home on the public domain. Any restriction upon its alienation must decrease its value. We are unable to find anything in the acts of congress or in the dictates of an enlightened public policy that requires the imposition of any such restraint. On the other hand, the general rule of law which discourages all restraints upon alienation, the marked contrast between the purpose and the provisions of the grant of the right to the original homestead, and the purposes and provisions of the grant of the right to the additional land, and the history of the legislation which is codified in the existing homestead law, leave us without doubt that the assignment before entry of the right to this additional land granted by section 2306 of the Revised Statutes contravenes no public policy of the nation, violates no statute, and is valid as against the assignor, his heirs and assigns. Moreover, if we were in doubt upon this question, we could not and ought not to shut our eyes to the fact that the conclusion which we have reached has been generally

accepted and acted upon as the law upon this subject for more than a decade in the western states, where most of these rights to lands additional to homesteads have been exercised. In 1882 the supreme court of the state of Wisconsin, in *Knight v. Leary*, 54 Wis. 459, 11 N. W. 600, held that a conveyance before patent, under a power similar to that in question in this case, of the land entered under section 2306 was sufficient to convey the title. In 1886, in *Mullen v. Wine*, 26 Fed. 206, Judge Brewer, then circuit judge of this circuit, now Mr. Justice Brewer of the supreme court, delivered a convincing opinion to the effect that this right to additional land was personal property, and assignable before entry. In 1887, in *Rose v. Lumber Co.*, 73 Cal. 385, 15 Pac. 19, the supreme court of California held such a right assignable before the entry of the land. These decisions met the general approval of the gentlemen of the bar, and in reliance on them thousands of acres of land have been conveyed under powers of attorney similar to that before us, and under assignments of these rights made before the lands were entered. In these western states land may almost be said to be an article of merchandise. It is bought and sold far more frequently than in the older states, and many tracts of these lands have been conveyed many times, and valuable improvements have been made upon them by the purchasers whose titles rest upon such assignments and powers. These early decisions have been repeatedly affirmed. *Montgomery v. Land Bureau*, 94 Cal. 284, 29 Pac. 640; *Webster v. Luther*, 50 Minn. 77, 54 N. W. 271; *Montague v. McCarroll* (Utah) 36 Pac. 50. This course of judicial decision ought not to be reversed, the titles to the lands conveyed on the faith of it ought not to be disturbed, and the inevitable litigation concerning them that must follow such a reversal ought not to be invited, unless the decisions to which we have referred were clearly erroneous. In such a case it is sometimes more important that the law should be settled and certain than that it should be technically right. For this reason, if the question before us was doubtful, we should hesitate long before we reversed a course of decision so long accepted in these states, and upon the faith of which so many valuable rights rest. But it is unnecessary to continue this discussion further, because we are satisfied, for the reasons stated in the earlier part of this opinion, that the early decisions to which we have adverted were undoubtedly right. The decree below must be affirmed, with costs, and it is so ordered.

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HARVEY et al. v. RICHMOND & M. RY. CO. et al.

(Circuit Court, E. D. Virginia. October 8, 1894.)

1. EQUITY PLEADING—TIME OF FILING DEMURRER.

When two demurrers, virtually the same, are filed to a bill, one within the time required by the court, the other subsequent to that time, it is within the discretion of the court to permit the filing of the second demurrer.

2. **FEDERAL COURTS—AVERMENTS SHOWING JURISDICTION.**

A bill must give jurisdiction in the district in which the suit is brought. Consequently, a bill is demurrable which sets out merely that the defendant is a resident of Virginia, since there are two judicial districts in Virginia.

3. **SAME—AMENDMENT.**

Where a bill fails to give merely the places of residence of the parties to it, as required by rule 20 in equity, such failure may be corrected by amendment on motion without delay.

4. **SAME—RESIDENCE OF CORPORATION.**

The fact that a corporation is resident in Richmond, and has its office for the transaction of all its business there, cannot be implied from the mere use of the word "Richmond" as a part of its corporate name in the bill.

**On Two Demurrers to the Bill of Complaint.**

Steele, Semmes & Cary and Meredith & Cocke, for plaintiffs.

Christian & Christian, Pegram & Stringfellow, and Wyndham R. Meredith, for defendants.

HUGHES, District Judge. This case is before me at present solely on the pleadings filed. The bill was first presented to one of the judges of the court on a motion for an injunction and the appointment of a receiver. After a hearing on this motion and two other hearings of motions by the court, the bill went back to rules. Under the practice obtaining in the circuit courts of the United States, it became incumbent upon the defendants in the cause to plead at the September rules last past; that is to say, on Monday, the 3d of September. It so happened that that day was a national holiday, and dies non, the clerk's office being closed. This circumstance constituted Tuesday, the 4th September, which was the next succeeding day, the September rule day for the purposes of this case. Accordingly, one of the defendants, viz. the Richmond Railway & Electric Company, appeared and filed a demurrer to the bill on the 4th. Afterwards, to wit, on the 6th of September, the Richmond & Manchester Railway Company entered its appearance by counsel, and tendered a demurrer, on its part, to the bill of complaint.

The two demurrers are substantially the same. The disposal of one of them by the court will virtually dispose of the other. As the demurrer of the Richmond defendant is regularly in, and permission to file that of the Manchester defendant cannot materially affect the proceedings in the case, and as, moreover, it is within the discretion of the court to permit the filing of the demurrer of the Manchester defendant, the court permits that demurrer to be filed.

The principal ground of demurrer insisted upon by defendants is the failure of the bill to set out the places of residence of the plaintiffs in the cause, and also the places of residence of defendants. The bill alleges the plaintiffs to be citizens of Maryland, and the defendants to be citizens of Virginia, but disregards rule 20 in equity which requires the residence of all parties to be set out in the bill. As rule 20 does not define the method by which the disregard of this requirement by the pleader shall be taken advantage of, I

infer that its intention is to leave that matter in each instance to the discretion of the court. My own opinion, in the absence of conclusive authorities on the subject, is that the failure of the bill to give merely the places of residence of the plaintiffs and defendants is not of sufficient gravity to require resort to a demurrer. I think it would be competent for the court to require the residences to be stated in the bill by amendment on the spot, without delay, on motion.

But the defect of the bill in this case is graver than the mere failure to give residences. There is a jurisdictional omission, more serious than the mere failure to conform to rule 20 in equity. It would not be sufficient for a bill to set out that John Doe, a citizen and resident of Maryland, complains of Richard Roe, a citizen and resident of Virginia. If there were but one judicial district in Virginia, the omission to state Richard Roe's place of residence might not be demurrable, and might be amended on mere motion. But there are two districts in Virginia, and the bill must give jurisdiction in the district in which the suit is brought. It is of jurisdictional essence that the bill shall allege that Richard Roe is a citizen of Virginia, resident at some place, alleged to be in the eastern district of Virginia. The bill at bar uses no other language in describing the defendants than to say that the suit is against "the Richmond & Manchester Railway Company, and the Richmond Railway & Electric Company, corporations duly incorporated under the laws of the state of Virginia, and as such citizens of Virginia." That is all. There is no allegation that the defendant companies are residents, respectively, of Richmond and of Manchester, in the eastern district of Virginia; having their offices for the transaction of all their business (Code Va. § 1104) in Richmond and Manchester, respectively, in the eastern district of Virginia. The omission is jurisdictional, and is demurrable. The fact that a corporation is resident in Richmond, and has its office for the transaction of all its business in Richmond, cannot be implied from the mere circumstance that "Richmond" is a word used in its corporate name. It is a fundamental rule of pleading that implications cannot supply allegations. Certainty and precision are of the essence of pleading, and all material averments must be positive and express. Implications, even necessary implications, can never dispense with material allegations. The bill here is demurrable and defective in not containing all averments giving jurisdiction of the cause to the circuit court of the United States for the eastern district.

I have not time at present to consider the remaining grounds of demurrer set out by the two defendants in the cause. I will say, however, that, whether these grounds be valid or not, the bill is amendable in the respects enumerated, on motion of complainants.

I do not think that the paper called the "answer of defendants" is yet in the cause, except as an affidavit. The defendants are not bound to file an answer in the present stage of the cause.

## GREENOUGH v. ALABAMA G. S. R. CO. et al.

(Circuit Court, N. D. Alabama, S. D. November 8, 1894.)

## 1. CORPORATIONS — ACTION TO CONTROL ELECTION OF AGENTS — WHEN MAINTAINED BY DIRECTOR.

A director of a corporation cannot sue in equity to hinder or control the election of other agents of the company in the manner prescribed by its charter and by-laws, on any showing as to what such agents may or may not do, or intend to do; especially until he has tried the usual methods of relief, and invoked the action of the full board of directors.

## 2. SAME — ELECTION OF DIRECTORS — ACTION TO ENJOIN — WHEN MAINTAINED BY MINORITY STOCKHOLDER.

The holder in trust of one share out of a total of 156,600 shares of stock of a railroad corporation cannot maintain an action to enjoin the election of directors by the other shareholders.

## 3. SAME — DIRECTOR — QUALIFICATION AT TIME OF ELECTION — WHEN NECESSARY.

Code Ala. 1886, § 1593, provides that the business of a corporation is managed by a board of directors holding and owning in good faith and in their own right shares of the capital stock, who must be elected by the shareholders at the regular annual meeting, etc. *Held*, that a person who holds and owns no stock of a corporation may be voted for and elected a director thereof, and afterwards qualify himself by acquiring one or more shares as owner in good faith and in his own right.

This was a bill by John Greenough against the Alabama Great Southern Railroad Company and others for an injunction restraining the election by defendants of certain persons as directors of such company, in which a temporary restraining order was issued. Defendants move to dissolve such order. Motion granted.

The stock of the defendant company consists of 156,600 shares, of which 156,587 are owned by the Alabama Great Southern Railway Company, Limited, of London, the other 13 shares standing in the names of different persons, and known as "directors' shares." The annual meeting for the election of a board of directors in the Alabama company was held at Birmingham, on October 3d. The English company had sent on a proxy for its 156,587 shares, directing a voting of the stock in favor of 11 specific directors, among whom were Henry A. Taylor, M. D. Woodford, Alfred Sully, Henry F. Shoemaker, Eugene Zimmerman, and John Howard Taylor. The evening before the election, John Greenough, alleging himself to be a registered stockholder of one share, applied to the circuit court, Judge Bruce presiding, for an injunction restraining all proceedings at the meeting looking to the election of these six directors, restraining the voting of this proxy and restraining the company from recognizing these men as directors. The alleged ground for his prayer was that these nominees were not registered stockholders in the company, as required by the laws of Alabama. No notice was given to the defendants, and Greenough obtained a temporary order *ex parte*. The election was held the next day, and all the ballots cast before the writ was served upon the parties; so that all that it accomplished was to prevent the judges of election from certifying the result. The company then moved to dissolve the injunction.

Lawrence Maxwell, Sol. Gen., for the motion.

Henry Crawford and Alex. P. Humphrey, opposed.

PARDEE, Circuit Judge (after stating the facts). This case has been presented to me for hearing at the request of the honorable circuit justice and the honorable district judge of the district, on a motion to dissolve the restraining order issued by the district



judge ex parte on the filing of the bill; and I have given it such consideration as the limited time at my disposal has permitted.

The complainant's standing under his bill, and his consequent right to invoke the jurisdiction of the court, is as a stockholder in the Alabama Great Southern Railroad Company, the main defendant in the case. It is true that he alleges himself to be also a director in that company, and an owner of certain bonds issued by certain other railroad companies, and secured by a deed of trust, conveying a majority of the shares of the Alabama Great Southern Railway Company, Limited, which latter company is the actual owner of all the shares of common and voting stock of the Alabama Great Southern Railroad Company, and thereupon seems to base all the material equities presented in his bill. As a director in the Alabama Great Southern Railroad Company, he can have no interest or standing to invoke the aid of a court of equity to hinder or control the election of other agents of the company in the manner and form prescribed by the charter and by-laws on any sort of a showing as to what the agents so elected may or may not do, or intend to do; particularly, until he has tried the usual methods of relief, and has invoked the action of the full board of directors. If the complainant is an owner of bonds issued by other parties apparently secured by a trust of shares of another company, but in equity really secured by the shares of the Alabama Great Southern Railroad Company, his bill does not present any such showing of his title or the facts of his case as to make a case for relief. As the complainant's equitable right to relief in the present case is to be alone based on his standing as a stockholder in the Alabama Great Southern Railroad Company, it is very important to see what that standing is. In his bill of complaint there is this cautious averment:

"Said duplicate, duly-certified list of stockholders is herewith filed, and made part of this bill of complaint, as Exhibit A, and complainant avers that all persons named thereon, including the complainant, are respectively registered stockholders of such corporation, and entitled to all rights appertaining to such relation, and have never assigned their stock, and there are no other holders of stock of such Great Southern Company than is shown and exhibited upon the official list prepared and certified by such secretary."

An examination of the exhibit referred to shows that the complainant is put down thereon for 1 share out of the total of 156,600 shares, and of which total number of shares the Alabama Great Southern Railway Company is the owner of all but 13. The complainant, then, by his averment, is a registered stockholder of one share, of \$50, out of a total stock of \$7,830,000. The showing made on this hearing is to the effect—and it is not disputed—that the complainant is not in equity the owner or holder of even one share of stock, but that, under an arrangement made to enable to complainant to comply with the law of Alabama requiring a director of a railroad company to be the owner in good faith of stock in the company, the Alabama Great Southern Railway Company transferred to the complainant, in September, 1893, one share of common stock of the Alabama Great Southern Railroad Company, not to own, but to hold in trust for the Alabama Great Southern Railway Company, Limited. The complainant, then, is before the court as

the holder in trust—and a naked trust at that—of 1 share of stock out of a grand total of 156,600 shares; and from that vantage ground he seeks, through the bill in this case, to control and keep in possession, as against his cestui que trust and the actual, real, bona fide owner, as well of all the other shares, a great railroad property. If complainant's bill had made a full and complete showing of complainant's insignificant interest as a stockholder in the Alabama Great Southern Railroad Company, it is hardly to be doubted that the judge to whom the bill was presented, on its filing, would have refused a rule nisi for an injunction based on such interest; and reasonably certain it is that no restraining order would have been issued. If, however, it should be conceded—and the argument has taken such range—that the complainant, as a stockholder, possesses sufficient interest to give jurisdiction to the court respecting the amount in controversy, and, further, that the relief sought is equitable in nature, then the question arises whether it is true in fact, as averred in the bill, that:

"In and by the statutes of the state of Alabama, which constitute the charter of the said Great Southern Company, no person can be lawfully elected a director of such corporation who is not by law entitled to vote at such annual election; \* \* \* and it is by law required that persons to be elected as directors must be holders and owners of stock, and nonstockholders are wholly ineligible."

The statute of Alabama in relation to the subject is as follows:

"The business of the corporation is under the management and control of a board of directors, consisting of not less than seven nor more than eleven members, holding and owning, in good faith, and in their own right, shares of the capital stock, who must be elected by the stockholders, at the regular annual meeting, and who hold office for a term of one year, and until their successors are elected and qualified. \* \* \*" Code Ala. 1886, § 1593.

The spirit and policy of the statute is undoubtedly that the affairs and business of the corporation shall be controlled and managed by principal agents, who shall have a pecuniary interest in the corporation. Under this statute, the qualifications of a director are that he shall be elected by the stockholders, and shall own and hold in good faith, in his own right, shares of the capital stock of the corporation. When these two—to wit, election as a director, and ownership of stock—combine in one person, that person is eligible as a director to participate in the management of the affairs of the corporation. In my view, neither the letter nor spirit of the statute requires that ownership of stock, much less registered ownership, shall precede the election. The law is satisfied if both election and ownership precede action as a director. I am aware that there are several decisions of respectable courts and judges that apparently conflict with this view, but I think the general run of reported cases under statutes as general as the Alabama statute are in accord therewith. The industry of counsel has furnished nearly all of the adjudged cases in the books, and I have considered them carefully in the light of the great interests said to be involved in this case. I give my conclusion, but do not undertake to review or harmonize the cases. The following well-considered cases are sufficient authority to support my action, particularly as common sense

and the course of business trend that way: *Mozley v. Alston*, 1 Phil. Ch. 790; *State v. McDaniel*, 22 Ohio St. 354-367; *Wight v. Railroad Co.*, 117 Mass. 226; *Despatch Line of Packets v. Bellamy Manuf'g Co.*, 12 N. H. 205; *Brown's Case*, 9 Ch. App. 102; *Parmelee v. Hambleton*, 24 Ill. 609; *State v. Murray*, 28 Wis. 96; *Privett v. Bickford*, 26 Kan. 52.

The case for equitable relief made by the complainant's bill turns entirely upon the question whether, at the annual election of directors of the Alabama Great Southern Railroad Company, a person can be legally voted for as a director of the company who is not a registered shareholder in the company. I conclude that he may be voted for, and, if elected, may subsequently qualify by acquiring as owner, in good faith and in his own right, one or more shares of stock of the company. So that, conceding the jurisdiction of the court, both in respect to the interest of the complainant to maintain the suit and in respect to the nature of the relief demanded, it seems clear the complainant's case must fail upon the merits.

Several other questions, important if the case shall come on hereafter for further hearing, have been very ably discussed by counsel; but as I am clear that, no matter what view I shall take of them, still, for the reasons given, the restraining order should be dissolved, it is unnecessary to state or consider them. An order dissolving the restraining order will be entered, to take effect immediately on being filed in the clerk's office.

## LAUGHLIN et al. v. UNITED STATES ROLLING-STOCK CO.

(Circuit Court, S. D. New York. September 28, 1894.)

### 1. RECEIVER'S CERTIFICATES—NOTICE—LIEN.

Where the receiver of an insolvent manufacturing corporation, without notice to its bondholders or general creditors, secured an order authorizing the issue of receiver's certificates, and issued such certificates, not for debts of the receiver, as such, but to creditors of the corporation for claims arising in the ordinary course of business prior to the receivership, *held*, that holders of such certificates were entitled to no priority, in the distribution of the assets of the corporation, over its other creditors, either secured or unsecured.

### 2. ELECTION—EVIDENCE.

Where a contract between a corporation and B. provided that if, after six months, B. still held certain stock, transferred on account of an indebtedness, and insisted on returning it, the corporation would accept it, and pay for it 90 per cent. in cash, and B., after the expiration of the six months, had collected dividends on the stock, and credited the stock to the corporation in statements of account, *held*, that these facts showed an election by B. to keep the stock in payment.

This was a suit in equity by Henry D. Laughlin and others against the United States Rolling-Stock Company, and is now heard on exceptions to the master's report.

Cravath & Houston, for complainants.

Seward, Guthrie, Morawetz & Steele, for defendant.

LACOMBE, Circuit Judge. Upon the argument two questions only were presented for the consideration of the court: First, whether the receiver's certificates are entitled to priority over the claims of other creditors, secured or unsecured; second, whether the receiver should have allowed a claim of Bement, Miles & Co. for \$52,275.50.

1. As no brief has been filed in support of the contention of the holders of the receiver's certificates, it will be unnecessary to enter upon any extended discussion of the law or the facts involved in the first question. There is no pretense that any notice of application for the orders authorizing the issuing of these certificates was given to the bondholders or general creditors, whose rights are now claimed to be affected thereby; and the receiver and all to whom the certificates were delivered, therefore, took the risk of the final action of the court touching the priority of such securities when in the fullness of time an opportunity to hear all parties and persons interested should be afforded. *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. 809. As the certificates were none of them issued for indebtedness of the receiver as such, but were all turned over to creditors of the company for claims accruing prior to the receivership for goods sold to the company in the ordinary course of business or money loaned to it, or for salaries of its officers or fees of its counsel, there is no warrant in the authorities for giving them any priority either over secured or even other unsecured creditors. To do so would be grossly inequitable. Cases referred to on the argument, dealing with the administration of railroad receiverships, are of no application in the case at bar, where the insolvent is a private manufacturing corporation. *Farmers' Loan & Trust Co. v. Grape Creek Coal Co.*, 50 Fed. 481. There is nothing in the orders heretofore made by the United States circuit court in Illinois which, either as an adjudication or as a matter of comity, should prevent this court from finally administering and distributing the assets in the hands of the receiver, according to these well-settled principles of equity jurisprudence. The Illinois court, on the contrary, has expressly inserted in its orders language which relegates all the questions raised upon the argument to this court for final decision. The master, therefore, under the terms of the order of reference, which required him to ascertain and report as to the respective priority of all claims, was not precluded by those orders from passing upon the priority of these receiver's certificates. As there is no good reason why the disposition of this question should be any longer delayed, and as the master has reported all the facts, the decree should adjudge that the holders of receiver's certificates are entitled to no preferential lien.

2. As to the claim of Bement, Miles & Co., an examination of the record affords no sufficient ground for reversing the finding of the master on the fundamental question of fact, viz. that the contract between the corporation and the firm, under which the stock was transferred on account of the indebtedness for machinery, provided that if, at the end of six months, it was still in the firm's hands, and

they should insist upon returning it, and taking 90 per cent. cash in its place, the corporation would accept it, and pay that sum. Waiving all question as to the validity of such a contract, the evidence in the case, which is barren of any suggestion as to an extension of the six months originally limited, and which shows the repeated collection of dividends, and the rendering of a statement of merchandise account showing a crediting of the stock to the corporation in settlement of the debt, satisfies me, as it did the master, that, upon the expiration of the six months, the firm elected to keep the stock as payment for the supplies they had furnished.

There is nothing in the proceedings before the Alabama court to prevent a final disposition of this question in this court. Those proceedings were wholly without notice to the other creditors, who here oppose the claim. Moreover, the Alabama court, as did the Illinois court, inserted, in the order whereby it transferred to the present permanent receiver all the property and effects of the corporation in the hands of the temporary receiver it had appointed, a clause providing for the payment of all liens lawfully created or imposed on the property by any order of its own, "as may be hereafter ordered or adjudged, this order being made without prejudice to any existing liens, and without prejudice to any objection or defense thereto." Evidently, the Alabama court did not undertake so to adjudicate upon the corpus temporarily in its hands as to cut off the rights of persons who had no opportunity to be heard before it.

The exceptions to this part of the master's report are overruled, and the claim disallowed. The receiver, however, should return them the stock which, presumably, they gave up when they received the receiver's certificate.

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UNITED STATES v. ELLIOTT et al.

• (Circuit Court, E. D. Missouri. October 24, 1894.)

1. CONSPIRACY IN RESTRAINT OF INTERSTATE COMMERCE—WHAT CONSTITUTES.  
A combination by railroad employes to prevent all the railroads of a large city engaged in carrying the United States mails and in interstate commerce, from carrying freight and passengers, hauling cars, and securing the services of persons other than strikers, and to induce persons to leave the service of such railroads, is within Act July 2, 1890, § 1, which provides that every contract, combination in the form of trust or otherwise, "or conspiracy in restraint of trade or commerce" among the states, is illegal.
2. SAME—INJUNCTION—POWER OF CONGRESS TO AUTHORIZE.  
Act July 2, 1890, § 4, which provides that the circuit courts of the United States have jurisdiction to restrain combinations and conspiracies to obstruct and destroy interstate commerce, before such objects are accomplished, is not void for want of power in congress to authorize such proceedings.
3. SAME—INJUNCTION ORDER—PERSONS NOT NAMED IN BILL.  
Under Act July 2, 1890, § 5, an injunction order in an action to enjoin an illegal conspiracy against interstate commerce may provide that it shall be in force on defendants not named in the bill, but who are within

the terms of the order, where it also provides that it is operative on all persons acting in concert with the designated conspirators, though not named in the writ, after the commission of some act by them in furtherance of the conspiracy, and service of the writ on them.

Bill by the United States against M. J. Elliott and others to restrain a conspiracy to obstruct and destroy interstate commerce in violation of Act July 2, 1890 (26 Stat. 209). A preliminary injunction was granted. 62 Fed. 801. Defendants demurred to the bill. Demurrer overruled.

Wm. H. Clopton, U. S. Atty.

W. W. Erwin, S. S. Gregory, and W. A. Shumaker, for defendants.

PHILIPS, District Judge (orally). This case was submitted yesterday on the demurrer filed to the bill by certain of the defendants. The district attorney submitted the same on the pleadings; and the defendants, on the pleadings and an extensive brief. This suit grew out of the recent "strike," and the bill was filed on behalf of the United States, by the district attorney, under direction of the attorney general of the United States, to enjoin the defendants from the consummation of an organized conspiracy, which threatened to obstruct and was impeding the passage of the United States mails, and interfering with interstate commerce. The demurrer, of course, admits all the material allegations of the bill; that is, all facts which are well pleaded. These averments may be summarized as follows: It is charged, in substance, that the defendants have combined and confederated together to prevent the several railroads named in the bill,—being about all of the many important roads coming into the city of St. Louis, Mo.,—which are engaged in carrying the United States mails and in interstate commerce, carrying passengers and freights, from conducting their customary business in transporting passengers and freights between and among the different states of the Union, and foreign countries. It is further charged that said defendants have combined and conspired to induce persons in the employ of said railroads to leave the service of their respective companies, and to prevent the companies from securing the services of other persons in the place of those induced to quit, the object of such conspiracy being to prevent said railroad companies from hauling cars which are extensively used in the necessary transaction of their business in interstate commerce. The bill charges the commission of divers and sundry acts by the alleged conspirators in furtherance of the objects of the confederation. Among other things, it is alleged that certain of the defendants, under the leadership of one Debs, have issued orders and directions to persons in the employ of said railroads to act subject to their direction, whereby said employes have been commanded and required to cease from operating the respective railroads. It is further charged that certain of said defendants have threatened to tie up the entire operations of trains of such of said companies as refuse to accede to certain demands made upon them by the leaders of the conspiracy, and that it is the purpose and object of the defendants to so obstruct and cripple

ple the business of said roads as to prevent them from performing their duties and functions as common carriers of freights and passengers among the several states through which the several lines of said roads pass. It is further alleged that it is among the objects and plans of said conspirators to control the interstate commerce between the city of St. Louis and points in other states, and thereby prevent the owners of said roads from exercising any independent control thereof in the transaction of interstate commerce. The bill further sets up, what is quite an historic fact in commercial circles, that the city of St. Louis is a large live-stock market for the sale and slaughter of cattle and hogs, and the preparation of the same for food, and is also a large manufacturing center, from which point these food supplies and manufactured articles are distributed to various points throughout the United States, and other necessities of life, which have become essential to the commerce, growth, and development of the country, and for its domestic life, and that the aforesaid interference with the transportation of these supplies is a great public detriment, not only to said city, of 600,000 people, but to all the people of the various states reached by the exertions and efforts of this distributing point, who, by the course of business, have become largely dependent upon this source of supply. The object of the bill is to have these parties, and their aiders and abettors, enjoined and restrained from the further prosecution of their unlawful purpose and dangerous conspiracy.

The demurrer raises the question of the jurisdiction of this court over the subject-matter, and the right of the United States to bring such suit in equity; and various other suggestions are made, of minor importance. As recited in the temporary order of injunction made by Judge THAYER, the suit was instituted upon the authority of the attorney general of the United States, and the bill is properly sworn to, in the usual form. I do not propose to go into any extended discussion of the many various questions discussed by counsel in the brief.

It is a fact of supreme importance, to be stated at the very threshold of this discussion, that the regulation and control of commerce among the states of the Union, and with foreign nations, is, by the federal constitution, reposed exclusively in the congress of the United States. The felt necessity of this federal jurisdiction was the one great impelling cause that led to the formation of the federal Union, and the adoption of the federal constitution. As early as 1778 this question was pressed upon the consideration of congress by a memorial from the state of New Jersey, and in 1781 Dr. Witherspoon, one of the statesmen of that day, presented a resolution which declared that "it is indispensably necessary that the United States, in congress assembled, should be vested with a right of superintending the commercial regulations of every state, that none may take place that shall be partial, or contrary to the common interests." And in 1786 Virginia adopted a resolution appointing commissioners to meet with like commissioners from other states, and the resolution to that effect, formulated by Mr. Madison, recited in the preamble that "Whereas, the relative situation of the United States has

been found on trial to require uniformity in their commercial regulations," etc. That great jurist, Chief Justice Marshall, in *Brown v. Maryland*, 12 Wheat. 445, most aptly presents this matter, as follows:

"The oppressed and degraded state of commerce previous to the adoption of the constitution can scarcely be forgotten. It was regulated by foreign nations with a single view of their own interests, and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties, but the inability of the federal government to enforce them had become so apparent as to render that power, in a great degree, useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great Revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by congress. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states. To construe the power so as to impair its efficacy would tend to defeat an object in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity." "What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several states?" "The power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior." "Commerce is intercourse. One of its most ordinary ingredients is traffic."

In the passion of the hour, we are apt to forget the pit from which we were dug, and the rock of permanency upon which our feet were planted, by the wise and patriotic men who constructed the fabric of our government. The power to regulate commerce among the states carries with it, as the supreme court has repeatedly held, the power to protect and defend.

On July 2, 1890, congress passed the law entitled "An act to protect trade and commerce against unlawful restraints and monopolies," section 1 of which is as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal." It may be conceded that the controlling, objective point, in the mind of congress, in enacting this statute, was to suppress what are known as "trusts" and "monopolies." But, like a great many other enactments, the statute is made so comprehensive and far-reaching in its express terms as to extend to like incidents and acts clearly within the expression and spirit of the law. It declares that every act, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the states, or with foreign nations, is forbidden. Therefore, any combination or confederation among two or more persons, in restraint of trade or commerce, comes within the express letter of the statute. The term "restraint of commerce" was used in its ordinary, business understanding and acceptance. Among the recognized meanings of the word are "prohibition of action; holding or pressing back from action; hindrance; confinement; restriction." It is a restriction or hindrance created by the application of external force. It is a vis major applied directly and effectually to carriers of



interstate commerce, which prevents them from operation. *Olivera v. Insurance Co.*, 3 Wheat. 193. It was perfectly competent for congress, in the exercise of its constitutional jurisdiction of the whole subject of such commerce, to pass laws to prevent and suppress unlawful conspiracies and combinations to interfere with the operation of such commerce. Accordingly, section 4 of said act provides that:

"The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited." "When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

It was pursuant to this statute, *inter alia*, that Judge THAYER issued the temporary restraining order in this case. I am unable to perceive the force of the argument against the power of congress to authorize such civil proceedings in equity to suppress and restrain combinations and conspiracies to accomplish the obstruction and destruction of interstate commerce and trade before it is accomplished. It was just as competent for congress to provide this civil remedy of prevention as it was to provide for punishment in a criminal proceeding for the unlawful conspiracy entered upon or consummated.

It is urged by counsel for defendants that courts of equity will not interpose by injunction to prevent the commission of an act which, when done, would be a crime penally punishable. This is an "old saw." It is a general rule of equity jurisprudence that courts of chancery will not interpose where there is an adequate remedy at law, nor will they ordinarily interpose to prevent the commission of a crime. A well and long established exception to this rule is that where parties threaten to commit a criminal offense, which, if executed against private property, would destroy it, and occasion irreparable injury to the owner, and especially where such destruction would occasion a multiplicity of suits to redress the wrong if committed, courts of equity may interpose by injunction to restrain the threatened injury. The law, it does seem to me, would be very imperfect, and indeed impotent, if a number of irresponsible men could conspire and confederate together to destroy my property, to demolish or burn down my house, that I should be remitted alone to the criminal statutes for their prosecution after my property was destroyed. Most generally, such lawbreakers who engage in such conspiracies are a lot of professional agitators. They have no property to respond in damages. Their tongues are their principal stock in trade; and inasmuch as imprisonment for debt is abolished, and cruel and unusual punishments are prohibited, an execution would be quite unavailing. It certainly presents a case that most strongly appeals to the strong arm of a court of equity to reach forth to pre-

vent great injury and loss, as the only means of conserving the rights of private property. It is now a well-recognized office of a court of equity to conserve and preserve the rights of private property in advance of its molestation and appropriation, where, from the peculiar circumstances, the remedy at law might be of doubtful restitution. In the recent case in Chicago, in which E. M. Arthur was intervener, against Thomas F. Oakes et al. (63 Fed. 310), Mr. Justice Harlan, in reviewing the restraining order issued by Judge Jenkins, has very effectually met this objection, and presented the law respecting unlawful conspiracies with a force and clearness to forever set this question at rest. It may not be out of place here to say that no public decision has perhaps been so much misunderstood, or ignorantly or intentionally misrepresented and perverted, as that of the distinguished jurist. The opinion recognizes the right of employes and labor organizations, in the absence of a contract binding the employe to a given term of service, whenever they become dissatisfied with their employment or their wages, to quit the service of the employer, either separately or collectively; and they have a right, by preagreement or preconcert of action, to unite together for taking peaceful and lawful means to secure an increase of wages; to withdraw, separately or in a body, from the service of the employer, when dissatisfied. It is not competent for the courts to interpose to restrain their right of volition, which is among the natural and inalienable rights of every citizen, to work for whom he pleases, where he can get employment, and to quit whenever he is dissatisfied therewith. But the opinion distinctly announces the further proposition that such men have no right to conspire and combine together, not only for the purpose of securing better conditions and wages, and quit service if not secured, but to go further for the purpose of preventing the employer from supplying the places vacated with other employes, who are ready and willing to take their places; that they have no right to combine and confederate together for the purpose of wantonly injuring and destroying the property of their employer, and to obstruct and interfere with his dominion over and control of his private property. An act which, if done by an individual, may be lawful, may become quite a different thing when undertaken to be done by a confederation among many, having for its inspiration the purpose of injuring and destroying the property of another, by preventing him from prosecuting his business by taking into his service others to supply the places of those who voluntarily have gone out. So the learned justice says:

"It seems entirely clear, upon authority, that any combination or conspiracy upon the part of these employes would be illegal, which has for its object to cripple the property in the hands of the receivers, and to embarrass the operations of the railroad under their management, either by disabling or rendering unfit for use the engines, cars, or other property in their hands, or by interfering with their possession, or by actually obstructing their control or management of the property, or by using force, intimidation, threats, or other wrongful methods against the receivers or their agents, or against employes remaining in their service, or by using like methods to cause employes to quit, or prevent or deter others from entering the service in place of those leaving it. Combinations of that character disturb the peace of society, and are mischievous in the extreme. They imperil the interests

of the public, which may rightfully demand that the free course of trade shall not be unreasonably obstructed. They endanger the personal security and the personal liberty of individuals, who, in the exercise of their inalienable privilege of choosing the terms upon which they will labor, enter or attempt to enter the services of those against whom such combinations are aimed. And as acts of the character referred to would have defeated the proper administration of the trust estate, and inflicted irreparable injury upon it, as well as prejudiced the rights of the public, the circuit court properly framed its injunction so as to restrain all such acts as have specifically been set forth, as well as combinations and conspiracies having the object and intent of physically injuring the property, or of actually interfering with the regular, continuous operation of the railroad."

Further on, he says:

"In our consideration of this case, we have not overlooked the observation of counsel in respect to the use of special injunctions to prevent wrong which, if committed, may be otherwise reached by the court."

Then, after observing that this jurisdiction of a court of equity should be cautiously and conservatively exercised, said:

"It will be refused until the court is satisfied that the case before it is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act. In such a case the court owes it to its suitors and its own principles to administer the only remedy the law allows, to prevent the commission of the act. The authorities all agree that a court of equity should not hesitate to use this power when the circumstances of the particular case in hand require it to be done, in order to protect rights and property against irreparable damages by wrongdoers."

Then, quoted from Mr. Justice Story, the following:

"The jurisdiction of these courts thus operating by special injunction is manifestly indispensable for the purpose of social justice, in a great variety of cases, and therefore should be fostered and upheld by a steady confidence."

The court then concludes with the statement that no other remedy than that of injunction, to meet such extraordinary conditions of affairs, was full and complete for the protection of the property, and "for the preservation of the rights of the public in its due and orderly administration by the courts." The court then says:

"That some of the acts enjoined can criminally subject the wrongdoers to actions for damages, or to criminal prosecution, does not therefore, in itself, determine the question as to interference by injunction. If the acts stop at crime, or involve merely crime, or if the injury threatened could, if done, be adequately compensated in damages, equity would not interfere. But as the acts threatened involve the irreparable injury to and destruction of property, as well as continuous acts of trespass, to say nothing of the rights of the public, the remedy at law would have been inadequate."

This doctrine was long ago announced by so distinguished a jurist as Mr. Justice Story, who said:

"If, indeed, courts of equity did not interfere in cases of this sort, there would, as has been truly said, be a great failure of justice in this country."

As said by Judge THAYER in granting this provisional injunction:

"A combination whose professed object is to resist the operation of railroads whose lines extend from a great city into adjoining states, until such roads accede to certain demands made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust, is certainly an unlawful conspiracy in restraint of commerce among the states; and under the laws of the United States, as well as at common law, men may not conspire to accomplish a lawful purpose by unlawful means."

It would present a most anomalous state of affairs, in a country like this, if men, because of some supposed or real grievance with an employer in a distinct business, should be permitted to confederate and conspire together for the purpose of coercing the employer into acceding to their demands, and, as a means to a specific end, tie up and stop independent railroads extending from the Pacific coast to the Lakes on the north and northeast, deaden all the engines on the tracks; thereby intercepting the transportation of passengers and the necessary supplies passing from one state to another, and stop the shipment of cattle, sheep, hogs, corn, wheat, oats, fruits, and vegetables. It is impossible to state in language the far-reaching destructiveness and ruin of such a scheme, if permitted to proceed to accomplishment. The business of this country has adjusted itself to operations of interstate commerce. Large communities of people are dependent for the necessities of life upon the agricultural products of other communities. While we have a state here with a productive energy and capacity for producing nearly all the necessities of life, yet, because of the fact that other localities can produce with less labor and more profit certain supplies than the local community, people forbear giving attention to the production of articles which they can thus obtain more cheaply and readily, and depend therefor upon other communities, and the railroads for transporting such supplies from one state to another. If persons may combine and confederate together to stop the railroad trains from passing from one city and one state to another, it is easy to be seen how quickly and readily they could produce ruin, famine, and death in our great cities. They could cut off such necessities for the sustenance of life as an adequate supply of coal, and in one month, or less, produce a coal famine in city and country. It certainly ought to be permissible to the government, representing the whole people, to interpose, to preserve and protect the public life and the public health. The framers of the federal constitution builded wisely when they gave to congress control over our interstate commerce. With prophetic eye, they looked far into the future of their country, and foresaw the development of its commerce, and the absolute necessity of the freedom of commercial intercourse between the different communities extending from ocean to ocean. The fact that congress did not enact the statute above recited until 1890, is no argument against the existence of its power. Many powers lodged by the constitution in the legislative department long lie dormant, until the exigency arises to invoke them into activity. As said by Mr. Justice Miller in *Sawyer v. Hoag*, 17 Wall. 620:

"When we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen."

Congress passed the act of 1890 in response to the public necessities. And as the sequel proved, in the great extremity to which the country was forced last summer, the framers of the law "builded wiser than they knew." The furious assaults made on the federal

judiciary in connection with this trouble, for grasping jurisdiction, are wholly unwarranted, in view of the express authority given the courts by said act of congress. The federal courts are the creation of the federal constitution, and the laws made in pursuance thereof. It is their office to execute, and not make, the laws. They possess just such powers, and all the power and jurisdiction, as are conferred on them by the supreme law of the land. And when they come in the exercise of the jurisdiction with which they have been clothed by an express act of the federal legislature, and grant injunctions, as they did last summer, against unlawful combinations of men, to restrain and prevent the operations of the unreasoning and unappeasable spirit of the mob, in the protection of the freedom of trade and commerce, to break the blockades on the public highways so as to open up travel and the transportation of the United States mails, and restore by civil processes the healthful glow and flow of a nation's commerce, they come as servitors, within the meaning of the preamble to the federal constitution, "to establish justice," and to conserve the public welfare. In such office they deserve the commendation of all good men, rather than the hurtful criticisms to which they have been exposed. It is well, in such a crisis, that the American people should be reminded that this is a government of law, and not of the tumultuous assembly controlled by one spirit to-day, and by another to-morrow.

Objection is made in the demurrer and the brief of counsel that the restraining order granted in this case went against parties not named specifically in the bill and the restraining order. The language of the provisional order in this respect is as follows:

"It is ordered that the aforesaid injunction, with writ of injunction, shall be in force and binding upon such of the defendants as are named in said bill, \* \* \* and shall be binding upon such defendants whose names are not stated, but who are within the terms of this order."

The order further directed that the injunction should be operative upon all persons acting in concert with the designated conspirators, and under their direction and control, and where parties were not named especially in the writ, but were found to be acting in concert with and under the direction of the alleged conspirators, and commit some act in furtherance of the conspiracy, then the marshal should serve the writ upon them, and if, after service of the writ upon them, they did any act in violation of the injunction, they would come within the terms of the restraining order. This, I think, it is competent for the court to do, under section 5 of the act aforesaid, and that it was conformable to the custom and usage of courts of equity, where there are engaged such large numbers of unknown persons in such unlawful conspiracy. As the order of injunction was not to become operative upon them until served with a copy thereof, it does not lie in their mouths to question the regularity of the proceeding. My conclusion is that the bill is sufficient, and the demurrer is overruled.

## CINCINNATI, H. &amp; D. R. CO. v. McKEEN.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1894.)

## 1. EXECUTED CONTRACT—ILLEGALITY—CANCELLATION.

Where the parties are in pari delicto, an executed contract will not, as a general rule, be set aside because of want of authority to make it.

## 2. SAME.

In May, 1887, complainant's board of directors authorized its vice president, I., to buy 20,000 shares of the stock of the T. & I. Railroad Co., and directed the sale of certain stock of the D. & M. Railroad Co., owned by complainant, to provide funds for the purchase, which stock was accordingly sold. June 1, 1887, I., "trustee," entered into an agreement with defendant, by which defendant agreed to sell to I. 11,160 shares of stock of the T. & I. Railroad Co. and 4,446 shares of stock of the T. & L. Railroad Co., to deliver 8,560 shares of T. & I. stock and all the T. & L. stock on June 4th, and the remainder of the T. & I. stock in 30 days, and acknowledged the receipt of \$250,000 from I., who agreed on June 4th to pay \$639,500, and execute his note for \$669,150, with the stock purchased as collateral. On June 4th the stock was delivered by defendant, and the money paid and note and collateral delivered by I., and a receipt signed by both parties acknowledging the receipt of stock, money, and notes. Within the 30 days, defendant delivered the remainder of the stock. June 21st, a meeting of complainant's stockholders ratified the sale of the D. & M. stock, with knowledge of the purpose of the sale. I. having been displaced as an officer of complainant, the board of directors passed two resolutions referring to the T. & I. stock, and treating it as the property of complainant, and subsequently brought two suits, before the present one, seeking relief based upon complainant's ownership of that stock. Upon this bill, alleging that the funds paid to defendant by I. belonged to complainant, and seeking to set aside the contract of June 1st as ultra vires the complainant, to declare defendant a trustee for complainant of the \$889,500 paid him by I., and to cancel the note given by I., *held*, that the contract had been fully executed; and both parties being equally chargeable with notice of its illegality, and no circumstances of oppression or fraud on defendant's part being established, it would not be set aside, nor would the note be canceled, the illegality of the contract being a complete defense at law, and the note being overdue at the commencement of this suit.

Appeal from the Circuit Court of the United States for the District of Indiana.

Suit by the Cincinnati, Hamilton & Dayton Railroad Company against William R. McKeen. Defendant obtained a decree. Complainant appeals.

This suit was brought to obtain a decree declaring the defendant, William R. McKeen, a trustee for the plaintiff, the Cincinnati, Hamilton & Dayton Railroad Company and its stockholders, in respect of certain moneys aggregating \$889,500 received by him from one Henry S. Ives, and also cancelling, as against that corporation, an agreement in writing of June 1, 1887, signed by McKeen individually, and by Ives, "trustee," and a note of June 4, 1887, given to McKeen by Ives as "trustee," for \$669,150, and payable six months after date.

The circuit court held by Judge Jenkins when district judge dismissed the bill for want of equity.

The case made by the pleadings and evidence is as follows:

Prior to May 30, 1887, Henry S. Ives, a vice president of the Cincinnati, Hamilton & Dayton Railroad Company, an Ohio corporation,

entered upon negotiations with the defendant, William R. McKeen, who at the time was the president and a stockholder of the Terre Haute & Indianapolis Railroad Company, an Indiana corporation, for the purchase of a majority of the shares of stock of the last-named company. McKeen did not at that time, as Ives knew, own a majority of such shares, although those held by him had been sufficient to give him practically the control of that company. He also owned 4,446 shares of stock in the Terre Haute & Logansport Railroad Company, an Indiana corporation then under lease to the Terre Haute & Indianapolis Railroad Company. During the negotiations between Ives and McKeen, the latter distinctly stated to the former that some modifications must be made in that lease before he would sell his stock in the Terre Haute & Indianapolis Railroad Company, unless Ives also purchased his stock in the Terre Haute & Logansport Railroad Company.

On the 30th day of May, 1887, the directors of the Cincinnati, Hamilton & Dayton Railroad Company, at a special meeting held in Cincinnati, adopted the following resolutions:

"Resolved, that Vice President Ives is authorized to purchase 20,000 shares (par value \$50 each) of the total outstanding issue of the 39,762 shares of the Terre Haute and Indianapolis Railroad Company at a price not exceeding \$100 per share, and that the same shall be submitted to the stockholders of this company for ratification at the annual meeting, June 21st proximo; and, to provide for the payment of the same, it is further

"Resolved, that it is expedient that the guaranteed common stock of the Dayton and Michigan Railroad Company, now owned by and held in the treasury of this company, be sold for the benefit of this company, provided that not less than one million dollars par value thereof can be sold at the present time; and that, therefore, C. C. Waite, the vice president and general manager, and F. H. Short, the assistant secretary, of this company, be, and are hereby, authorized and directed to cause the same to be sold at thirty-five dollars per share, being seventy per cent. of the par value thereof, and that the proceeds of such sale or sales be deposited in the treasury of this company," etc.

Pursuant to these resolutions, 20,500 shares of the guaranteed stock of the Dayton & Michigan Railroad Company, of the par value of \$1,025,000, were sold May 31, 1887, and certificates therefor were duly delivered to the purchasers.

It may be here stated that at this time the Terre Haute & Indianapolis Railroad Company, whose road extended from Indianapolis to Terre Haute, operated, under lease, a railroad extending from Terre Haute to East St. Louis, known as the "Vandalia Line;" and the Cincinnati, Hamilton & Dayton Railroad Company, whose road extended from Cincinnati, by way of Hamilton, to Dayton, owned the entire capital stock of the Cincinnati, Hamilton & Indianapolis Railroad Company, whose road extended from Hamilton, Ohio, to Indianapolis, and was connected at Indianapolis with the Terre Haute & Indianapolis Railroad by way of the Belt and Union Railway tracks. The object, therefore, of the directors of the Cincinnati, Hamilton & Dayton Railroad Company in authorizing the purchase of 20,000 shares of the stock of the Terre Haute & Indianapolis Railroad Company, must have been to obtain the control of a continuous line of railroad from Cincinnati to St. Louis.

On the 1st day of June, 1887, Ives and McKeen, pursuant to previous arrangement, met in Terre Haute for the purpose of closing up the business, about which they had been negotiating for some weeks. Ives was attended on that occasion by Mr. Ramsey, who at the time held the position of general counsel of the Cincinnati, Hamilton & Dayton Railroad Company, by Mr. Waite, vice president and general manager of that company, and by Mr. Short, a director and the secretary and assistant treasurer of the same company. McKeen was attended by his counsel, Mr. Williams. At this meeting the written agreement which the bill prays may be canceled was signed by McKeen and by Ives, after having been examined by the respective counsel of the contracting parties. That agreement was as follows:

"This agreement, made and entered into this 1st day of June, A. D. 1887, by and between William R. McKeen, of the county of Vigo and state of Indiana, and Henry S. Ives, trustee,

"Witnesseth, that the said McKeen hereby agrees to sell, assign, and transfer unto said Ives 11,160 shares of the capital stock of the Terre Haute and Indianapolis Railroad Company and 4,446 shares of the capital stock of the Terre Haute and Logansport Railroad Company, both corporations of the state of Indiana, and to deliver the certificates for such stock to said Ives, as follows, to wit:

"Certificates for 8,560 shares of said Terre Haute and Indianapolis stock and for 4,446 shares of said Terre Haute and Logansport stock on June 4th, 1887, and the remainder of said Terre Haute and Indianapolis stock, to wit, 2,600 shares, on or before thirty days from this date.

"In consideration of the premises, the said Ives has this day paid to said McKeen \$250,000, and hereby agrees to pay him, on June 4th, 1887, upon delivery of the certificates of stock aforesaid, the further sum of \$639,500, and also at the time last aforesaid the said Ives will execute and deliver to said McKeen a good and sufficient note for \$669,150, dated June 4th, 1887, due on or before January 1st, 1888, bearing 6 per cent. interest from date, and providing for the sale and purchase of the collaterals herein-after mentioned, in the form and upon the terms usually adopted in cases of notes secured by collateral security. The said Ives further agrees that, as collateral security for the payment of the note above described, he will on said June 4th, 1887, assign and transfer unto said McKeen certificates for 8,560 shares of the capital stock of said Terre Haute and Indianapolis Railroad Company and 4,446 shares of the capital stock of the said Terre Haute and Logansport Railroad Company, and will also, from time to time, likewise transfer and assign to said McKeen, as such collateral, any or all of the certificates for the 2,600 shares of said Terre Haute and Indianapolis which said McKeen is to deliver to him within thirty days from this date, as hereinbefore provided.

"It is agreed that, if said McKeen does not deliver any or all of said certificates for 2,600 shares within thirty days from this date as aforesaid, then the said McKeen shall pay or refund to said Ives the sum of \$200 for each and every share of said Terre Haute and Indianapolis stock which he may fail to deliver within said thirty days, as liquidated damages.

"Said Ives shall neither buy, directly or indirectly, nor offer to buy, any of said stock from any other party or parties until said thirty days shall have expired.

"William R. McKeen.

"Henry S. Ives, Trustee."

At the time this agreement was executed, McKeen, as Ives had been informed, did not own as much as 11,160 shares of the stock of the Terre Haute & Indianapolis Railroad Company, and it was contemplated that he would supply the deficiency by purchase from



others within the time limited by the contract; and the last clause was inserted in order to protect him against competition with Ives in the stock market.

In part execution of the agreement, Ives paid \$250,000 to McKeen on the 1st day of June, 1887. The parties, attended by the same persons, with perhaps one exception, met again in Terre Haute on the 4th day of June, 1887, on which day Ives paid to McKeen the additional sum of \$639,500, and executed and delivered to the latter the note for which the above agreement provided, and which the bill prayed may be canceled. That note reads:

"\$669,150.

Terre Haute, Ind., 4th June, 1887.

"Six months after date, or before, at my option, I promise to pay to the order of W. R. McKeen, at 25 Nassau street, New York, six hundred and sixty-nine thousand one hundred and fifty dollars, for value received, and without relief from valuation or appraisement laws, and with interest at six per cent. per annum after this date until paid; and I hereby pledge, as security to the payment of this note, eleven thousand one hundred and sixty shares Terre Haute and Indianapolis Railroad Company and 4,446 shares of Terre Haute and Logansport Railroad Company, with power hereby conferred upon the holder of this note to sell said stock, after default in the payment of this note, in such manner and at such times as he or they may deem proper, either at public or private sale, without notice. Said W. R. McKeen, or the then holder of this note, shall have the right to purchase said stock at such sale.

"Henry S. Ives, Trustee."

On the occasion of the execution of this note the contracting parties signed a paper in duplicate, of which the following is a copy:

"This is to certify that on this, the 4th day of June, 1887, pursuant to the contract of June 1st, 1887, by and between W. R. McKeen and Henry S. Ives, trustee, the said McKeen has assigned, transferred, and delivered to said Ives 8,560 shares of the capital stock of the Terre Haute and Indianapolis Railroad Company and 4,446 shares of the capital stock of the Terre Haute and Logansport Railroad Company, and has received from said Ives (\$639,500) six hundred and thirty-nine thousand five hundred dollars, and also the above-named shares of stock as collateral security for the payment of the note for (\$669,150) six hundred and sixty-nine thousand one hundred and fifty dollars provided for in said contract.

"Henry S. Ives, Trustee.

"Wm. R. McKeen."

Subsequently, June 13, 1887, McKeen transferred to Ives, trustee, one certificate calling for 2,594 other shares of the capital stock of the Terre Haute & Indianapolis Railroad Company; and 6 shares of stock in the same company were transferred to parties friendly to the Ives combination, in order that they might qualify as directors.

On the 4th day of June, 1887, after the execution and delivery of the note for \$669,150, and in order that the Terre Haute & Indianapolis Railroad Company might pass under the control of Ives and his associates, the request was made that the directors, except McKeen, resign, and their places be supplied by others, to be named by the new owners of the stock. The old board was accordingly convened, when Mr. Ramsey, the legal adviser of Ives and his associates, prepared an additional by-law providing that the board of directors at any meeting might fill any vacancies occasioned in the board by death, resignation, or otherwise.

This by-law being adopted, Henry Ross, a member of the old board, resigned, and in his place Frederick H. Short, a director and the secretary and assistant treasurer of the Cincinnati, Hamilton & Dayton Railway Company, was elected to fill that vacancy. He immediately qualified and took his seat as a director. Mr. Williams, another member of the old board, also retired. Short thereupon presented a resolution ordering the sale to Henry S. Ives, trustee, for the price of \$62.50 per share, of 8,840 shares of the stock of the Terre Haute & Indianapolis Railroad Company, then in the treasury of the company, and standing in the name of McKeen, as its trustee. This resolution was adopted. Immediately thereafter Mr. Ramsey was elected a director, and entered upon the duties of the office. Three others of the old board then resigned, and their places were filled by the election of C. C. Waite, Henry S. Ives, and Christopher Meyer. The board consisted of Short, Ramsey, Waite, Ives, Meyer, Collett, and McKeen. To the board thus constituted, McKeen tendered his resignation as president, and, on motion of Mr. Ramsey, Ives was elected president, and immediately assumed the duties of that position.

On the same day (June 4, 1887) certificates for the 8,840 shares of stock in the Terre Haute & Indianapolis Railroad Company, in the treasury of that corporation, were, by order of the board of directors, issued to Henry S. Ives, trustee. The latter delivered the same to Short, secretary and treasurer of that company, as well as assistant treasurer of the Cincinnati, Hamilton & Dayton Railroad Company. Ives, trustee, then made a draft upon Henry S. Ives & Co., of New York, payable to the order of the Terre Haute & Indianapolis Railroad Company, for \$552,500,—representing the price of the 8,840 shares at \$62.50 per share,—and delivered it to Short or to the assistant treasurer of that company. By direction of Short, treasurer, the amount of that draft was simply credited to the payee on the books of Henry S. Ives & Co., of New York, who shortly thereafter failed in business. No part of the price agreed to be paid for the 8,840 shares was ever otherwise received by the Terre Haute & Indianapolis Railroad Company, or by any one in its behalf.

On the 21st day of June, 1887, at a meeting of the stockholders of the Cincinnati, Hamilton & Dayton Railroad Company, the following resolutions, offered by Mr. Short, were unanimously adopted:

"Whereas, the board of directors of this corporation, at a meeting duly held on May 30th, 1887, duly passed and adopted the following resolution, which is duly recorded in the minutes of said meeting, viz.: [Here follow the resolutions of May 30th, 1887, above referred to.] And whereas, under the foregoing resolution, the directors of the company did sell on May 31st, 1887, twenty thousand five hundred shares of said guaranteed stock of the par value of \$1,025,000, the certificates for which were duly delivered to purchasers thereof: Now, therefore, be it resolved, that we hereby ratify, approve, and confirm the said resolution, and the said sales of stock made thereunder, as well as all other acts done under said resolution."

The minutes of this stockholders' meeting, at which 36,307 shares were represented, make no express reference to the purchase of the stock of the Terre Haute & Indianapolis Railroad Company; but the evidence showed, beyond all question, that the stockholders present

at that meeting, with few, if any, exceptions, were aware of the fact—disclosed by the record of the meeting of the directors of the Cincinnati, Hamilton & Dayton Railroad Company of May 30, 1887—that the guarantied stock of the Dayton & Michigan Railroad Company was directed to be sold “in order to provide for the payment” of the stock of the Terre Haute & Indianapolis Railroad Company, which Vice President Ives had been previously authorized to purchase. No supposition to the contrary could be justified by any reasonable view of the facts and circumstances.

As bearing upon the inquiry whether the contract between McKeen and Ives, trustee, was fully executed before the institution of the present suit, the following additional facts may be stated:

Within a short time after the above meeting of stockholders it was ascertained that, under the Ives management, assets and securities belonging to the Terre Haute & Indianapolis Railroad Company of the value of nearly \$2,000,000, as well as the 8,840 shares of treasury stock of the same corporation, had all disappeared. For what purposes they had been used is not shown. In consequence of disclosures of the dishonest practices of Ives, he was displaced as an officer of the Cincinnati, Hamilton & Dayton Railroad Company, and Julius Dexter became its president.

On the 3d day of December, 1887, the board of directors of the Cincinnati, Hamilton & Dayton Railroad Company passed a resolution “that all of the capital stock of the Terre Haute and Indianapolis Railroad Company purchased by this company in June, 1887, amounting to \$1,000,000, par value, shall be transferred upon the books of the said company unto Julius Dexter, as trustee, and that said Dexter be requested to execute a certificate of trust as to said stock, as the same shall be transferred to him.” A copy of this resolution was furnished to McKeen on the 18th of January, 1888. And on the same day the Cincinnati, Hamilton & Dayton Railroad Company, by its general counsel, requested in writing that the dividend of July or August, 1887, and that to be declared February 1, 1888, “upon the shares of the stock transferred to Henry S. Ives, trustee, by the Terre Haute and Indianapolis Railroad Company, on or about June 4, 1887, amounting to 8,840 shares,” be withheld, “said Ives having transferred said shares, or a large part thereof, to various parties, without the authority of the Cincinnati, Hamilton and Dayton Railroad Company, whose trustee he was, and for whose benefit he held said shares.”

The Cincinnati, Hamilton & Dayton Railroad Company, on the 8th day of December, 1887, commenced a suit against McKeen in the circuit court of the United States for the district of Indiana. The bill charged that prior to June 4, 1887, Ives, then vice president of the plaintiff, “was authorized by its board of directors to purchase on behalf of your orator, and as trustee for it, 20,000 shares of the stock of the Terre Haute and Indianapolis Railroad Company, a corporation having a total capital stock of less than 40,000 shares, said shares being of the par value of \$50 each, at a price not to exceed \$100 per share. The defendant was advised of said action of the board of directors, and of the authority of said Ives thereunder, and

thereupon sold to the said Ives, as trustee for your orator, 11,160 shares of the stock of said Terre Haute and Indianapolis Railroad Company, at the price of 200 per cent., or \$100 per share, amounting to \$1,116,000, and said Ives paid to the defendant on account of said purchase, out of the funds of your orator, as the defendant well knew, the sum of \$889,500, leaving a balance due on account of the said purchase of \$226,300."

The bill also charged that at or about the same time Ives purchased from the Terre Haute & Indianapolis Railroad Company 8,840 shares of its stock, standing in the name of McKeen, at the price of \$552,500 (or \$62.50 per share), and paid for the same out of the plaintiff's funds; that, as part of the transaction, Ives, without the knowledge of the plaintiff, agreed to pay McKeen individually 75 per cent. of the amount of the stock, to wit, \$331,500, and also to purchase from McKeen individually 4,446 shares, of the par value of \$50 each, of the stock of the Terre Haute & Logansport Railroad Company at the price of \$111,150; that, to cover the real transaction, Ives, as trustee, executed to McKeen the above note, dated June 4, 1887, for \$669,150, with interest at 6 per cent., and delivered the 11,160 shares of the stock of the Terre Haute & Logansport Railroad Company as collateral security for that note, with authority to McKeen or the then holder to sell the said stock, as indicated in the note, in case of default in meeting it. After stating that Ives had no authority to purchase the stock of the Terre Haute & Logansport Railroad Company for or on account of the plaintiff, and that McKeen had always pretended to plaintiff, and plaintiff until recently had believed, that all of the 11,160 and 8,840 shares had been purchased from him at \$100 per share, the bill alleged that the real indebtedness of the Cincinnati, Hamilton & Dayton Railroad Company to McKeen was \$226,500, the balance remaining after deducting \$889,500 paid by Ives from \$1,116,000, the price of the 11,160 shares at \$100 per share, which balance the plaintiff had offered and was willing to pay upon the return to it by McKeen of the 11,160 shares of the stock of the Terre Haute & Indianapolis Railroad Company.

The relief asked was that McKeen be enjoined from selling or otherwise disposing of said shares of stock, and that upon final hearing he be either required to accept \$226,500, with interest, in full and final payment of all obligations of the plaintiff upon the said note for \$669,150, to cancel that note against the plaintiff, and to deliver up the 11,160 shares of stock, or, in the alternative, that he be required to cancel that note as against the plaintiff, and return the sum of \$889,500, with interest from June 4, 1887.

On the 31st day of December, 1888, while that suit was pending, the Cincinnati, Hamilton & Dayton Railroad Company brought a suit against the Terre Haute & Indianapolis Railroad Company, Ives, and McKeen, in which it alleged that it was the owner of 20,000 shares of the stock of the latter company, which had been paid for with its funds; that 11,160 shares stood in the name of Ives, as its trustee, and the certificates therefor were held by McKeen as collateral security for a sum due to him from Ives, trustee; that the amount of the balance due was in dispute; and that Ives, "without

the consent, authority, or knowledge of your orator, has wrongfully caused the residue of said 20,000 shares of stock belonging to your orator, and which were put in the name of your orator, viz. 8,840 shares, to be transferred to and unto the names of sundry persons, to your orator unknown, who are the clerks and agents of said Ives, but who nevertheless hold said stock, notwithstanding said unlawful transfers, as trustee for your orator, to whom said stock rightfully belongs." The bill in that suit also alleged that Ives was no longer an officer or stockholder of the Cincinnati, Hamilton & Dayton Railroad Company, and that Julius Dexter, its president, had been authorized to vote said stock of the Terre Haute & Indianapolis Railroad Company at its next meeting. The relief asked was a decree enjoining Ives and McKeen from voting upon said 20,000 shares of stock, and requiring the Terre Haute & Indianapolis Railroad Company to accept the vote cast thereon by Dexter for and on behalf of the plaintiff.

On the 17th day of February, 1888, the Cincinnati, Hamilton & Dayton Railroad Company dismissed the first of the above suits, and on the same day brought the present suit. In the injunction suit brought December 31, 1887, the court denied the application for a preliminary injunction, and on the 3d day of March, 1888, the plaintiff dismissed that suit.

In his answer in the present suit, McKeen denied every allegation of the bill imputing to him fraud or deception, or which implied that the sale by him to Ives was upon any other terms than those indicated in the written agreement of June 1, 1887, or under any other circumstances than we have stated. His denials have not been overthrown by the evidence in the cause.

As already indicated, the relief sought by the Cincinnati, Hamilton & Dayton Railroad Company is a decree declaring McKeen a trustee for that company and its stockholders in respect to the sums paid to him by Ives, aggregating \$889,500, and canceling, as against that corporation, the written agreement of June 1, 1887, and the note for \$669,150, of June 4, 1887.

C. W. Fairbanks and Lawrence Maxwell, Jr., for appellant.

Miller, Winter & Elam (Benj. Harrison and John M. Butler, of counsel), for appellee.

Before HARLAN, Circuit Justice, and BUNN and SEAMAN, District Judges.

HARLAN, Circuit Justice (after stating the facts as above reported).

The principal contention of the plaintiff is that the moneys paid to McKeen belonged to it, and, although paid by Ives for its benefit and by authority of its directors, were paid in part execution of a contract unauthorized by the plaintiff's charter or by the statutes of the state of which it was a corporation; and the same view as to want of corporate power was urged in relation to the agreement and note signed by Ives, trustee.

The defendant, among other things, insists that he did not contract with Ives as representing, nor receive the moneys in question

as coming from, or as being paid for, the plaintiff; that the contract between him and Ives was fully executed before this suit was brought; and that, under the circumstances disclosed by the evidence, a court of equity will not give the relief asked, even if it were true—which, however, the defendant denies—that the plaintiff was incompetent under its charter, or forbidden by the law of its creation, to make or to apply its funds in discharge of the agreement and note sought to be canceled.

If it be true that the plaintiff was without corporate power, under its charter or the laws of Ohio, to use its funds in the purchase of shares of the stock of the Terre Haute & Indianapolis Railroad Company or of the Terre Haute & Logansport Railroad Company, and if it be also true that McKeen, during his negotiation with Ives, knew or should be held to have known, that the latter in fact represented the Cincinnati, Hamilton & Dayton Railroad Company, and that the cash payments made by Ives were with funds belonging to that corporation,—upon which matters we express no opinion,—it does not follow that the plaintiff is entitled to the relief it now seeks.

It seems to the court that the cases of *Thomas v. Railroad Co.*, 101 U. S. 71, 85, and of *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 395, 400, 406, 12 Sup. Ct. 953, particularly the latter, are decisive of this case.

In *Thomas v. Railroad Co.* the court said:

“There can be no question that in many instances where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred. In regard to corporations, the rule has been well laid down by Comstock, C. J., in *Parish v. Wheeler*, 22 N. Y. 494, that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it.”

*St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* was a suit in equity by the *St. Louis, Vandalia & Terre Haute Railroad Company*, an Illinois corporation, against the *Terre Haute & Indianapolis Railroad Company*, an Indiana corporation, to set aside and cancel a conveyance of the plaintiff's railroad and franchise to the defendant for a term of 999 years. The principal ground upon which the plaintiff corporation sought that relief was that the lease was void for want of lawful authority in either party to enter into it. The court adjudged that the contract was clearly beyond the corporate powers of the defendant company, but deemed it unnecessary to express a definite opinion upon the question whether the contract between the parties was beyond the powers of the plaintiff, because “a contract beyond the corporate powers of either party is as invalid as if beyond the corporate powers of both.”

Assuming, as contended by the plaintiff in that case, that the contract was ultra vires of the defendant, and therefore not binding upon either party, nor capable of sustaining a suit upon it at law or in equity by either party against the other, the court said:

“It does not, however, follow that this suit to set aside and cancel the contract can be maintained. If it can, it is somewhat remarkable that, in the

repeated and full discussion which the doctrine of ultra vires has undergone in the English courts within the last fifty years, no attempt has been made to bring a suit like this."

After showing that the English cases relied on were inapplicable to the case then under consideration, the court proceeded:

"The general rule in equity, as at law, is 'In pari delicto potior est conditio defendentis;' and therefore neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted at law or in equity, unless the contract remains executory, or unless the parties are not in equal fault; as, where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant. *Thomas v. Richmond*, 12 Wall. 349, 355; *Spring Co. v. Knowlton*, 103 U. S. 49; *Story*, Eq. Jur. § 298. While an unlawful contract, the parties to which are in pari delicto, remains executory, its invalidity is a defense in a court of law; and a court of equity will order its cancellation only as an equitable mode of making that defense effectual, and when necessary for that purpose. *Adams*, Eq. Consequently, it is well settled at the present day that a court of equity will not entertain jurisdiction to order an instrument to be delivered up and canceled upon the ground of illegality appearing on its face, and when, therefore, there is no danger that the lapse of time may deprive the party to be charged upon it of his means of defense. *Story*, Eq. Jur. § 700a, and cases cited; *Simpson v. Howden*, 3 Mylne & C. 97; *Ayerst v. Jenkins*, L. R. 16 Eq. 275, 282. When the parties are in pari delicto, and the contract has been fully executed on the part of the plaintiff by the conveyance of property or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. *Thomas v. Richmond*, above cited; *Ayerst v. Jenkins*, L. R. 16 Eq. 275, 284."

In illustration of the rule just stated, the court further said:

"In the case at bar, the contract by which the plaintiff conveyed its railroad and franchise to the defendant for a term of nine hundred and ninety-nine years was beyond the defendant's corporate powers, and therefore unlawful and void, of which the plaintiff was bound to take notice. The plaintiff stood in the position of alienating the powers which it had received from the state, and the duties which it owed to the public, to another corporation, which it knew had no lawful capacity to exercise those powers or to perform those duties. If, as the plaintiff contends, the contract was also beyond its own corporate powers, it is certainly in no better position. In either aspect of the case the plaintiff was in pari delicto with the defendant. The invalidity of the contract, in view of the laws, of which both parties were bound to take notice, was apparent on its face. The contract has been fully executed on the part of the plaintiff by the actual transfer of its railroad and franchise to the defendant; and the defendant has held the property, and paid the stipulated compensation from time to time, for seventeen years, and has taken no steps to rescind or repudiate the contract."

Has the contract which the appellant seeks to have rescinded been fully executed, or does it remain executory in any material respect?

McKeen agreed to sell and deliver to Ives 11,160 shares of the capital stock of the Terre Haute & Indianapolis Railroad Company and 4,446 shares of the capital stock of the Terre Haute & Logansport Railroad Company, certificates for the latter shares and for 8,560 of the 11,160 shares to be delivered to Ives on the 4th of June, 1887, and certificates for the remaining 2,600 shares of the stock of the Terre Haute & Indianapolis Railroad Company to be delivered 30 days from that date. All these things were done by McKeen within the time limited by the written agreement.

In consideration of McKeen's agreement to sell and deliver these shares of the stock of both the Indiana corporations, Ives, on June 1, 1887, paid to McKeen \$250,000 in cash, and agreed to pay to him on the 4th of June, 1887, the additional sum of \$639,500, and to execute a note dated on that day for \$669,150, payable six months after date, and bearing 6 per cent. interest, and providing for the sale and purchase of the above certificates of stock in the form, and upon the terms, usually adopted in cases of notes secured by collaterals, and to assign and transfer those certificates to McKeen as collateral security for the payment of the above note. All these things were done by Ives within the time limited by the contract.

It would seem, then, that, within the meaning of the general rule to which we have adverted, the contract between the parties was fully executed on the 4th day of June, 1887. In *Sturges v. Crowninshield*, 4 Wheat. 122, 197, Chief Justice Marshall said that "a contract is an agreement in which a party undertakes to do, or not to do, a particular thing." And in *Fletcher v. Peck*, 6 Cranch, 87, 136, he said that "an executory contract is one in which a party binds himself to do, or not to do, a particular thing;" and "a contract executed is one in which the object of [the] contract is performed." Each particular thing specified in the agreement of June 1, 1887, to be done by the respective parties was done on the 4th day of June, 1887; so that a suit instituted after that day to compel its specific performance could have been dismissed upon the sole ground that nothing remained to be done which its provisions required at the hands of either party. If neither party could have maintained a suit of that character, it is not perceived upon what ground the contract between them could be characterized as executory in respect to any of its provisions. It cannot be deemed to have been executory because of the nonpayment of the note for \$669,150 prior to the commencement of this suit. The written agreement of June 1, 1887, so far as it related to the balance of the price of the stock sold to Ives, after crediting the cash payments of \$250,000 and \$639,500, required only the execution and delivery of his note for a specified amount, containing certain provisions, and to be secured by the stock to be delivered to McKeen as collateral. Besides, under the law of the state in which the contract was made, anything may be regarded as payment which the creditor accepts as payment; and by the same law, if the note given in payment is negotiable according to the commercial law, the presumption is that it was received as payment. *Weston v. Wiley*, 78 Ind. 54, 56; *Waring v. Hill*, 89 Ind. 497, 501; *Nixon v. Beard*, 111 Ind. 137, 12 N. E. 131; *Louden v. Birt*, 4 Ind. 566; *Tilford v. Roberts*, 8 Ind. 254. Interpreting the agreement of June 1, 1887, in the light of the circumstances attending its execution, it cannot be doubted that the note for \$669,150, secured by the stock of the two Indiana corporations, was accepted by McKeen as payment. And Judge Jenkins well said, in the present case, that, "whatever might be the rights of one who is to receive money under a contract, it cannot be that the party who is to pay in a specific manner, and has so paid by obligations satisfactory to the payee, can repudiate the transaction,



and claim the contract still to be an existing, unexecuted agreement."

If, then, the original contract now sought to be rescinded was fully executed before this suit was brought, what principle will justify the interference of a court of equity in behalf of the plaintiff? If the contract was illegal because beyond the corporate powers of the plaintiff, the parties were equal in fault,—the one for using its funds for purposes foreign to the objects of its creation, the other for accepting and appropriating such funds; both being bound to take notice of the limitations which the statutes of Ohio put upon the authority of the Cincinnati, Hamilton & Dayton Railroad Company. Nor can the assistance of a court of equity be invoked upon any ground of oppression or fraud on the part of the defendant. Neither the bill nor the evidence suggests any fact showing oppression. Fraud in certain particulars is indeed charged by the bill, but the allegations to that effect are expressly denied, and the evidence does not overcome the answer on that point. The case, then, comes within the decisions of the supreme court of the United States above cited, so far as the bill seeks, in behalf of the railroad company, a decree adjudging the defendant to hold the moneys received from Ives in trust for it.

In respect to the prayer for the cancellation of the note given by Ives, there is no need for the interposition of equity, even assuming the contract, in all its parts, to have been illegal and void as beyond the corporate powers of the railroad company. If, at the time this suit was commenced, the company was liable to suit by McKeen, either at law or in equity, upon the note itself, or for its amount as being the balance of the stipulated price for the shares purchased by Ives, trustee, the illegality of that contract would have been a complete defense. Upon the theory that the contract was ultra vires of the plaintiff, it may be that a suit in equity might have been maintained for the cancellation of the note, if one had been commenced before the note fell due, and while there was danger of its being transferred to a bona fide holder for value, without notice from the note itself or otherwise of the illegality of the contract out of which it arose. But this suit was not brought until after the maturity of the note, and therefore a transfer of it, after the institution of this suit, to a third person, would not have cut off any defense that the railroad company could have made as against McKeen, the payee.

It may be stated as part of the history of this litigation that, a few days after the present suit was brought,—that is, on the 27th of February, 1888,—McKeen notified both Ives, trustee, and the Cincinnati, Hamilton & Dayton Railroad Company, that under authority conferred by the note itself he would, at a named hour and place, on the 8th of March, 1888, sell as an entirety the stock pledged as collateral security for its payment. It was sold at the time and place designated, McKeen becoming the purchaser at the price of \$750,000. Of this purchase McKeen notified the president of the Cincinnati, Hamilton & Dayton Company, as well as of the amount of the surplus in his hands over and above the face of the note.

Although the facts relating to this sale were fully set forth in the answer of McKeen, we have considered the question of the cancellation of the note in the light of the situation as it was when the present suit was brought. This we have done because it is insisted that the jurisdiction of the court to decree the cancellation of the note given by Ives depends upon the facts as they existed when that jurisdiction was invoked.

It has been suggested that these principles should not be applied to the injury of the stockholders of a corporation which has misapplied its funds in violation of its charter, or for objects foreign to those for which it was created. Whatever force this suggestion would have had if suit in the name of the corporation had been brought before the contract sought to be rescinded was fully executed, or however strongly, under some circumstances, it would appeal to the chancellor in a suit brought by or for the benefit of stockholders even after the execution of the contract, it is not entitled to weight in the present case. Although the plaintiff seeks a decree declaring that McKeen holds the \$889,500, received from Ives, in trust for its stockholders as well as for itself, there is no allegation in the bill that the stockholders were not fully aware of the negotiations between Ives and McKeen, or of the use by the plaintiff of its funds for the purchase of the stock of the two Indiana corporations. We are satisfied, from the undisputed facts and from all the circumstances of the case, that the stockholders, with very few, if any, exceptions, were cognizant of Ives' movements in the interest of the Cincinnati, Hamilton & Dayton Railroad and of himself. They could not have been ignorant of the transactions of Ives and his associates, nor of the two suits instituted in the circuit court of the United States sitting in Indiana. While they remained inactive, Ives contrived to dissipate a very large amount of the assets of the Terre Haute & Indianapolis Railroad Company. So that, when this suit was brought, the stock of that company, obtained by him from McKeen, had materially diminished in value. The restoration of the parties to their original position has become an impossibility; and, while that consideration alone might not justify the court in refusing to rescind an executory contract entered into by a quasi public corporation in violation of law, it is of great weight when the extraordinary power of equity to cancel an executed contract is invoked. *Delaine Co. v. James*, 94 U. S. 214; *Union R. Co. v. Dull*, 124 U. S. 182, 8 Sup. Ct. 433. We are of opinion that the corporation, so far as it may be considered as representing stockholders, is precluded from obtaining, at the hands of a court of equity, the relief asked in the bill. *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 408, 12 Sup. Ct. 953; *Graham v. Railway*, 2 Macn. & G. 146.

For the reasons stated, the decree below is affirmed.

## FURNALD v. GLENN.

(Circuit Court of Appeals, Second Circuit. October 15, 1894.)

No. 123.

## 1. EQUITY—ENJOINING PROCEEDINGS IN ANOTHER COURT.

A court of equity will not interfere to set aside an interlocutory decree in a cause then pending in another court. The party complaining of such a decree has a sufficient remedy by applying to the court which made it, and it would be most unseemly and an intolerable interference with the ordinary administration of justice, for another court to assume to interpose.

## 2. SAME—ACTION IN STATE COURT.

A Virginia corporation, being insolvent, executed a deed of trust for the benefit of creditors; and subsequently, in a suit in equity in a Virginia court, instituted by creditors, and to which the corporation, some of its directors and the trustees under the deed, were parties, an account of its affairs was taken, its debts ascertained, the deed of trust adjudged valid, and a new trustee appointed by the court, and directed to sue stockholders for unpaid subscriptions. While such suit was still pending, awaiting reports of the trustee before final adjustment of the claims of creditors, etc., the trustee sued complainant in this court to recover a subscription to stock, and complainant filed this bill to restrain the prosecution of the trustee's action at law, alleging fraud and collusion between the trustee and creditors and some of the directors of the corporation, in the Virginia suit, to exaggerate claims against the corporation, and throw the burden of loss upon nonresident stockholders, and praying that the decrees of the Virginia court might be declared null and void, the trustee enjoined from prosecuting his action, or that an account might be taken of the liabilities and assets of the corporation and the moneys received by the trustee. *Held*, that while the United States circuit court is not precluded from exercising, in proper cases, the inherent jurisdiction of courts of equity to restrain actions at law, though the particular action may be based on the judgment of a state court, it would be wholly improper, and an intolerable interference with the orderly administration of justice, for a court of equity to undertake to annul the interlocutory decree of another such court in a pending cause, especially when the latter court is the forum where the litigation naturally belongs, when all parties are before it, and have full opportunity to apply in it for redress of their grievances, and when the party applying has long neglected to avail himself of such opportunity.

## 3. EQUITY PRACTICE—PARTIES—STOCKHOLDERS OF CORPORATION.

In a suit to ascertain the indebtedness of an insolvent corporation, collect the assets, and apply them to pay the debts, the corporation represents the stockholders, and there is no necessity for making them parties.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a suit by Francis P. Fernald against John Glenn to restrain the prosecution of a suit at law. From a decree dismissing the bill of complaint (56 Fed. 372), complainant appealed to this court.

George Zabriskie and J. Archibald Murray, for appellant.

Charles Marshall, Arthur H. Masten, and Burton N. Harrison, for appellee.

Before BROWN, Circuit Justice, and WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The complainant appeals from a decree of the circuit court for the southern district of New York dismissing his bill, filed to restrain the prosecution of a suit at law pending in that court, brought against him by John Glenn, trustee, etc. In the suit at law the present complainant is alleged to be a stockholder of the National Express & Transportation Company, a Virginia corporation, which became financially embarrassed in September, 1866, and executed a deed of trust to Hoge and others, as trustees for the benefit of its creditors. It owed debts for borrowed money, services rendered, and other obligations, amounting to about \$273,000, and its principal assets consisted of unpaid subscriptions from stockholders, amounting to over \$3,000,000. Its stockholders, at a meeting assembled for considering the situation, adopted a resolution instructing the directors to make a call upon the unpaid stock for the purpose of extricating the company and paying its debts. This was the last meeting ever held, and nothing was done to carry the resolution into effect. The trustees under the trust undertook to collect some of the assets, but accomplished little. In November, 1871, a creditors' suit was brought by W. W. Glenn, in chancery court of the city of Richmond, in Virginia, in behalf of himself and such other creditors of the company as might become parties, to obtain a construction of the deed of trust, ascertain the indebtedness of the company, compel the board of directors to make a call upon the stockholders for enough of their unpaid subscriptions to satisfy the debts, to appoint a receiver to collect the assets, and to have the moneys collected brought into court, and applied to the payment of the debts. Although the trustees and some of the directors were made parties, the corporation was not served with process in the suit, nothing of practical value was accomplished, and the efforts of the attorneys for the creditors seem to have been spent in a vain attempt to induce the officers to appear for the corporation and co-operate in the purposes of the suit. In 1879, however, an amended and supplemental bill was filed, and the corporation was served with process by service upon Anderson, a director. The Baltimore & Ohio Railroad Company, the Bank of Commerce of Baltimore, and the Philadelphia, Delaware & Baltimore Railroad Company, creditors of the express company, intervened, upon petition, asking to be made coplaintiffs in the suit, and their petitions were granted. A decree pro confesso was made, and an order of reference to a commissioner to take an account of the debts of the company. The claims of a large number of creditors were proved before the commissioner. The suit then proceeded to an interlocutory decree, which was made December 14, 1880. That decree adjudged, among other things, that the deed of trust made by the company was valid, and passed to the trustees and their successors all the property of the corporation, including the amount unpaid on the stock and not called; that the trustees, nevertheless, had no legal right to sue for or recover the same until called by the company or by the court on default of the company; that there was due certain indebtedness specified in the report of the commissioner, to whom it had been referred to ascertain the debts of the company,

and the aggregate amount thereof was about \$509,392; that there were no means of payment except the amount of the capital stock which had not been called; that a call of 30 per cent. was necessary, and was thereby ordered, and the several stockholders of the company were required to pay the same; and that the suit be retained for future consideration as to the priority of payment of the debts, and for further action of the court in case other calls or assessments should be necessary. The decree also removed the trustees under the trust deed, and appointed John Glenn trustee in their place; and he was directed from time to time to make to the court a report, and the distribution of the fund among those entitled thereto was reserved for the consideration of the court upon the reports of the trustee. In July, 1883, a further decree was made in the cause, authorizing Glenn, as trustee, on the payment to him within six months from that date, by any person liable as a subscriber for the stock, of 25 per cent. of the original amount of the subscription, to execute a receipt therefor, which should operate as a full acquittance and discharge on account of such subscription. The court also ordered that notice be given, by mail, of a copy of the decree to every person against whom any liability was asserted in the suit. Notice of that order was given to all these persons pursuant to the terms of the decree. In April, 1884, certain stockholders of the company filed a petition, in behalf of themselves and all other stockholders who desired to join, to set aside the decree, and for a rehearing of the cause. Pending the disposition of this petition, the suit was removed from the chancery court of Richmond to the circuit court of Henrico county. Answers were filed by the parties plaintiff to the petition of the stockholders, and proofs were taken upon the issues made by the petition and answers. Upon that hearing, among other things, it was insisted for the petitioners that the corporation was never properly before the court, and the court was without jurisdiction to render the decree; that the stockholders were not represented in fact; and that the claims allowed against the company were barred by the statute of limitations. March 4, 1885, the court made a further decree, dismissing the petition conditionally. That decree contained the following clause:

"But this decree is to be without prejudice to any subsequent application of the petitioner or other stockholders to reopen the decree entered in this cause on the 14th day of December, 1880, so far as may be necessary to inquire into the validity of any of the debts against said company recognized in said decree; such application to set out sufficient reasons to justify the court in reopening the decree for said purpose, and to be accompanied with a tender of adequate security to pay all the costs awarded to any party, and all damages sustained by any party by reason of such application, and in other respects to abide the judgment of this court."

Subsequently, decrees were made in the cause for further calls upon the stockholders for unpaid subscriptions. December 13, 1886, Glenn, the trustee appointed by the decree, brought suits in the circuit court of the United States of the southern district of New York against a number of alleged stockholders, among them one against the complainant, to recover the judicial calls made by the

decrees of the Virginia courts. The present bill was filed to restrain the prosecution of that suit. It proceeds upon the theory that neither the company, the complainant, nor any person representing stockholders was made a party in the Virginia suit; that the creditors, the trustees under the trust deed, and some of the directors colluded to deprive the stockholders of any opportunity to contest the claims of the alleged creditors; that, by their connivance, claims were established by the decree without adequate evidence, and others were established as to which there were valid defenses which were intentionally concealed from the court; that the compromises made with various stockholders, pursuant to the order of the court, were unjustifiable, and inequitably increased the liability of other stockholders; and that generally the proceedings were fraudulently conducted, in order to make the claims against the company as large as possible, and charge the burden of the adjudged indebtedness on the nonresident stockholders. The prayer of the bill is that the decrees of the chancery court of the city of Richmond and the circuit court of Henrico county may be adjudged to have been made without jurisdiction, and to have been procured by fraud and collusion, and to be null and void; and for an injunction against setting up or enforcing them, and restraining Glenn from proceeding in his action at law. It also prays as alternative relief that an account be taken of the liabilities and assets of the company, and that, in taking the account, proof be taken of the validity of all claims set up against the company, and that the trustee be required to account for all property received by him or his predecessors in the trust, and charged with the whole amount unpaid on the compromised subscriptions.

Great industry and astuteness on the part of counsel have been displayed in presenting by the bill and proofs every circumstance which can in any conceivable way militate against the good faith and the legal effect of the proceedings in the Virginia suit, but there is such a manifest want of equity in the attempt made by the bill to transfer to a foreign forum a litigation which properly belongs to the courts of Virginia,—the state where the corporation was domiciled, and in reference to whose laws the stockholders contracted,—which is still pending in the court of original jurisdiction, and when that court remains open to the complainant and other stockholders for all necessary redress of their grievances, that a few controlling considerations will suffice to dispose of the case without any extended discussion of collateral questions.

The averment that the corporation was never made a party to the Virginia suit can be safely disregarded. If true, there was no occasion for the bill, and an appeal to a court of equity is unnecessary, because the fact would nullify the proceedings and the decree in the Virginia suit, and afford a simple and perfect defense to the suit at law. Notwithstanding the testimony of Anderson, who is in doubt whether he was ever a director, but is confident that, if he ever was, he had resigned before service of process upon him, we think that he was a director when served, and consequently that the corporation was regularly made a party to the suit. Lewis'

*Adm'r v. Glenn*, 84 Va. 947, 6 S. E. 866. The corporation in such a suit represents the stockholders, and there is no necessity for making them parties. They are parties by representation, and are effectually present. *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739.

The theory that the trustees or directors colluded with the creditors to deprive the stockholders of an opportunity to be represented cannot be accepted. At the inception of the suit, the counsel for the creditors labored with Perot, the president, to induce him to have the corporation appear and answer; and, when process was finally issued against the corporation, attempts were made to serve it in every practicable method. Although the corporation and stockholders were not heard in the proceedings, this was not by the procurement or purpose of the creditors, but because of the neglect of the agents of the stockholders, the officers of the corporation, who seem to have preferred to disclaim any responsibility as directors or liability as stockholders, and trust to the chances of litigation for immunity. If the corporation had appeared and contested the suit, it is entirely plain that the decree could not have properly been other than it was, except in a single particular. This is shown by the judgments of the court of appeals of Virginia in *Lewis' Adm'r v. Glenn*, 84 Va. 947, 6 S. E. 866, and *Hamilton v. Glenn*, 85 Va. 901, 9 S. E. 129. It may be that there were valid defenses to some of the claims, in whole or in part, which were established by the creditors against the corporation, and consequently that the decree erroneously fixed the aggregate of indebtedness upon which the assessment was based; but in all other respects the decree is not subject to any just criticism; and if it is true that as to some of these claims there were valid defenses known to the creditors who proved them, and concealed in order to mislead the court, it is beyond doubt that many of the claims proved were in all respects honest and valid obligations of the company, and the creditors who proved them had no interest in promoting the invalid claims, and did not participate in doing so. The attempt to infect the valid claims, and impute to the creditors proving them knowledge and participation in the proof of the dishonest or invalid ones, because all the claims were represented by the same solicitors, and the solicitors knew of the defenses which might have been made, is a violent use of the doctrine of presumptive fraud. The considerations presented to us to show that there was no good defense to these claims, if they have not fully convinced us, were probably sufficient to convince these solicitors. Under these circumstances a court of equity is asked to annul a decree of another court of equity in a pending cause, to which court and cause the stockholders can now resort to redress any errors of which they can reasonably complain.

The circuit court of the United States are not precluded from exercising in proper cases the inherent jurisdiction of courts of equity to restrain the prosecution of unconscionable actions at law, notwithstanding the particular action may be based upon the judgment of a state court. *Payne v. Hook*, 7 Wall. 425; *Barrow v. Hunton*, 99 U. S. 80; *Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. 619; *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62; *Mississippi Mills*

v. Cohn, 150 U. S. 202, 14 Sup. Ct. 75. How far they can with propriety undertake to review and nullify a decree of a court of equity, impeached for fraud, made by a state court having plenary jurisdiction and the usual powers of courts of equity, by bill of review and otherwise, to revise their own proceedings and decrees, we are not now called upon to consider. We are asked to annul the interlocutory decree of the Virginia court; and, if this were done, the only effect would be to leave the cause to proceed in that court just as though the decree had not been made. The corporation is not a party here; the trustees to whom it transferred all its assets are not parties; the creditors who intervened and made themselves parties to the suit are not here, and, the decree being adjudged null for fraud, none of them would be represented by the trustee who derives all his authority by it; and, under such conditions, the theory that the court below could take an account of the liabilities and assets of the company, and proceed to assess the stockholders and satisfy the debts, is preposterous. No authority has been cited for the proposition that one court of equity will undertake to annul the interlocutory decree of another court of equity; and there is no support for it upon principle or in good sense. The party complaining of such a decree has a sufficient remedy by applying to the court which made it, and it would be most unseemly, and an intolerable interference with the orderly administration of justice, for another court to assume to interpose. That the decree is interlocutory merely is settled by the decisions of the highest court of Virginia. *Rawlings v. Rawlings*, 75 Va. 76; *Thomson v. Brooke*, 76 Va. 160. In Virginia, as elsewhere, the rule is that only those decrees are final in which no further order of the court is necessary to give completely the relief contemplated by the court; and until final decree the court has full control over the cause. In the courts of Virginia this rule is especially pronounced. *Cocke's Adm'r v. Gilpin*, 1 Rob. (Va.) 20; *Ryan's Adm'r v. McLeod*, 32 Grat. 367. It is well established by the authorities that equity will not interfere to set aside proceedings in an action in another court upon charges of fraud, where the party seeking its aid has been guilty of laches or fault, or when relief is open in the original action to the complaining party by a proper application. *Sanders v. Soutter*, 126 N. Y. 193, 27 N. E. 263; *Dufossat v. Berens*, 18 La. Ann. 339; *Dalhoff v. Keenan*, 66 Iowa, 679, 24 N. W. 273; *Brown v. County of Buena Vista*, 95 U. S. 157; *Nougue v. Clapp*, 101 U. S. 551; *Graham v. Railroad Co.*, 118 U. S. 161, 6 Sup. Ct. 1009.

The provision made in the interlocutory decree reserving the privilege to any stockholder of the company to apply to reopen the decree, and contest the validity of any debt against the company recognized by it, was accompanied with just and reasonable conditions, and was in all respects a wise exercise of judicial discretion. The complainant was informed as early as in July, 1883, of the pendency and nature of the Virginia suit. From that time until the commencement of the suit at law to recover the assessment, he had an opportunity to acquaint himself with the proceedings, and intervene to reopen the decree,—a privilege which was given by the court



to other stockholders, and was subsequently preserved for all stockholders by the formal amendment of the decree. When he filed the present bill, that remedy was still open to him; and, so far as appears, he can still resort to it. It would be grossly inequitable towards the creditors whose honest claims are established by that decree, after this lapse of time, and when possibly they may have lost the evidence of their claims, to vacate the decree, and undo all the subsequent proceedings in the suit.

We are of the opinion that the court below properly dismissed the complainant's bill. To sanction his suit would be to countenance similar suits on behalf of each stockholder who may be sued for an assessment in any of the courts of the score of states in which the stockholders are to be found. The spectacle of a multitude of courts sitting concurrently in review of an interlocutory decree of a Virginia court, and assuming to control its proceedings, would be a reproach and disgrace to our jurisprudence. The decree of the circuit court is affirmed, with costs.

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MORRIS v. BRADLEY FERTILIZER CO.

(Circuit Court of Appeals, Third Circuit. November 1, 1894.)

No. 1.

1. SALE OF CHATTEL—IMPLIED WARRANTY OF FITNESS.

Defendant telegraphed and wrote plaintiff, requesting it to ship a G. mill, of same size and kind as one sold to the P. Salt Co., stating that he wanted the mill for grinding limestone. Plaintiff shipped a G. mill, of the size and kind described, which proved unsuccessful in defendant's business, as he wished to grind wet limestone, for which the mill was not adapted. In a letter written subsequently, defendant told plaintiff that one E. (not connected with plaintiff) had recommended the mill, and he (defendant) thought he would try it. *Held*, that these facts failed to show that the purpose for which the article ordered was to be used was disclosed to the seller, and reliance placed on his judgment, so as to give rise to an implied warranty of fitness.

2. SAME—STATEMENT IN CATALOGUE.

Two years before the sale of the mill, plaintiff's agent had given defendant a catalogue advertising the G. mill, which stated that it would grind substances "as hard as flint and as soft as lime. \* \* \* It will grind wet or dry,"—but which showed, by other passages that "wet or dry" referred to alternative constructions or modes of operation of the mill, not to the nature of the substance ground. *Held*, that this statement was not misleading as to the fitness of the mill for grinding wet limestone, but that, if the catalogue had expressly stated it to be fit, and the mill been bought in reliance upon such statement, it would have constituted an express, not an implied, warranty.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was an action by the Bradley Fertilizer Company, a corporation created under the laws of Massachusetts, against A. G. Morris, a citizen of Pennsylvania, to recover \$2,000 and interest, being the amount due for a grinding mill purchased by defendant from the plaintiff. A verdict was rendered for plaintiff, and defendant's motion for a new trial denied, whereupon defendant brought error.

C. Berkley Taylor and Wm. H. Addicks, for plaintiff in error.  
Leoni Melick, for defendant in error.

Before SHIRAS, Circuit Justice, and ACHESON and DALLAS, Circuit Judges.

DALLAS, Circuit Judge. "If a man buy an article for a particular purpose, made known to the seller at the time of the contract, and rely upon the skill or judgment of the seller to supply what is wanted, there is an implied warranty that the thing sold will be fit for the desired purpose." Benj. Sales (2d Am. Ed.) § 661. Where, however, a positive and unqualified order for a specific article is given, this rule is not applicable. In such cases there is an implied condition, according to the English authorities, or, as substantially the same thing is usually called by our courts, an implied warranty, that the article supplied shall correspond with the designation, description, or exemplar, as the case may be, by which the thing purchased had been defined. But the seller's undertaking does not extend beyond this guaranty of identity. There is no implied collateral agreement that the article sold is fit for the use for which the buyer designs it. He buys on his own judgment, and if that turns out to be at fault he must himself bear the burden of his disappointment. These principles are well settled and do not appear to be challenged, but it is contended that the circuit court erred in its application of them to the facts which were before it. The contract between these parties was for the purchase and sale of a "Griffin mill," and such a mill was delivered. The action in the court below was for recovery of the agreed price, and the defense was that the mill would not do the work for which it was wanted. The business of the defendant below was the grinding of limestone without first drying it. Consequently, he required a mill which would grind it when in a wet condition, and as the mill in question would not do this it was useless to him. Is the seller liable for the resultant loss? If he is, as fraud is not charged, and no express warranty is alleged, it must be by reason of the existence of an implied warranty of fitness, which, as we have seen, cannot exist unless it appears—First, that the purpose for which the mill was bought was sufficiently made known to the seller; and, second, that his judgment as to its suitability for that purpose was relied upon. This brings us to the investigation of the evidence by which these points must be determined, and upon which we base our decision.

The defendant below testified that, about two years before he bought the mill, Mr. Griffin (acting, it may be assumed, for the plaintiff) gave him a catalogue in which it was stated, with regard to the Griffin mill: "It will grind equally well substances as hard as flint and as soft as lime. \* \* \* It will grind wet or dry." But this catalogue was in evidence, and the defendant further testified that he had read it,—“read it over,”—and it is made quite manifest by other passages which it contains that the statement as to grinding either wet or dry does not relate to the substances to be ground, but to alternative constructions or modes of operation of the machine itself. For instance, it is said, "In wet grinding the water is in-

roduced with the feed, and when the mill is running the water takes the same motion as the material in the dry mill," etc. The statement of which the defendant below complains is therefore not a misleading one, if read—as of course it should be—in connection with other parts of the paper in which it occurs. If, however, this catalogue had plainly asserted that the Griffin mill would grind wet limestone, and if it had clearly appeared that the purchase was made with reference to that assertion, the defendant below would have proved too much, for the warranty shown, if any, would be an express, and not an implied, one; and the brief submitted on his behalf rightly concedes that the charge of the trial judge upon the subject of express warranties was unobjectionable. Moreover, the defendant below, though he may, as he testified, have thought, from his perusal of this catalogue, that the Griffin mill would answer his purpose, certainly did not, as will appear further on, rely upon its statements in giving his order of two years later. The correspondence which created the contract is set forth in the record as follows:

“[Business Heading.]

“Tyrone, Pa., September 24, 1892.

“Bradley Fertilizer Company, Boston, Mass.—Gentlemen: I have just wired you as follows: ‘Have you Griffin mill, same size sold the Pennsylvania Salt Co. (only steel), that you could at once, if ordered? Answer.’ This I now confirm. My ground limestone works at Bellefonte, Pa., burnt down, and I will have to get a new mill for grinding limestone, if you have on hand a mill the same size and kind as you sold the Penn’a Salt Mfg. Co., Natrona, Pa., only I want it steel. Wire me at once price, and say if you can ship at once, if ordered.

“Yours, truly,

A. G. Morris. R.”

“[Business Heading.]

“Tyrone, Pa., September 27, 1892.

“Messrs. Bradley Fertilizer Company, No. 27 Kilby St., Boston, Mass.—Gentlemen: I am in receipt of your telegram saying you can ship mill any day, and have wired you as follows: ‘Ship most improved Griffin mill for grinding limestone. Will write.’ I now confirm this. Please ship at once. I want the best and latest you have for making fine-ground limestone. My mill burnt down last week, and it is necessary for me to rebuild at once; and I also want you to send a man at once, with plans for the foundation, etc., so I can have everything ready as soon as the mill arrives here. Please do not delay shipment, and let me know on receipt of letter when shipment will be made, and man sent. Ship to Bellefonte, Centre county, Penn’a, care of B. C. R. R.

“Yours, truly,  
“(Dictated.)”

A. G. Morris. R.”

These letters, and the telegrams they confirmed, show that a specific article—a Griffin mill—was ordered, and that it was to be of the size and kind of that of the Pennsylvania Salt Manufacturing Company, except only that it was to be of steel; and it is not denied that the article supplied was a Griffin mill, and that it conformed to exemplar and description. It is insisted, however, that a warranty of fitness for grinding wet limestone should be implied, because it was stated that the mill was wanted “for grinding limestone,” and “for making fine-ground limestone”; but this position is not tenable, for reasons heretofore indicated, inasmuch as these statements did not disclose a material feature of the particular purpose for which the mill was required, and the general purport of

the letters in which they are contained shows that the buyer bought on his own judgment, and neither sought nor relied upon that of the seller. The contractual letters and telegrams did not inform the seller that the limestone which the buyer used was wet limestone, nor was any evidence given or offered from which, in our opinion, effective knowledge of that fact could be ascribed to him. The buyer, in the first letter which he wrote to the seller after finding that the mill would not suit him (October 20, 1892), made no complaint of the seller. He treated the trial which had been made as an experiment of his own. He said: "It don't appear to be a success. \* \* \* The stuff appears to be too damp and heavy," and in his next letter (November 23, 1892) he offered to pay freight, and for the seller's trouble and expense, if the latter would dispose of the mill to some other customer. Not until January 11, 1893, was there any intimation that the buyer would seek to hold the seller responsible for the mistake which had been made, and the claim then suggested was put upon the ground that the letters of purchase had referred to "limestone," which, as has been shown, is not legally adequate for the support of such a claim, and also upon a statement said to have been made by a representative of the seller, "that he did not think the mill would do the work," and the buyer's reply, that, "if it would not do, it was not worth anything" to him. But, as this is admitted to have taken place after the sale had been completed and perfected, it could not affect the contract. A warranty is, in general, a collateral undertaking forming part of the transaction of sale. When a distinct subsequent warranty is alleged, it must be more satisfactorily established than by evidence of such a conversation as is here relied on, and must be supported by a new consideration, which, as to the warranty supposed to be deducible from the remark and reply which have been quoted, is wholly lacking.

It has now, we think, been made evident that, as to an essential particular, the purpose for which this mill was wanted was not made known to the seller at the time of the purchase, and that at no subsequent time was any undertaking of warranty assumed, and it seems to be at least equally apparent that the judgment of the seller was not relied on by the buyer. The latter knew of the mill belonging to the Pennsylvania Salt Company. He believed that one of the same size and kind would suit him. "Mr. Ewer" (not connected with the seller) "recommended it," and he (the defendant below) "thought he would try it." This is, in substance, what he himself said in letters written after he had tried the mill, and before this controversy arose, and the case made on the trial is to the same effect. Therefore, we repeat that, even if full disclosure of the purpose for which the mill was intended had been made, an implied warranty of fitness would not have resulted, because of the absence of a further necessary constituent of such warranty,—reliance on the judgment of the seller.

The foregoing discussion of the fundamental questions involved in this case renders it unnecessary for us to deal in detail with the several assignments of error. They have all been considered, but none of them is sustained. The judgment is affirmed, with costs.

## GREENWOOD v. TOWN OF WESTPORT.

(District Court, D. Connecticut. November 5, 1894.)

No. 915.

Samuel Park, for complainant.

Curtis Thompson, for defendant.

TOWNSEND, District Judge. Exceptions to the report of the commissioner. The case is reported in 53 Fed. 824, and 60 Fed. 560. The only exception pressed at the hearing was upon the ground that the commissioner erred, either in allowing damages resulting from the negligence of the master, or in allowing more than one-half of said damages. The boiler stores and furniture were damaged, after the accident, by the steam which was kept up by the master; but the commissioner having found, upon all the evidence, that such amount of steam was necessary for pumping the barge out in case she should leak, the court will not disturb such finding. *Panama R. Co. v. Napier Shipping Co.*, 9 C. C. A. 553, 61 Fed. 408. The other damages resulted directly from the accident. It is claimed that they were caused by negligence, prior to the accident, on the part of the persons in charge of said barge. These claims were fully presented to the court at the hearing on the merits, and were considered and passed upon in its opinion. The report of the commissioner is in accordance with the conclusions reached by the court, and it is therefore confirmed.

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## SWIFT et al. v. PHILADELPHIA &amp; R. R. CO.

(Circuit Court, N. D. Illinois. November 5, 1894.)

## 1. COMMON LAW OF THE UNITED STATES.

There is, within the boundaries of the several states, no common law of the United States, as a distinct sovereignty; neither the constitution nor congress having adopted that law, and the power of the nation to make laws, within the field of power assigned to it by the constitution, being exercised only by express enactments of congress, or by treaties.

## 2. CARRIERS—UNREASONABLE RATES—INTERSTATE COMMERCE ACT—PLEADING.

An action will not lie against a carrier to recover back freight exacted in excess of a reasonable rate, impliedly contracted for, upon shipments made after the passage of the interstate commerce act, in the absence of an averment that no rates were published and in existence as required by that act.

Action at law by Swift and others against the Philadelphia & Reading Railroad Company. On motion for leave to withdraw pleas, and file demurrers to the declaration.

A. H. Veeder and Mason B. Loomis, for plaintiffs.

Ullman &amp; Hacker and Osborn &amp; Lynde, for defendant.

GROSSCUP, District Judge. This, with other cases involving the same questions, now comes on, upon motion of the defendant, for leave to withdraw pleas, and file demurrers to the declaration. The disposition of the motion is dependent upon whether the declaration

sets out a good cause of action, and is practically, therefore, a demurrer to the declaration. The declaration differs in some respects from its predecessor, but, before entering upon the effect of this difference, I propose to revert to the original questions discussed in my former opinion. *Swift v. Railroad Co.*, 58 Fed. 858. I do this because the conclusions of that opinion have been persistently and ably combated, not only in current legal periodicals, but also by some of the courts of the other circuits.

The conclusions to which I arrived in the former opinion may be summarized as follows: The right to recover from common carriers for unreasonable exactions must be found in some positive law of the land, applicable to the case in hand. Such a prohibition is in fact found in the common law; but it is not applicable to the case in hand, unless there be a common law of the United States, as a distinct sovereignty, because the regulation of the rates upon which the suit is dependent is within the scope of interstate commerce, and an exclusively national affair, in which the need of uniformity is imperative. There is no common law of the United States, as a distinct sovereignty; and there being no pronouncement of congress upon this subject, either expressly or impliedly, outside of the interstate commerce act, and this action not having been brought under the interstate commerce act, there is no law, either of the United States or the state, applicable to the case in hand, and there can therefore be no recovery.

The only link in the foregoing summary that has met with serious objection is the one which affirms the nonexistence of a United States common law. Indeed, it is conceded that unless a prohibition against the exaction of unreasonable rates is to be found in the body of the laws in force in the United States, outside of the scope of state jurisprudence, an action such as this cannot be sustained in the courts, either of the United States or the states, for, confessedly, the right to sustain them in the courts of the states is predicated upon the jurisdiction of state courts, in most instances, to enforce personal rights growing out of United States law. In my former opinion, I assumed that there was no common law of the United States, basing that assumption upon the repeated declarations of the supreme court. These declarations, I confess, were not decisive of the particular cases in which they occurred, and have not been accompanied by any discussion of the considerations upon which they are founded; but throughout the literature of that tribunal they have occurred often enough, without even the suggestion of a probable controversy, to justify their acceptance as the settled pronouncement of the court. I propose now, however, to consider the proposition as if it were wholly original and undecided.

Assuming that the regulation of freight rates upon interstate commerce is exclusively a national affair, is there any law of the United States applicable to the case in hand, except such as may be found to have arisen from the legislation of congress? Is there any common-law prohibition against unreasonable rates? Is there any United States common law at all? This inquiry can only be answered by taking a rapid glance at the whole sweep of our dual sys-

tem of government, and its legal settings upon the jurisprudence of the past.

What is law? In the sense under review, it is a rule of civil conduct prescribed by the supreme power in the state. Mere definitions of right and wrong are not necessarily law. They may be so manifestly just that they ought to control civil conduct, but the citizen is under no legal obligation to obey them unless they are the expressed command of the supreme power in the state. A rule of civil conduct, to have the force of law, must emanate from some power that is supreme in the field to which the rule belongs. When we would know what the law is, therefore, we must inquire always from what power it proceeds, and the right of that power to prescribe it.

No one doubts the existence of some law of the land everywhere. No plain or valley, no nook or corner, to which the dominion of man has extended itself, is without some law of the land. Indeed, law is the breath of dominion. Its commands are to be found in the express enactments of the sovereign legislative bodies, in the body of our judicial decrees, and in those ancient systems of law to which these later emanations are only supplementary. The last named were brought to the shores of America by the feet of the early emigrants; by the Englishmen, the common law; and, by the Frenchmen and Spaniards, the civil law. Each of these,—the civil and the common law,—within the respective boundaries into which they have settled, constitutes the fundamental rules of civil conduct; and there is no inch of our soil in which one of them is not in force. But, as we have seen, law is not simply a rule of civil conduct, but a rule prescribed by the supreme power in the state. Now, the supreme power of the state is, with us, divided. The line of division is not territorial, but topical. Each inch of soil is subject to the rule of two powers of state, overlapping each other in some respects, but never conflicting, and divided always according to prearranged constitutional adjustments. In some fields the nation is the sole power to prescribe rules of conduct, in other fields that power is exclusively in the state, and in still other fields it is concurrent. It is plain that in the first of these fields the emanation of a rule of conduct from the state, as, in the second, a like emanation from the nation, would not have the effect of law. Neither, in the field of the other, is a power in the state. The nation has not the power to prescribe rules of civil conduct within the field exclusively belonging to the state. The state has not the power to prescribe rules within the fields exclusively belonging to the nation. From each of these two fields the nation and the state, as the case may be, is excluded as a lawgiver. Now, this must apply as well to the system of law to which the sovereign succeeds as to that which it immediately creates; to the common or civil law as well as to that which comes from its own legislative or judicial will. In other words, the state or nation, having no power to give law in the fields exclusively belonging to the other, logically, can have succeeded to no law applicable to such fields. Neither can have a common law or a civil law within fields to which it can extend no law at all.

But the contention is that, the lawgiving power being divided topically between state and nation by the constitution, each of the participants is both the rightful current lawgiver, and the rightful successor to the common law, in the specific field apportioned to it; from which it would follow that the common law, like its own legislation, is prescribed by the state as a rule of civil conduct within the field of powers belonging to the state, and by the nation within the field of powers belonging to the nation. In other words, that the common law or civil law, as the case may be, prevails everywhere, and on every subject, but the source of the command is national or state according to the line of demarkation between the fields of power of the nation and state. This premise accepted, it would follow that the nation, having power to regulate interstate commerce, has succeeded within that field, as sovereign and lawgiver, to the commands embodied in the common law, and that within that field the common law, attributable to the nation, as sovereign, is in force. The error, if there be any, is in the assumption of the premise. It is true that the state has, by succession or adoption, prescribed the common law to its citizens upon subjects within the field of power of the state. Whether the common law would prevail within the state in the absence of express adoption by statute, it is not now necessary to discuss. It is true, also, that upon subjects wholly beyond that field the state can prescribe no such rules of conduct. But it is not necessarily true that within its field of mere power the nation has succeeded to or adopted any code of laws as rules of civil conduct, except those to be found in its legislation. There is no express adoption of any system of laws by the constitution or by statute, and the theory of the national government does not necessarily imply that it, as sovereign, succeeds to any system of laws. The inquiry is one of fact, rather than speculation, and is to be solved by the intendments of the constitution. The inquiry is whether the constitution contemplated that within its field of power the nation should succeed, as sovereign, to the common law, or whether, within that field, no law should be prescribed by the nation, except by express or implied enactment.

It is plain to me that, so far as the nation is coteritorial with the states, the latter was intended. The great bulk of governmental regulation was meant to be left to the states. The field of power conferred upon the nation, outside of that essential to its functions and defense as a nation among nations, is principally a field of bare power. Over this field of bare power, unenforced by congressional enactment, the powers of the state overlap. In these fields of bare power there are two sovereigns,—the state until the nation acts, the nation only after it acts. Out of this has grown up the doctrine of concurrent jurisdiction, now too firmly fixed to be debated, much less denied. Thus, notwithstanding the power of congress to establish uniform laws on the subject of bankruptcy, or to fix the standard of weights and measures, or to regulate interstate commerce, the states have, in the absence of national laws in enforcement of these powers, been permitted to establish their own systems of bankruptcy, their own standards of weights and measures, and their



own regulation of the great multitude of incidents to interstate commerce. It is settled constitutional law that over these fields, in the absence of congressional enactment, the laws of the state—both those that grow out of legislation and those that have come over from the common law—are the law of the land. And thus it is that largely within the field of even the express powers of the nation, the laws of the state have the primary place, and are only excluded when congress so wills by express legislative enactment.

Now, what consequences follow if it be assumed that there is a common law of the nation,—rules of civil conduct prescribed by the nation in all fields of its constitutional power? The legislature of Illinois has adopted the common law, so far as it is applicable and of a general nature, and all acts of the British parliament made in aid thereof prior to the fourth year of James the First, exclusive of designated acts of parliament. We may assume, for illustration, that the common law of the United States, if there be such, within the fields of bankruptcy, of standards of weights and measures, and of interstate commerce, is definable in the same terms. There exists, then, a common law of the United States over the subject-matter of bankruptcies, standards of weights and measures, and commerce between the states, for laws relating to all of these subjects had grown up and were well established in England prior to the fourth year of the reign of James the First. Is such transplanted jurisprudence the law of the United States? Have its mandates been prescribed by the nation as rules of civil conduct? If so, how is the field still left open to state legislation? By what authority does the state, in the face of such existing national common law, enact and enforce bankrupt and insolvent laws, change the standard of weights and measures, and prescribe the multitude of regulations that relate to commerce, interstate as well as intrastate? If there be existing laws upon these subjects, referable to the nation as their authority, would it not follow that all legislation of the state, within these fields, is inoperative? There cannot be separate systems of law over the same subject-matter and the same territory, emanating from separate sources of authority. If the nation already has a system, and such system is within its field of power, the state cannot invade that field to change or modify it. The state could as effectively repeal or alter an act of congress relating to bankruptcies or commerce between the states as repeal or alter the nation's common law touching these subjects, if there be such; for such common law would, until changed by congress, be the existing mandate of the nation upon those subjects. The proposition contended for would exclude at once the whole conception of concurrent jurisdiction, and leave the state without any power upon any subject concerning which congress was, under the constitution, authorized to legislate. It would break down at one stroke the vast and important legislation of the states, that has universally been recognized and enforced as the law of the land, but that occupies fields within the bare power of congressional legislation. It would require the nation, at once, to enter upon what it has never yet attempted, except as the im-

perative emergency arose, namely, a complete code of laws upon every possible subject within its constitutional powers, where the provisions of the common law had become antiquated or burdensome. If the nation has already prescribed the common law upon subjects within the field of its power, the states are thereby excluded, and the whole doctrine of concurrent jurisdiction is not only without logical basis, but is practically and inherently impossible.

An argument even stronger than these consequences to a settled judicial interpretation of the constitution is found in the letter of the constitution itself. To no one more than to the framers of that instrument was it apparent that two systems of law upon the same subject, from different governmental authorities, could not harmoniously exist. One system or the other must be regarded as supreme. Hence, it was provided (article 6) "that the constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States shall be the supreme law of the land \* \* \* anything in the constitution or laws of any state to the contrary notwithstanding." Observe what is made the supreme law: The constitution, the laws which shall be made in pursuance thereof, and all treaties made, or which shall be made. If, under the constitution, the nation adopted or succeeded to the common law of England, as the law of the land, within the field of national power, why should there have been no mention of such common law as a part of the supreme law of the land? Why should it be exposed, any more than the constitution, or the acts of congress thereafter made, to the attack or modification of the states? Treaties are necessarily made laws of the nation, and, hence, the existing treaties were made inviolate against state intrusion. Why should the then existing laws, introduced into the system as continuing laws, share a different fate? Was it contemplated that the rules of civil conduct prescribed to the citizen by the nation, through the supposed body of the common law, should be rules only so long as the states permitted? If a national common law prevails, it is by virtue of the constitution. Can any reason be assigned why acts of congress were made supreme, while this supposed act of the constitution was left subservient?

The new government, for obvious reasons, was compelled to observe its treaties, but, excepting these, it seems plain to me that the framers of the constitution contemplated a government whose beginnings were there and then, and whose commands to the citizen must be found in the letter of the constitution, or the laws thereafter promulgated. The great bulk of authority was left with the states. Each of these had already existing laws that covered the body of ordinary current affairs. The nation was not devised to give law upon these affairs. It was invested with a field of vast power, but only to be entered as the needs of nationality from time to time gave rise. No national common law was necessary. The subjects upon which common law acted were principally left to the states, and there it already existed. It was apparent that, as rapidly as

the nation was called upon to enter upon its fields of otherwise bare power, congress could supply the laws needed.

But, it is urged, the supreme court has invariably recognized the existence of general law, according to which its administration of justice has proceeded. Thus, for instance, in an action for damages growing out of negligence, within the boundaries of Ohio, the supreme court of the United States held the engineer and fireman of a locomotive, running alone, and without any train attached, to be fellow servants (*Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914), while a long line of decisions of the supreme court of the state held they were not. So, too, the supreme court of the United States held that the payee or indorsee of a bill, upon its presentment to the drawee, and his refusal to accept, had the right to immediate recourse against the drawer, notwithstanding a statute of the state forbidding suit to be brought in such a case until maturity of the bill. *Watson v. Tarpley*, 18 How. 517. It is insisted that these and other cases show the existence of some general law, separate from and independent of the law of the land prescribed by the states. This does not, in my opinion, follow. Indeed, it could not follow without introducing into the jurisprudence of this country the anomaly of the existence of two laws over the same territory, and upon the same subject-matter, enforceable, respectively, according to the accidents of the residence of the parties between whom the differences arise. Suppose, in the Ohio case, that two firemen had been on the engine with the engineer, and both had been injured through his negligence; one of the firemen living in the state of the defendant, and the other living in another state. To each of the injured the locus is identical; the negligence is identical. Is it possible that the accidental difference of residence brings into play a difference of law affecting their rights so radically? Is the obligation of the railroad upon the soil of Ohio, under circumstances identical, different to the Ohioan from what it is to the Kentuckian? The supreme court could not have so held. In the case cited the federal court administered, not the law of the United States, but the law of Ohio. The difference between its holdings and those of the courts of Ohio was not due to a difference of law, but to a different interpretation of the law. In all cases to which the jurisdiction of the federal court is extended, its duty is, not only to ascertain the facts, but to interpret the law applicable thereto, as well. The law is the same law interpreted by the state courts, but the interpretations are not necessarily the same. The decisions of the state court are not necessarily the law, but only mirrors of the law. They may be mistaken interpretations, and therefore incorrect mirrors. The litigant in the federal court is entitled to the law as it is, not simply to the local judicial reflection of the law. What the supreme court in effect said in that case was, not that the law applicable to the case before it was different from the law applicable to any like case arising in Ohio, but, that the decisions of the state courts had not accurately evidenced the law, and were therefore not to be followed.

The same observation applies to the Mississippi case. The general commercial law in force in Mississippi, as well as in other states of the

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Union, gave the payee of a bill immediate recourse upon the drawer, upon the refusal of the drawee to accept. The statute of the state, however, forbade suit to be brought until after the maturity of the bill. The question was whether a litigant seeking recovery through the federal courts, before maturity, was barred by this statute. Undoubtedly, the state had the right to modify the commercial law that should prevail within its boundaries. But the statute in question created no change in substance of the commercial law, but only in the remedy that the parties should enjoy. It was purely remedial, and not substantive, and, so far as it was remedial was not necessarily binding upon the federal court. The federal court sat in Mississippi to enforce the commercial law applicable to the given case, and as such was an independent tribunal, to be governed, as to its remedial rules, by the procedure to be found in the common law, the acts of congress, and the policy of the state, so far as such was found just and applicable. Whether the prohibition of this remedial statute should be applied to a suitor in the federal tribunal was to be determined by itself, upon considerations of justice, and did not mandatorily follow the enactment of the local statute.

That the federal courts enforce, not a general law of the United States, but the law of the particular states applicable to the controversy, is demonstrated by an illustration arising every day. At common law, neither the heirs nor administrators could recover damages for the death of the decedent, though caused by negligence. There has been no act of congress changing this rule. In most of the states, however, the common law, in this respect, has been modified by permitting a recovery in such cases to a given amount. The federal courts are every day made the scene of such suits. Are the judgments granted therein in pursuance of any common law of the United States? Manifestly, not; for in the common law, unmodified, there can be found no warrant for such suits. The actions, though in the federal court, are based, as in the state court, upon rules of civil conduct prescribed by the state through its adopted common law, with the modifications thereof prescribed by the state.

I can conceive that it may be said that though, in the illustration given, the federal courts enforce state law, it would not follow that, in actions arising from matters within the field of the nation's powers, the federal court may not find a United States common law to enforce. I am not considering that distinction, but am treating of cases which are urged wholly irrespective of such distinction. Neither the Ohio nor the Mississippi case cited, nor any of those to which my attention has been called in that connection, involved subjects within the field of the nation's power. The Ohio case arises from the law of negligence,—a purely police, and therefore local, regulation,—and the Mississippi case does not disclose any element of interstate commerce or other national power. Indeed if the decisions cited established the existence of a United States common law or general law over the subject-matters involved, it would follow that the line of demarkation between state and national fields of power had nothing to do with the solution.

But it is urged that the Reports abound with cases in which

the federal courts, in construing ordinances and statutes, and otherwise ascertaining the rights of parties, resort for light to the common law. It could not be otherwise. The common law is the background against which the outlines of our institutions are drawn, and the foundation upon which the transactions of our race are builded. It is as essential to interpretation as light is to the operations of the microscope. But it is not thereby made the law of the land. Mechanics and medicine are likewise essential to interpretation. Only by looking into their fields can courts accurately ascertain the meaning of many transactions or statutes. They are the settings of transactions and statutes, but do not by reason of that become a part of the law of the land. The law of the land is a rule of civil conduct prescribed by the supreme power in the state. An appeal to the common law for light is entirely distinct from a search of the law of the land for the evidence of a command.

But, it is asked, what law prevails in the territories and the District of Columbia? The constitution itself answers. Upon congress is conferred (article 1, § 8) the right "to exercise exclusive legislation" over the District of Columbia, and all places purchased for the erection of forts, arsenals, etc., and (article 4, § 3) to "make all needful rules and regulations respecting the territory of the United States." Over the area covered by the territories and the District of Columbia, therefore, there is but one sovereign. The territorial governments are simply the agencies of the nation, and are, in this respect, different from the states. But, as I have pointed out, there is a law of the land attached to every inch of our soil. It is, in some cases, the common law; in others, the civil law,—dependent chiefly upon the character of the earlier dominion extended over it. Now there being but one sovereign,—the nation,—the common law or the civil law, as the case may be, is necessarily attributable to it, as the only supreme power in the state. Here the nation has succeeded to the earlier sovereignties which prescribed the common or civil law as the law of the land. There is, therefore, a common or civil law of the United States over those areas not yet taken into the boundaries of the states.

But there is no inconsistency between this and the position hereinbefore taken. Each inch of soil necessarily has its law of the land, but, in the areas in which the nation and state are coterritorial, the sovereignty to which all law is attributable, except such as is found in the constitution of the United States and the laws in pursuance thereof, and the treaties, is that of the state. There the common law is not attributable to the United States as sovereign, because neither the constitution, nor laws of the United States in pursuance thereof, have so adopted it. The distinction, though it might theoretically and speculatively be otherwise, is actual, as shown by the intendments of the constitution and the doctrine of concurrent jurisdiction already pointed out, and it is only with actualities that the court can deal.

It is also asked, what law is in force upon the navigable waters of the United States, unless there be a general law of the United States? The answer is again found in the constitution (section 2,

art. 3), which extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction. This is an express bestowal, in the fundamental law of the land, of all maritime power and authority, upon one of the departments of the nation. The bestowal is as broad and as exclusive as the power to declare war. It necessarily carries with it the code of rules applicable to maritime jurisdiction. That code is specifically a national code. It is neither common law nor general law. It is, in the language of Justice Bradley, in *The Lottawanna*, 21 Wall. 558, "like international laws, or the laws of war which have the effect of law in any country no further than they are accepted and received as such." The clause is simply the bestowal upon the nation of a purely national power, self-enforcing by the employment of such rules as the nation alone may prescribe. But beyond this special jurisdiction, carved out of the general jurisdiction, and, for national purposes, bestowed exclusively upon the national government, the laws of the states within whose territories the navigable waters lie are still in force, subject to the exigencies and necessities of the maritime power. The territory covered by the navigable waters is under the law of the land which the proper state may prescribe. The existence, therefore, of this power in the nation, adds nothing to the proposition that there is a United States common law of the land.

But it is said that, if there is no United States common law applying to the field of interstate commerce, there could have been, until the enactment of the interstate commerce act, no law in that field whatever. And it is inferred from this that common carriers within that field, until the enactment of the interstate commerce act, could not have been liable for refusing to receive goods or passengers, or delaying their arrival, or for other like wrongs or delinquencies. It is never safe to argue the existence of a law from the necessities that ought to give rise to it. The sovereign power does not always meet even the apparent needs. And, if law were always to be inferred where needs were found, I fear a diversity as wide as the personal predilections of the judges would be introduced. But the gaping vacuum upon which the argument is predicated does not in fact exist. The power of the nation over interstate commerce is exclusive only in respect of those features where a uniform rule is imperative,—features that are essentially national affairs. In all other respects, until congress acts, the field of interstate as well as intrastate commerce is occupied by the power and existing laws of the state. Into this latter classification, undoubtedly, would fall the duty of the common carrier to receive all proper goods offered to it for transportation, to make no undue discrimination between shippers of a like class, and to transport with reasonable expedition. There is nothing essentially national in these requirements. They can reasonably be left to the judgment of the local law where the goods are offered. Indeed, the constant and uninterrupted application of such local law to these fields of interstate commerce, through a century, forestalled the need of any national legislation, and constitutes a cogent illustration of the nonexistence

of a common law attributable to the nation as its sovereign and giver; for, how could the many modifications introduced by the state into these common-law duties and liabilities be effective, if there existed also a national common law upon the same subjects, unmodified by congress, and insusceptible of modification by the states?

Having duly considered these criticisms upon and variations from my former holding by some of the judges of the other circuits, I remain of the opinion that there is no national common or general law, in the sense of a rule of civil conduct, prescribed by the nation, as sovereign, which can be made the basis of an action to recover back rates, simply because the court may find them to be unreasonable. So far as the existing law applicable to the subject of rates in interstate commerce was concerned, prior to the interstate commerce act, the shipper and the carrier were at liberty to make such contract as they could agree upon; and such a contract would be left untouched, unless for such reasons as would justify the abrogation of contracts between other parties and upon other subjects. This, of course, does not exempt the carrier from the duty of carrying out the contracts actually made. If, between it and the shipper, a specific rate was fixed, such will control; and if no rate was fixed, the ordinary method employed by the law to supply the missing element of the contract is to be followed. If no rate was fixed, and the shipment was not made in contemplation of any specific rate, the implications of the law are that the parties intended a reasonable rate; and the exaction in such cases of an unreasonable rate can be made the basis of a recovery, not because of the existence of any law which prohibits the exaction of unreasonable rates generally, but because, in the particular case in hand, the exact rate is the omitted element of the contract, and must therefore be supplied by the implications of the law.

The majority of the counts in the declaration under consideration proceed expressly upon the theory that, irrespective of the contract between the parties, the law prohibited the exaction of unreasonable rates, and allowed their recovery back upon a showing of the fact. To these counts, in my opinion, a demurrer ought to be sustained. Several of the counts are evidently drawn upon the theory that no specific rate was at the time agreed upon, or in contemplation, and that in view of this the rate actually exacted, being unreasonable, was contrary to the element of the contract read into it by the implications of the law. So far as these counts relate to shipments prior to the interstate commerce act, they present some difficulties, and especially so, in view of the fact that they compress into single averments the different shipments of months and years, each of which must necessarily have been distinct from the other, and properly subject to distinct contracts or rates in contemplation. So far as these counts relate to shipments after the interstate commerce act, I am clear that, in absence of the averment that no rates were published and in existence as is required by the law, the actions would not lie. By requiring the fixing and publication of these rates, the interstate commerce act supplies at least prima facie evidence of the contract rate, which can only be overcome by

avermert in avoidance thereof. One of the counts proceeds upon the theory of unjust discrimination between shippers, but whether it alleges with sufficient preciseness that the discrimination was between shippers who, by reason of contemporaneousness of shipment, route traversed, and character of product shipped, were entitled to like rates, does not clearly appear.

My conclusion, on the whole, is to sustain the motion, and allow the demurrers to be filed, intending to sustain the demurrers to all the counts, except those relating to discrimination, and those relating to shipments prior to the interstate commerce act, which proceed upon the idea that an express contract for rates was not concluded, but was left to the implications of the law. On the counts of this character, I will hear the demurrer, to determine if the allegations of the count are sufficiently specific and single to bring them within the right of recovery.

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### ACCUMULATOR CO. v. DUBUQUE ST. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. September 24, 1894.)

No. 391.

#### 1. SALE—INTERPRETATION OF CONTRACT—"GUARANTY" AND WARRANTY.

Plaintiff made written proposals to defendant, a street-car company, to furnish a trial car with electric storage batteries, to be operated by defendant for 60 days, and, if not then shown to be unsatisfactory, plaintiff was to furnish additional storage-battery equipments at specified prices. Accompanying these proposals was a letter wherein plaintiff agreed that in the event the equipments were furnished under the proposals "we will guaranty for a period of four years \* \* \* that the cost of renewal of batteries \* \* \* shall not exceed \$2.50 per year," on the cars at plaintiff's factory, etc. *Held*, that this so-called "guaranty" was not an independent collateral undertaking, nor a mere guaranty of indemnity against loss which required defendant to operate the system four years before an action could be maintained for a breach, but, on the contrary, should be interpreted, under the circumstances of the sale, as a part of the contract, and as amounting to a warranty of the character and durability of the batteries.

#### 2. SAME—"CONDITIONS" AND WARRANTIES.

A contract for furnishing storage-battery equipments for street cars, after specifying the machinery, terms of payment, and various stipulations, further provided that "the plant will be considered satisfactory if it fulfills the following conditions." Among the conditions enumerated were that each car should run 12 miles an hour over a suitable track, carrying 50 passengers; that with additional battery cells it should draw a trailer, loaded to a given weight; that a set of batteries once fully charged should propel a car 25 miles, etc. *Held*, that these provisions were not merely conditions under which the vendor might compel the acceptance of the equipment, and which were waived by an acceptance, but were warranties for the breach of which damages could be recovered.

#### 3. SAME—DEFENSE OF BREACH OF WARRANTIES—EVIDENCE.

Plaintiff contracted to furnish defendant with one storage-battery street car, to be operated for 60 days on trial, and if it was not then shown to be unsatisfactory they were to furnish a number of storage-battery equipments for other cars, with certain warranties as to amount of work, durability, etc. The trial car was accordingly furnished, and was operated for 60 days. No complaint was made of



its performance, and plaintiff then furnished the other equipments, and afterwards sued for the price thereof. Defense was made on the ground of failure of the equipment to fulfill the warranties. *Held*, that as the warranties did not go into effect until the trial car had performed its functions, plaintiff was not entitled to show that that car failed in the same particulars as the equipments subsequently furnished.

4. SAME—BREACH OF WARRANTIES—CONSEQUENTIAL DAMAGES.

Expenses incurred by a street-car company in constructing shifting devices necessary for the installation of a storage-battery system are recoverable as damages against the vendor of the storage-battery plant, when the warranties contained in the contract of sale are broken to such an extent that the system is an utter failure, and the company is compelled to abandon it, and the shifting devices then become useless.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

This was an action upon a contract to recover \$48,896.89, the purchase price of certain machinery, material and services which constituted an electrical equipment for operating the Dubuque Street Railway by the storage-battery system. The defense was that the plaintiff, the Accumulator Company, failed to comply with its contract as to the character and efficiency of the equipment, to the damage of the defendant, the Dubuque Street Railway Company, in an amount in excess of the purchase price. There was a verdict and judgment for the defendant, and this writ of error is brought to reverse that judgment.

The contract on which the suit was based consisted of a proposal dated and accepted July 30, 1890, and a letter from the vendor to the railway company of the same date. The parts of the proposal material to the questions presented for our consideration are as follows:

"New York, June 30th, 1890.

"Dubuque Street Railway Company, J. A. Rhomberg, President, Dubuque, Iowa—Dear Sir: In conformity with our verbal understanding to-day we beg to make herewith the following proposal: We will deliver f. o. b. Philadelphia, one (1) trial car, sixteen (16) feet long, with two (2) ten (10) horse power motors, and two (2) sets of storage batteries, together with complete charging equipment, such as you have seen at 23rd and Brown Sts., Philadelphia, for your use in Dubuque, and we will send an expert to supervise the running of it during a period of sixty (60) days. Our experience with this trial car renders us certain that the guaranty will be performed to your satisfaction, and if at the end of the sixty days, to wit, on or before the first day of October, 1890, we do not receive proof to the contrary, then the balance of this contract, covering purchase of six (6) car equipments, with the option of nine (9) car equipments additional, at the same price, shall go into full effect. If at the end of the said sixty (60) days the trial car shall have failed in any important particular to perform the specified service, then and in that case you shall notify us promptly on or before the last day of the said sixty (60) days, and you shall return the trial car and equipments in good order to us. You are to pay us three hundred dollars (\$300.00), being intended to cover half of all the expenses of the transportation both ways of this trial car, and also the expenses of the expert from the time he leaves Philadelphia until his return from Dubuque. If the balance of this proposal for six (6) car equipments or more does not take effect as above provided, at the end of the sixty (60) days, then you are to pay us a further sum of three hundred dollars (\$300.00), which is intended to cover the balance of the above-described expenses, and return the car, etc., to us in good order. If at the termination of the said sixty (60) days, or sooner, at your option, the balance of this contract shall come into effect as above provided, we will supply you with not less than six (6) car equipments, as described in the accompanying specifications, for the sum of eighteen hundred dollars (\$1,800.00) cash f. o. b. cars Philadelphia, and not less than one hundred (100) cells per car of the '23M' type,

together with all necessary connections, crates, &c. (the crates to have suitable automatic connections), at twelve dollars (\$12.00) per cell, including the cost of the crates f. o. b. cars at our factory, Newark, N. J. \* \* \* We will also supply two (2) reserve armatures of 25,000 watts each for the sum of one thousand dollars (\$1,000) f. o. b. Philadelphia. You will supply necessary power, suitable location for plant, and will erect the shifting devices from our drawings, and will also furnish all the labor necessary for the installation of the plant. \* \* \* If the above-mentioned trial car is not returned within sixty (60) days, this company is to proceed at once with the filling of the rest of the order, not less than six (6) car equipments, together with all the rest of the above-mentioned equipments, and including at least one hundred (100) cells of battery per car, which are to be delivered f. o. b. Philadelphia or Newark, N. J., within ninety (90) days after the expiration of the before-mentioned period of sixty (60) days. \* \* \*

"The plant will be considered satisfactory if it fulfills the following conditions: 1st. \* \* \* 2nd. That each car will run twelve (12) miles an hour on a straight, level, and suitable track in good order, when carrying fifty (50) passengers, or an equivalent weight, not exceeding 6,000 lbs., and, if provided with additional cells, will draw a trailer weighing, loaded, not exceeding 6,000 lbs. 3rd. \* \* \* 4th. \* \* \* 5th. That two sets of batteries per car shall be delivered, either of which, when fully charged, shall be capable of propelling the car as above on a practically level track for a distance of twenty-five (25) miles, if required, when it shall be replaced by the reserve battery, which meanwhile shall have been fully charged. Each battery can be charged while its alternate is being used. 6th. That the batteries, when treated according to printed instructions, and their parts renewed as required, will remain in efficient condition. 7th. That all manufactures of this company being intended to be first-class in every respect, any defects of workmanship, material, or design (ordinary wear and tear excepted) of which due notice shall be given by the customer to this company within one year of the date of delivery shall be corrected by us promptly without charge."

On the same day that this proposal was dated and accepted, and as a part of the same transaction, the vendor delivered to the railway company the following letter:

"New York, June 30th, 1890.

"(Strictly Confidential.)

"Dubuque Street Railway Company, J. A. Rhomberg, President, Dubuque, Iowa—Dear Sir: In connection with our proposal of even date herewith which has been duly accepted by you, we hereby agree that, in the event of the electric car equipment therein referred to being supplied to you by this company, we will guaranty for a period of four (4) years from the date of installation thereof that the cost of renewals of batteries for the service proposed shall not exceed an average of two dollars and fifty cents (\$2.50) per cell per annum f. o. b. cars at our factory, Newark, N. J. (the old piles being returned to us, freight and charges paid), provided the said batteries are used in accordance with the printed instructions, a copy of which will be posted by you conspicuously in the engine house, battery house, and the drivers' platform, and which instructions will form part of this guaranty. This guaranty is to be construed so as to exclude all damage or deterioration due to accident, malice, neglect, or act of God."

The trial car was furnished and operated by the plaintiff for 60 days, and no notice was given by the railway company that it failed in any important particular. Thereupon the Accumulator Company furnished an electrical equipment under the contract, and the railway company received it, and proceeded to operate its cars with it. The operation of street cars by means of storage batteries was an experiment, and there was evidence tending to show that in this case it was a very disastrous experiment; that although by a subsequent modification of the contract each car was provided with 160 cells (80 in operation and 80 being recharged), instead of the 100 (50 in operation and 50 being recharged) specified in the original contract, the equipment failed to comply with the contract in the following

essential particulars: First, the electric power supplied by a battery of 80 cells was insufficient to propel a car at the speed of 12 miles an hour on a straight, level, and suitable track, in good order, and to carry 50 passengers, or an equivalent weight not exceeding 6,000 pounds; second, the electric power such a battery supplied would not draw a trailer weighing, loaded, not exceeding 6,000 pounds, on such a track; third, the electric power supplied by such a battery was incapable of propelling a car 25 miles, or more than 19 miles, on a practically level track, without recharging; and, fourth, the cost of renewing the batteries at the market price was on the average more than \$5 per cell per annum. There was evidence to the effect that the failure of the equipment to comply with the contract in these particulars was so radical that it was worthless for the purpose of operating street cars, and that the railway company was compelled to abandon the use of it at the end of a year, and to substitute the trolley system. In order to set this storage-battery system at work, the railway company was compelled to provide a transfer table and a charging table, and to prepare an extra room in which the cells could be washed, at an expense of some \$2,000, and this room and these tables became useless to it and worthless when it was compelled to abandon this system. The jury, under the direction of the court, allowed the defendant as its damages for the vendor's failure to furnish the equipment called for by this contract the sum of \$2,000 for its loss on this room and these tables, and also the difference between the value of the electric equipment furnished and that agreed to be furnished. The errors assigned relate principally to the rulings of the court relative to the measure of the defendant's damages, and are stated and considered in the opinion.

Francis B. Daniels, for plaintiff in error.

D. E. Lyon (D. J. Lenehan, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion.

In answer to this action for the purchase price of machinery and supplies the defendant pleaded and recovered as a counterclaim the damages which resulted to it from the failure of the plaintiff to furnish an electric equipment of the character described in the contract of sale. The subject-matter of the contract was the necessary machinery and supplies to operate the Dubuque Street Railway by electricity through the use of the storage-battery system. In the operation of this system batteries charged with electricity are placed upon the cars, and used to propel them until the electricity is exhausted, when they are removed, recharged, and replaced upon the cars to propel them again. The use of the batteries gradually disintegrates their positive plates until it becomes necessary to renew them. The cost of each renewal was about \$2.50 per cell, and the commercial value of such an electric equipment as was described in this contract depends largely upon the durability of the plates and the amount of power the batteries will supply from a single charge. June 30, 1890, the vendor submitted to the defendant a proposal to furnish the equipment in question, which, together with a letter of the same date, contained the terms of the contract subsequently concluded between them. In that letter the vendor wrote as follows:

"In connection with our proposal of even date herewith, which has been duly accepted by you, we hereby agree that, in the event of the electric car equipments therein referred to being supplied to you by this company, we

will guaranty for a period of four years from the date of installation thereof that the cost of renewals of batteries for the service proposed shall not exceed an average of two dollars and fifty cents (\$2.50) per cell per annum f. o. b. cars at our factory, Newark, N. J. (the old piles being returned to us, freight and charges paid)."

It is assigned as error that the court below held that this was a warranty of the durability of the batteries, and charged the jury in effect that if the batteries furnished required renewals so frequently that the average cost for the four years would exceed \$2.50 per cell per annum, there was a breach of the contract, and the vendee might recover the difference between the value of the machinery had it met the requirements of the contract and its value in the condition in which it was actually delivered to the vendee. The contention of the plaintiff is that this letter "is not in any sense a warranty of the character of the equipment, but is an independent collateral undertaking in the nature of a contract of indemnity against loss arising to the intending purchaser from the cost or renewals exceeding the figure therein named, which indemnity, however, shall not be paid for a period exceeding four years from the date of the contract."

There are no rules for the construction of contracts more salutary in their operation or more universal in their application than that (1) the court may put itself in the place of the contracting parties, and then, in view of all the facts and circumstances surrounding them at the time of the execution of the instrument, consider what they intended by the terms of their contract; and (2) that when the intention is manifest it will control in the interpretation of the instrument, regardless of inapt expressions and technical rules of construction. Let us apply these rules to this contract. When it was made—in 1890—the vendor was a corporation engaged in promoting the business of propelling street cars by electricity supplied by storage batteries, and in furnishing the necessary machinery and electric equipments for that purpose. The vendee was a street-railway company engaged in operating its railroad by animal power. The vendor desired the railway company to purchase its machinery and supplies, and to substitute the storage-battery system for its animals. The use of that system was an experiment. It had not been sufficiently tested to ascertain its commercial value. The vendor doubtless had all the knowledge and experience of its character and practicability that had then been attained, and had complete confidence in its success. The railway company knew little or nothing about it, save the statements of the vendor; but it was anxious to buy the necessary machinery and supplies to substitute for its animals a power that would prove the least expensive in the operation of its railroad, and yet was unwilling to take upon itself the risk of any experiments. Under these circumstances the vendor proposed to sell to the railway company carefully specified machinery and supplies to operate its railway by the vendor's system for a certain price. About this price there seems to have been no question, but the railway company was evidently determined to be assured how much power the plant the vendor pro-

posed to furnish would supply, and how expensive its operation would be before it closed the contract. It was evident to the vendee that the durability of the batteries and the amount of power they would supply from a single charge conditioned the expense of operation and measured the value of the equipment. To assure the defendant that the operation of the plant would be inexpensive, and the machinery valuable, the vendor declared in its proposal that it would send a trial car and an expert to Dubuque, and would there operate this car for 60 days, and that if during this time it failed in any important particular to fulfill the terms of the proposal submitted, the defendant could then exercise its option to conclude the contract or reject the proposal. In this proposal it declared that the character of the plant it proposed to furnish was such that a street car supplied with 50 cells would run 12 miles an hour on a straight, level track, and carry 50 passengers, or 6,000 pounds; that if provided with additional cells it would draw a trailer weighing, loaded, 6,000 pounds, and that the batteries it proposed to supply to each car would, when charged, propel it on a practically level track a distance of 25 miles without being recharged. This was well. This was a proposal to warrant the quantity and efficiency of the power a single charge would supply to the batteries, but it was evidently insufficient to induce the defendant to purchase. It left in doubt and unguarded the crucial test of the value and availability of the equipment,—the durability of the batteries. If they would endure but a month, the plant was worse than worthless, if a year, it was well worth the price. To assure the defendant of the durability of these batteries, and to induce it to conclude the contract, the vendor, on the same day that it made the proposal, wrote the letter of June 30th, and there agreed that if it furnished the equipment proposed it would guaranty that the cost of the renewals of the batteries should not exceed an average of \$2.50 per cell per annum during the term of four years. It is said that this was an independent collateral undertaking. But how can that be? It was written and delivered on the same day as was the proposal. The proposal expressly provided that the contract of purchase should not be concluded until the trial car had been sent to Dubuque, and operated for 60 days, and that it should then be at the option of the defendant to close or reject it in case the car failed in any important particular. The trial car was sent to Dubuque, and was operated for the 60 days. No complaint was made of its operation, and the contract of purchase was then closed according to the terms of the proposal by the silence of the defendant. The proposal and the letter together awaited for at least 60 days the acceptance or rejection of the offer to the defendant they contained, and at the end of that time together they became the terms of the contract of purchase it accepted. Neither was independent of nor collateral to the other. Each contained some of the terms of a single offer to sell and of a single contract of sale.

Nor are we able to persuade ourselves that this was a mere guaranty of indemnity against loss from the cost of the renewals that required the defendant to operate this system four years before

an action could be maintained for its breach. That these parties used the word "guaranty," and not the word "warrant" in this contract is entitled to slight, if any, consideration in view of the facts and circumstances surrounding the parties and their manifest intent in making the contract. Their officers were doubtless business men, not lawyers, and the somewhat technical distinction in the significance of the two words ought not to be permitted to defeat the plain intention of the parties. If it had been their intention to make a contract that the vendor would renew these batteries as required for four years at an average expense of \$2.50 per cell per annum, it would have been easy and natural that they should have so written the agreement. They did not do so. Evidently that was not their intention; that was not the contract in the minds of the parties. In the sixth paragraph of the proposal the vendor covenanted that when the parts of the batteries were renewed as required they would remain in efficient condition. Evidently this was not a sufficient warranty of efficiency to induce the railway company to purchase. The parties knew the cost of the renewals, but the question was how often would renewals be required,—how durable would the batteries be? And that was the crucial question that determined the practicability and value of the plant. The guaranty that the cost of the renewals would not exceed \$2.50 per cell per annum on an average during four years was an answer to this question. It was but the practical method the vendor adopted to express its manifest intention to warrant the batteries to be furnished to be so durable that they would require renewal on an average of about once a year. It certainly was not the intention of the defendant to pay nearly \$50,000 for the privilege of making an experiment for four years under the guaranty of another corporation. It was not experiments or guaranties of corporations, but an efficient and practical electric equipment that would be comparatively inexpensive in operation, that this defendant evidently insisted upon purchasing, and that every line of the contract and all the surrounding circumstances show the vendor was anxious to sell and willing to warrant, and that it did warrant, that the defendant should receive. It is incredible that either party intended that this vendee should pay more than \$48,000 for the privilege of being compelled to operate this experimental equipment for four years, regardless of expense, before it could avail itself of this provision of the contract relative to the durability of the batteries, relative to the one characteristic of this plant which more than any other conditioned the value or worthlessness of the equipment. In our opinion, the court below committed no error in its ruling here, but construed this provision of the contract in accordance with the manifest intention of the parties when it held it to be a warranty of the character and durability of the batteries.

It is also assigned as error that the court below held that the provisions of the contract that each car should run 12 miles an hour over a suitable track when carrying 50 passengers or 6,000 pounds; that with additional cells it should draw a trailer weighing, loaded, not exceeding 6,000 pounds; that a set of batteries, when fully

charged, should be capable of propelling a loaded car over a distance of 25 miles without being recharged, and that the batteries, when properly treated and renewed, should remain in an efficient condition,—which are found in the original proposal among the “conditions” following the clause that “the plant will be considered satisfactory if it fulfills the following conditions,”—were warranties that the equipment would comply with these conditions, for the breach of which the defendant could recover its damages. It is contended that these provisions simply specified the conditions under which the vendor might compel the acceptance of the equipment, and that an acceptance and use of it by the vendee waived these conditions, and left the purchaser remediless for the breach of them. An interpretation so narrow and technical would prevent the accomplishment of the plain intention of these parties. The only description or affirmation of the quality and efficiency of the equipment sold is found in these conditions and in the letter we have already considered. The same considerations which led to the inference that the agreement in that letter was a warranty of the durability of the batteries compel the conclusion here that these provisions in the proposal were affirmations of the character and efficiency of the plant offered, and when the proposal was accepted they became warranties of its quality. The statement that the plant would be considered satisfactory if it fulfilled the specified conditions was but a convenient method of stating that the plant proposed to be furnished would possess the qualities and efficiency there described. These affirmations were clearly intended to induce, and undoubtedly they did induce, the purchaser to buy the plant; and affirmations of the essential qualities of goods sold made by the vendor and relied upon by the vendee in the purchase constitute warranties. *English v. Commission Co.*, 6 C. C. A. 416, 57 Fed. 451; *Hastings v. Lovering*, 2 Pick. 214; *Henshaw v. Robins*, 9 Metc. (Mass.) 83; *Latham v. Shipley* (Iowa) 53 N. W. 342; *Richards v. Grandy*, 49 Vt. 22; *Beals v. Olmstead*, 24 Vt. 114; *Bryant v. Crosby*, 40 Me. 9; *Thorne v. McVeagh*, 75 Ill. 81; *Polhemus v. Heiman*, 45 Cal. 573; *Callanan v. Brown*, 31 Iowa, 333.

Complaint is made that the circuit court refused to permit the plaintiff to prove that the trial car failed in quality and efficiency in the same particulars in which those failed which were operated under the equipments subsequently furnished, and withdrew from the jury the consideration of the acts and omissions of the parties relative to that car. The trial car was furnished and operated for 60 days, under the supervision of the vendor, to demonstrate to the defendant the practicability of the system, and to induce it to make the contract of purchase. It was not operated to inform the vendor regarding the equipment it proposed to sell. The vendor was already fully informed. In its proposal it declares:

“Our experience with this trial car renders us certain that the guaranty will be performed to your satisfaction, and if at the end of the sixty days \* \* \* we do not receive proof to the contrary, then the balance of this contract, covering purchase of six (6) car equipments, \* \* \* shall go into full effect.”

The warranties in the contract of purchase, then, did not go into full effect until the trial car had performed its function. Then the silence of the defendant accepted the proposal and closed the contract. It was certainly no defense to the breaches of the warranties in that contract that the trial car did not comply with their terms before the contract that contains them took effect, and the ruling of the court below upon this subject was right.

It is assigned as error that the circuit court allowed the defendant to prove that a car equipped with 80 cells would not draw a loaded trailer weighing not more than 6,000 pounds, on the ground that the vendor covenanted that it would draw such a trailer only when provided with additional cells. It is a conclusive answer to this assignment that when the contract was made it warranted that a car supplied with 50 cells would, when provided with additional cells, draw a loaded trailer, and each of the cars that the evidence tended to show was incapable of drawing a trailer had been provided with 30 additional cells, so that it carried 80.

Another supposed error assigned is that the court charged the jury that if the plant furnished failed to such a degree that the defendant was justified in abandoning the use of it, and, in order to set the storage-battery system at work, the defendant was required in the first instance to furnish a transfer table and a charging table, and to prepare another room for the purpose of having the cells washed, and if, when it abandoned the system, these articles ceased to be of any further use or value to it, they might allow to the defendant as damages the difference between the cost of furnishing these articles and their value after the abandonment of the storage-battery system, in addition to the difference between the value of the electric equipment actually furnished and that agreed to be furnished, which the judge had authorized them to allow as general damages for the breaches of the warranties. The proof was plenary that the defendant had necessarily incurred an expense of several thousand dollars in constructing these shifting devices in order to install the plant the vendor furnished, that the plant failed so utterly that the defendant was compelled to abandon it, and that the shifting devices then became worthless and useless. The vendor was aware when this contract was made that it would be necessary for the defendant to construct these devices. Indeed, it expressly provided in its proposal that the defendant should erect them from the vendor's own drawings, and should furnish all the labor necessary for the installation of the plant. If the vendor had furnished an electric equipment of the character it contracted to furnish, the shifting devices would have been useful and valuable, and the cost of constructing them would not have been lost to the defendant. The railway company's loss of this cost was the direct, natural, and inevitable result of the vendor's disastrous failure to comply with its contract, and it was a loss in addition to the difference between the equipment furnished and that which the vendor agreed to furnish. No sound reason occurs to us why the defendant should not be permitted to recover it. Compensation for pecuniary loss that is the direct, natural, and immediate con-



sequence of a breach of warranty is both the just and legal measure of a purchaser's damages. The rule is well settled that the damages recoverable of a manufacturer for the breach of a warranty of machinery which he contracts to furnish and place in operation for a known purpose are not confined to the difference between the machinery as warranted and as it proves to be, but include such consequential damages as are the direct, immediate, and probable result of the breach. The charge of the court was in accordance with this rule. It was just and clear. It commends itself to the judgment, and is amply sustained by the authorities. 3 Pars. Cont. (7th Ed.) p. 212; 2 Suth. Dam. § 672; Mining Syndicate v. Fraser, 130 U. S. 611, 622, 9 Sup. Ct. 665; Poland v. Miller, 95 Ind. 387; Sinker v. Kidder, 123 Ind. 528, 530, 24 N. E. 341; Swain v. Schieffelin, 134 N. Y. 471, 31 N. E. 1025; Passenger v. Thorburn, 34 N. Y. 634; Ferris v. Comstock, Ferre & Co., 33 Conn. 513.

One hundred and eighteen supposed errors are assigned in the record of this case. We have carefully considered them all, and are of the opinion that they disclose no substantial error in the trial below. We have discussed the more important questions they present, and indicated the reasons for the conclusions we have reached upon them. Most of these supposed errors relate to the questions we have considered, and no good purpose would be served by extended notice of the remainder. The judgment below must be affirmed, with costs, and it is so ordered.

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GULF, C. & S. F. RY. CO. v. JACKSON.

SAME v. CURB et al.

(Circuit Court of Appeals, Eighth Circuit. September 24, 1894.)

Nos. 424 and 425.

**BILL OF EXCEPTIONS—TIME OF FILING—CONSENT TO ENLARGEMENT.**

An indorsement on a bill of exceptions, "We agree upon the above and foregoing bill of exceptions," signed by opposing counsel during an extension of time for filing, made by an ex parte order in vacation, held binding as a consent to the enlargement of the time for settlement.

**In Error to the United States Court in the Indian Territory.**

On petitions of plaintiffs in error for rehearings. These were two suits brought by the Gulf, Colorado & Santa Fé Railway Company against Jo Jackson, and W. R. Curb and Rosella Curb, respectively.

J. W. Terry and P. L. Soper, filed brief in support.

W. B. Johnson, A. C. Cruce, and Lee Cruce, filed brief opposing same.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. Petitions for rehearings of these cases, on the ground that the defendants in error consented to the extension of the time for filing the bills of exceptions, have been presented and considered. During the trial term in the court

below, the time for filing the bills of exceptions in these cases was extended, by order of the court, to December 24, 1893. In December, 1893, and after the term had lapsed, the judge made an ex parte order extending the time for filing the bills until January 23, 1894, and these bills of exceptions were not settled or filed until January 13, 1894. On this state of facts, orders were made at this term affirming the judgments below on the ground that the judge had no power to extend the time to file these bills by an ex parte order in vacation, without the consent of the defendants in error to such extensions, in accordance with our decision in *Railway Co. v. Russell*, 9 C. C. A. 108, 60 Fed. 503. It now appears that the bills of exceptions contained a statement of the substance of the ex parte orders extending the time to prepare and file them, and that some time in January, 1894, before they were settled or filed, they were presented to the counsel for defendants in error, one of whom indorsed upon each of them the following words, "We agree upon the above and foregoing bill of exceptions," and signed this agreement. In our opinion this was a plain consent to the enlargement of the time for the settlement of these bills, and the defendants in error ought not to be permitted to revoke or evade it now, when the cases have been prepared for hearing on the merits in this court in reliance upon their waiver of all objections to the bills of exceptions. These motions for rehearings are granted, the orders striking out the bills of exceptions and affirming the judgments are set aside, and the cases reinstated for hearing on the merits.

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UNION PAC. RY. CO. v. BARNES.

(Circuit Court of Appeals, Eighth Circuit. October 8, 1894.)

No. 440.

1. DECEIT—SALE OF LANDS.

Neither an agreement to sell land and cause a good title thereto to be conveyed to the purchaser at a future time, nor a deed without covenants, which recites the supposed source of the grantor's title, and purports to grant and convey the land, is sufficient to support an action against the vendor for false and fraudulent representation as to his title, where he makes the agreement and deed in good faith, under color and claim of title, in the honest belief that the title and its source are good, although in fact they are both invalid.

2. VENDOR AND PURCHASER—RECOVERY OF PURCHASE MONEY.

An action will not lie by a purchaser to recover the purchase money on failure of title in the absence of fraud or covenants to secure the title.

3. LIMITATION OF ACTION—ACTION FOR PURCHASE MONEY.

A right of action, if any, for purchase money paid, on failure of title to realty, accrues when the money is paid and the deed obtained.

In Error to the Circuit Court of the United States for the District of Colorado.

This was an action originally brought by Thomas H. Barnes against the Union Pacific Railway Company to recover for alleged false representations as to the ownership of land purchased by plaintiff of defendant. The case was first heard in the court below

upon demurrer to the amended complaint. The judgment of the court below sustaining the demurrer was reversed upon error to this court (4 C. C. A. 199, 54 Fed. 87), and defendant allowed to answer. Pending the action, Thomas H. Barnes died, and S. Marcella Barnes, administratrix, was substituted as plaintiff. On a trial to the jury a verdict was directed for plaintiff, and defendant brought error.

Willard Teller (Harper M. Orahoad and Edward B. Morgan, on the brief), for plaintiff in error.

Charles M. Campbell, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The writ of error in this case is sued out to reverse a judgment against the plaintiff in error, the Union Pacific Railway Company, for damages for false representations in the sale of a tract of land to Thomas H. Barnes. In the lifetime of Mr. Barnes the case was before this court upon a demurrer to the complaint. It has now been tried to a jury, and the court below instructed them to return a verdict against the railway company, and upon this verdict the judgment complained of is based.

In *Barnes v. Railway Co.*, 4 C. C. A. 199, 205, 54 Fed. 87, 92, 12 U. S. App. 1, upon the demurrer to the complaint in this action, we held that it alleged in effect that the railway company falsely represented to Thomas Barnes that it had a grant from the government of, and was the sole owner of, a certain tract of land, that it made these representations to induce him to buy this land; that these representations did induce him to purchase it, and to pay the railway company for it \$2,376.60; and that the company in fact had neither claim nor color of title to, and was not in possession of, the land in question. We held that this was a statement of facts sufficient to constitute a cause of action to recover damages for false representations, on the ground that, if the company knew its representations to be false, that was a fraud of the most positive kind; and if it did not know whether its statements were true or not, and yet made the positive averments of these facts as of its own knowledge, as the complaint alleged, that was a false and fraudulent statement that it did know these to be the facts, and, as these statements caused the same damage to the vendee, the company was equally liable in either event. 4 C. C. A. 201, 54 Fed. 89, 12 U. S. App. 5. Accordingly we reversed the judgment sustaining the demurrer, and remanded the case for answer and trial. The railway company answered that the allegations in the complaint that it made these representations were untrue, and upon the trial below the only evidence in support of them was that on February 8, 1878, the Denver & Pacific Railway & Telegraph Company made a written agreement with Barnes to sell this tract of land to him on condition that he would pay to it the sum of \$2,376.60 in various installments on or prior to February 8, 1883, and that it would, upon such payment, "cause to be made and executed unto the said second party [Barnes], his heirs and assigns, upon request, at the general land office of the

first party [the railway company], and surrender of this contract, a deed conveying said premises in fee simple;" and that on October 20, 1881, Jay Gould and Russell Sage, as trustees of the Union Pacific Railway Company, which is the successor of the Denver & Pacific Railway & Telegraph Company, made a deed of this land to Barnes without covenants, in which they recited that the Denver & Pacific Railway & Telegraph Company, by its mortgage or deed of trust, conveyed to certain trustees all the lands granted to it by act of congress; that they had succeeded to the rights of such trustees; and that by virtue of the deed of trust they granted, bargained, sold, and conveyed the land in question to Barnes, his heirs and assigns. It is conceded that the contract of the Denver & Pacific Railway & Telegraph Company and the deed of the trustees are to be considered in this case as the contract and deed of the Union Pacific Railway Company, and we shall speak of them henceforth as such. The record now discloses the fact that the land in dispute was a part of an odd section within the limits of a grant of lands to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean under the act of July 1, 1862, and the acts amendatory thereof (12 Stat. 489), and that the title to this land would have passed to the railway company under that grant had it not been for the fact that a pre-emption or homestead claim, which had expired by limitation, or been abandoned before the agreement to sell this land to Barnes was made by the railway company, had attached to this tract before the line of the road was fixed by the filing of its map of definite location with the commissioner of the general land office. It also appears from this record that when the agreement of sale was made, and when the deed was executed, and indeed until the decision of the supreme court in *Railway Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. 566, in 1885, the railway company believed that this land, and other lands similarly situated, had reverted to the railway company, and had become a part of the grant to it when the pre-emptor or homesteader had failed to perfect or had abandoned his claim. When the decision in that case had been rendered, both the vendor and the vendee first discovered that neither of them had ever had any title to this land. Thereupon the vendee, who had been in possession under his contract of purchase and deed since 1878, filed an application for the land as a homestead, and obtained the title to it from the government under this application at an expense of some \$60.

This brief summary of the facts in this case is sufficient to show that the railway company was guilty of no actual fraud, of no intention to deceive, in its attempted sale and conveyance of this land. All that it did was done in the utmost good faith, and in the honest belief that it was the owner of the land under its grant. Nor did the company make any statement as of its own knowledge that this land was within its grant, or that it was the owner of it to induce the vendee to purchase. No oral representations whatever are proved, and the vendee is forced to rely upon the agreement of sale and the deed alone for proof of his allegations of false representations.

No argument is required to show that the agreement of February 8, 1878, to sell the land and to cause a deed to be made to the purchaser conveying it in fee simple five years thereafter was no representation whatever that the company then owned it, or that it was then within its grant. It was nothing but a mere promise to sell the land, and to cause him who should be the owner five years thereafter to convey the title to the purchaser. It goes without saying that an action for false and fraudulent representations can never be maintained upon a promise or a prophecy. *Kerr, Fraud & M.* p. 85, note 3; *Sawyer v. Pritchett*, 19 Wall. 146, 163. Nor does the fact that the company made a deed of this land without covenants, and therein referred to its grant as the source of its title, furnish any sound basis for such an action, where, as in this case, the grantor was acting in good faith under claim and color of title, and in the honest belief that it had derived a good title from the source it referred to, and that it was conveying such a title to its grantee. Such an action requires for its foundation a false statement knowingly made, or a false statement made in ignorance of, and in reckless disregard of, its truth or falsity, and of the consequences such a statement may entail. The evil intent—the intent to deceive—is the basis of the action. Such an intent, it is true, may be inferred from the positive statement as of his own knowledge of a fact concerning which one knows he has no knowledge at all, because such a statement shows such a contempt for the truth, and such a reckless disregard of the rights of others who may rely upon it, that it is deemed sufficient evidence of an evil intent to warrant a recovery when damages have resulted from the falsehood. The record in this case is barren of any such statements or representations, and the proof is plenary that the company was acting under color of title, and in the utmost good faith. It will not do to say that whenever a title to land fails an action for false representations will lie against every grantor who has made a deed of the land, and recited therein the source of his title, which appeared to be, and which he then believed to be, good. Neither an agreement to sell land, and to cause a good title thereto to be conveyed to the purchaser at a future time, nor a deed without covenants which recites the supposed source of the grantor's title, and purports to grant and convey the land, is sufficient to support an action against the vendor for false and fraudulent representations as to his title where he makes the agreement and deed in good faith, under color and claim of title, in the honest belief that the title and its source are good, although in fact they are both invalid. Nor can this action be maintained as one for money had and received. Chancellor Kent said in *Abbott v. Allen*, 2 Johns. Ch. 519, 522, in the year 1817, that it was the settled law that, "if there be no fraud, and no covenants taken to secure the title, the purchaser has no remedy for his money, even on a failure of title," and cited *Frost v. Raymond*, 2 Caines, 188, 192, in support of this proposition. The law he then announced has been steadily reaffirmed by the subsequent decisions, and it is fatal to this action. The rule caveat emptor governs purchasers of land as well as of personal property. The vendee must

take care that the title he buys is sound. If he has any doubt concerning it, he may require covenants to secure the title as a condition of his purchase. If he makes no such requirement, he takes the risk of the title upon himself, in the absence of fraud, and cannot hold the vendor responsible for its failure. *Patton v. Taylor*, 7 How. 133, 159; *Van Rensselaer v. Kearney*, 11 How. 297, 322; *Noonan v. Lee*, 2 Black, 499, 508; *Peters v. Bowman*, 98 U. S. 56, 60. Moreover, if the vendee here could ever have maintained an action for money had and received, that cause of action manifestly accrued to him in 1881, when he paid his money, and obtained his worthless deed; and it was barred by the statute of limitations of the state of Colorado in 1887, and at least three years before this action was commenced. 2 Mills' Ann. St. Colo. § 2900. This action was not commenced until June 3, 1891. The judgment below must be reversed, and the cause remanded, with directions to grant a new trial; and it is so ordered.

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**THEROUX v. NORTHERN PAC. R. CO. et al.**

(Circuit Court of Appeals, Eighth Circuit. October 22, 1894.)

No. 472.

**1. DEATH BY WRONGFUL ACT—LIMITATIONS—LEX FORI OR LEX LOCI.**

An action for death by wrongful act, occasioned in a state which gives three years for suing therefor, may be maintained in another state, which gives only two years, at any time within three years.

**2. LIMITATIONS—HOW RAISED—MOTION FOR JUDGMENT.**

The sufficiency of a complaint because it shows the cause of action to be barred should not be raised by motion for judgment, after an answer which does not plead the statute has been interposed, and not withdrawn.

In Error to the Circuit Court of the United States for the District of Minnesota.

Action by Josephine Theroux, administratrix of James Theroux, deceased, against the Northern Pacific Railroad Company and its receivers, for the death of deceased. Judgment for defendant.

C. B. Smith (C. L. Smith was with him on brief), for plaintiff in error.

J. H. Mitchell, Jr., (Tilden R. Selmes was with him on brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. In this case the record discloses that Josephine Theroux, as administratrix of the estate of James Theroux, deceased, brought an action against the Northern Pacific Railroad Company, and Thomas F. Oakes, Henry C. Rouse, and Henry C. Payne, as receivers of that company, to recover damages for the death of her husband and intestate, who was killed in the state of Montana on the 20th day of October, 1890, while in the service of the Northern Pacific Railroad Company as a locomotive engineer. The complaint showed, by proper averments, that the death of the deceased was

occasioned by the wrongful act, neglect, and default of the Northern Pacific Railroad Company, and the suit was founded on the provisions of the damage act of the state of Montana which was in force on October 20, 1890. Comp. St. Mont. 1887, §§ 981, 982. The action was commenced on October 10, 1893,—more than two years, and less than three years, after the death occurred,—in the district court of Hennepin county, Minn., from whence it was removed to the circuit court of the United States for the district of Minnesota. An answer was filed by the defendant company which admitted that James Theroux, the plaintiff's intestate, was killed on or about October 20, 1890, in the state of Montana, while in the employ of the Northern Pacific Railroad Company, but it denied generally all other allegations. Subsequently, while the answer remained on file, a motion was made orally, by the defendant company, for judgment in its favor on the pleadings. This motion was sustained by the court, and a final judgment was entered in favor of the defendant company. The record does not show upon what ground this motion was predicated, and but for the statements of counsel and the assignment of errors we would be unable to tell, except by surmise, why a judgment was rendered in favor of the defendant, without trial, when a well-defined issue of fact requiring a jury trial was presented by the pleadings. We are advised, however, that it was contended on the hearing of the motion that the complaint showed that the cause of action therein stated was barred by limitation, because the Minnesota damage act required a suit like the one at bar to be commenced "within two years after the act or omission by which the death was caused." Gen. St. Minn. c. 77, § 2. This view, as we are advised, prevailed in the circuit court, and the action was dismissed, although the Montana statute on which the suit was founded (sections 981 and 982, *supra*) allows three years after death occurs within which to commence such an action, and although the suit had been brought within that period. The principal question that we have to determine is whether this ruling can be sustained.

It was held in *Boyd v. Clark*, 8 Fed. 849, which is a leading case on the subject, that when a statute of a state or country gives a right of action unknown to the common law, and, in conferring the right, limits the time within which action may be brought, such limitation is operative in any jurisdiction where it is sought to enforce such cause of action. The same doctrine was recognized and approved in the following cases: *The Harrisburg*, 119 U. S. 199, 214, 7 Sup. Ct. 140; *Munos v. Southern Pac. Co.*, 2 U. S. App. 222, 2 C. C. A. 163, 51 Fed. 188; *Eastwood v. Kennedy*, 44 Md. 563; *Railway Co. v. Hine*, 25 Ohio St. 629; and *O'Shields v. Railway Co.*, 83 Ga. 621, 10 S. E. 268. Indeed, it may be said that cases of the kind last referred to form a well-established exception to the general doctrine that the *lex fori* governs in determining whether a cause of action is barred by limitation. An attempt is made to distinguish the case at bar from *Boyd v. Clark*, *supra*, and to exempt it from the operation of the rule declared in that case, on the ground that in that case an effort was made to enforce a statutory cause of action

in a foreign jurisdiction after it had ceased to be enforceable in the country by whose laws the right of action was given, whereas in the case at bar the effort is simply to bar a statutory cause of action, when sued upon in a foreign state, by applying thereto the local limitation law which is applicable to similar causes of action when they originate within the state. We recognize the obvious difference between the two cases, but we think that it will not suffice to withdraw the case in hand from the operation of the rule enunciated in *Boyd v. Clark* and in the other cases heretofore cited. It was said, in substance, by Mr. Chief Justice Waite, in *The Harrisburg*, supra, that when a statute creates a new legal liability with the right to sue for its enforcement within a given period, and not afterwards, the time within which suit must be brought operates as a limitation of the liability, and not merely as a limitation of the remedy. The same thought was expressed by the supreme court of Ohio in *Railway Co. v. Hine*, supra, and by the supreme court of Maryland in *Eastwood v. Kennedy*, supra. In the Ohio case it was said that a proviso contained in a statute creating a new cause of action, which limits the right to sue to two years, is a condition qualifying the right of action, and not a mere limitation of the remedy. It must be accepted, therefore, as the established doctrine, that where a statute confers a new right, which by the terms of the act is enforceable by suit only within a given period, the period allowed for its enforcement is a constituent part of the liability intended to be created, and of the right intended to be conferred. The period prescribed for bringing suit in such cases is not like an ordinary statute of limitations, which merely affects the remedy. It follows, of course, that, if the courts of another state refuse to permit the cause of action to be sued upon during a part of the period limited by the foreign law, to that extent they refuse to give effect to the foreign law, and by so doing impair the right intended to be created. Doubtless, the courts of a state may refuse to enforce a liability unknown to the common law that has been created by the laws of a foreign state or country, but the rule of comity which prevails as between the various states of this Union requires that the courts of each state shall enforce every civil liability that may have been created by the laws of other states, for an act done or omitted within their several territorial jurisdictions, unless the liability so created and sought to be enforced is clearly repugnant to some local law, or is opposed to some well-established public policy of the state whose courts are asked to enforce it. *Railroad Co. v. Mase* (decided by this court at the present term) 63 Fed. 114; *Railroad Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978, and cases cited. In point of fact, nearly every state in this Union has now adopted the provisions of Lord Campbell's act, with slight variations; and we are not aware that the courts of a single state have ever refused to entertain a suit founded on the provisions of that act, as adopted in a sister state, or to give all the provisions of the act full force and effect, where the wrongful act or omission of duty complained of was committed in the latter state. Such being the rule of comity which is generally recognized and enforced, we do not see how the courts of Minnesota, and much



less a federal court sitting in Minnesota, can well refuse to enforce a liability created by the laws of Montana for a wrongful act or omission of duty resulting in death, which was committed in Montana within three years, and more than two years prior to the institution of the suit, merely because the laws of Minnesota provide, with respect to similar acts committed in Minnesota, that suit shall be brought within two years. To refuse to entertain such a suit within three years would be to subtract from the liability, and to impair the right intended to be conferred by the laws of Montana; for the period allowed in which to enforce the liability, as we have before shown, is a substantial part of the liability imposed and of the right intended to be created. Moreover, it cannot be said that, by entertaining the suit after the lapse of two years, the laws of Minnesota would be set at naught, or any well-defined public policy of that state violated; for, in contemplation of law, the two-year limitation prescribed by the statute of that state (chapter 77, § 2, *supra*) was only intended to apply, and can only apply, to causes of action which originate in that state, and not to causes of action that originate elsewhere. We are of the opinion, therefore, that the circuit court erred in sustaining the motion for judgment on the pleadings.

What we have already said disposes of the case, and necessitates a reversal of the judgment; but the record also presents a question of practice which is of sufficient importance to deserve notice. We have already commented on the fact that the motion for judgment on the pleadings was made by the defendant after issues had been joined by filing an answer, and that this motion, as incorporated in the present record, fails to show on what ground it was rested. It is only by virtue of the briefs of counsel and the assignment of errors that we were able to say that the circuit court considered the question heretofore decided,—whether the cause of action was barred by limitation. We are aware of the fact that the practice is now established in some of the states in this circuit, notably in Minnesota, of taking advantage of the statute of limitations by demurrer to the complaint, or even by a motion in arrest of judgment after verdict, where the complaint clearly and conclusively shows that the cause of action was in fact barred. *Trebbv v. Simmons*, 38 Minn. 508, 38 N. W. 693. The court said in that case, however, that in consequence of the early construction of the Code of that state, which gave birth to the rule that the statute of limitations may be invoked by demurrer, “the court has been engaged ever since in applying, explaining, and modifying the rule,” and that recent modifications of the rule in that state, holding that a demurrer or motion in arrest will not lie unless the complaint conclusively shows that the cause of action is barred, have very nearly abrogated the rule itself, and made it of little practical value, as it will rarely ever happen that a complaint will show, beyond every reasonable intendment, that the cause of action is barred. We are further aware that the supreme court of the United States has sanctioned the practice in the federal courts of invoking the statute of limitations, by demurrer to the complaint or declaration, in those states where the practice is well established in the local tribunals. *Bank v. Lowery*, 93 U. S. 72; *Retzer v. Wood*,

109 U. S. 185, 3 Sup. Ct. 164; *Bank v. Carpenter*, 101 U. S. 567. Our researches, however, do not satisfy us that the federal courts have ever approved the practice (which seems to have been pursued in this case) of moving orally for a final judgment in favor of the defendant on the pleadings, after an answer has been filed which fails to plead the statute of limitations, because the cause of action stated in the complaint is apparently barred by limitation. We think that there is an obvious objection to such a practice, and that it ought not to be tolerated. If a defendant is allowed to interpose a motion for judgment on the pleadings, after an answer has been filed which does not even plead the statute as a defense, it will very frequently happen that the plaintiff will be subjected to unnecessary expense and delay in preparing for trial on issues of fact raised by the answer, and the hearing of cases will be unnecessarily delayed. This would seem to be a sufficient reason for rejecting the practice in question, even if the defense of the statute is not absolutely waived by failing to plead it. We think, therefore, that, when a defendant desires to test the sufficiency of a complaint on the ground that it affirmatively shows that the cause of action is barred by limitation, he should do so by demurrer in the first instance, or, if he has filed an answer and failed to plead the statute, that he should ask leave to withdraw his answer and to demur, and that the latter action should be taken a reasonable length of time before the day appointed for the trial. Such, we think, is the correct practice, and the rule which should be observed by the federal courts. The judgment of the circuit court is reversed, and the cause is remanded with directions to award a new trial.

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#### FERGUSON v. UNITED STATES.

(District Court, N. D. New York. November 7, 1894.)

##### BURGLARY OF POST OFFICE—MONEY FOUND ON BURGLAR — RIGHT OF UNITED STATES TO RETAIN.

A. pleaded guilty to the first count of an indictment in which he was charged with breaking into a post office and stealing postage stamps. The second count charged the stealing of \$50.60 in money, which was taken at the time of the burglary. When he was arrested and searched, \$113.96 was found on his person, but no part of it was ever identified as the money stolen. \$50.60 of such money was retained by the post-office inspector, and A. gave his attorney an order on the inspector therefor. Afterwards the inspector delivered the \$50.60 to the United States. *Held*, that the United States had no right to the money as against such attorney.

Action by Frank C. Ferguson against the United States to recover \$50.60 taken by officers from the person of one James Atwood, who pleaded guilty to an indictment for burglary of a post office, and who gave plaintiff an order for such money.

On the night of July 15-16, 1893, the post office at Whitesboro, N. Y., was broken into by a burglar, and postage stamps to the amount of \$320.61, money-order funds to the amount of \$41.31, and postal funds to the amount of \$9.29 taken therefrom. On July 17, 1893, one James Atwood was arrested in New York City for the burglary. At the time of his arrest postage stamps

of the value of \$127.30 and \$113.96 in money were found on Atwood's person, besides other articles of small value, all of which were turned over by the city detectives to J. E. Jacobs, a post-office inspector. The postmaster at Whitesboro identified certain envelopes found on Atwood's person, as the envelopes in which he had received the stamps from the post-office department, and Atwood acknowledged to him that he was the person who robbed the post office. The money found on Atwood's person could not be identified as the money stolen. On August 10, 1893, Jacobs paid to an attorney for Atwood, pursuant to an order of the United States circuit court commissioner before whom an examination was had, the sum of \$63.36 of the moneys taken from Atwood, retaining in his hands the balance of \$50.60, the amount of moneys stolen from the post office. Atwood was indicted at the January term, 1894, of the United States district court. The indictment contained two counts; the first alleged the stealing of the postage stamps, and the second the stealing of the money-order and postal funds. Atwood pleaded guilty to the first count of the indictment, and was sentenced on the 17th of January, 1894, to imprisonment in the Albany County Penitentiary, for the period of two years and six months. The plaintiff was retained by Atwood, as his counsel, before he pleaded to the indictment, and on the 19th of January, 1894, gave to the plaintiff an order directing the post-office inspector to pay the \$50.60 to the plaintiff. The plaintiff presented this paper to said Jacobs, and made a demand upon him for said sum of \$50.60, taken from Atwood and then in Jacobs's possession as such post-office inspector. Jacobs refused to pay the money to the plaintiff, and on the 30th day of January, 1894, he forwarded it to the postmaster general, together with the postage stamps and other articles taken from Atwood. The plaintiff brings this action to recover said sum of \$50.60.

Frank C. Ferguson, pro se.

William F. Mackey, U. S. Asst. Dist. Atty.

COXE, District Judge. It was admitted at the trial, and the admission is reiterated in the defendant's brief, that the money found on Atwood was not identified as having been taken from the post office at Whitesboro. The court is, therefore, unable to discover by what right or title the defendant assumes to retain this money. There is not a particle of proof that it is the money that was stolen, or that the defendant holds it pursuant to any legal process. The defendant has it and proposes to keep it if it can. So much is clear, but the reasoning by which it is sought to justify this proceeding is not clear. The argument seems to be that, because the defendant has lost money through Atwood's burglary, it can reimburse itself, without process of law, from any property found in Atwood's possession. This will not do. The proposition pushed to its logical conclusion would enable the defendant to seize Atwood's watch or even his clothes, sell them, and apply the proceeds to the extinguishment of the debt. At the time of the assignment to the plaintiff the defendant had not even the possession of the money; it was in the hands of the inspector. The assignment transferred the money to the plaintiff and gave him a good title, certainly as against the defendant, who has no title at all. The plaintiff is entitled to judgment as demanded in the petition.

## WECHSELBERG v. FLOUR CITY NAT. BANK.

(Circuit Court of Appeals, Seventh Circuit. October 27, 1894.)

No. 105.

## 1. CORPORATION—ATTEMPT TO FORM—LIABILITY OF CORPORATORS AT COMMON LAW—WISCONSIN STATUTE.

Rev. St. Wis. tit. 19, c. 86, §§ 1771-1775, provide that three or more persons may form a corporation by signing and acknowledging written articles declaring the purpose, amount of capital stock, and other particulars regarding the corporation, which articles must be filed for record in certain public offices, and "no corporation shall, until such articles be so left for record, have legal existence"; that in stock corporations stockholders only shall be members; that, until directors are elected, the signers of the articles shall have direction of the affairs of the corporation, and make rules for perfecting organization and regulating subscriptions to stock; that "no such corporation shall transact business with any other than its members" until one-half of its capital has been subscribed, and 20 per cent. paid in, and upon any obligation contracted in violation of such provision the corporation shall have no right of action, but the stockholders then existing shall be personally liable; and finally, that "every such corporation, when so organized," shall be a body corporate, and have the powers of a corporation. Where W., with two others, had signed and acknowledged articles, pursuant to this statute, which were duly filed and recorded, but no further proceedings were taken, and no stock subscribed for or issued, and no capital paid in, but the other parties, with W.'s knowledge, but without his participation, proceeded to transact business as a corporation and incur obligations as such, *held*, in an action against the signers of the articles, including W., upon a note executed in the corporate name, that it was the purpose of the statute that a qualified corporate existence only should date from the filing of the articles, but that the full privileges of incorporation, including exemption of the members from liability, should be withheld until capital stock was provided, and that, until compliance with the statutory requirements as to providing such stock, the signers of the articles, including W., were liable at common law for the debts incurred in the name of the corporation. Woods, Circuit Judge, dissenting.

## 2. SAME—NATURE OF LIABILITY.

*Held*, further, that such liability was a primary, contract liability of the signers of the articles, and was not dependent upon the knowledge or understanding of those dealing with the purported corporation, nor upon the personal participation of such signers in the transaction of business, nor upon their deriving any profit from it. Woods, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

Action by the Flour City National Bank against Julius Wechselberg, Ernest S. Moe, and Charles H. Williams. Plaintiff obtained judgment. Defendant Wechselberg brings error.

This is an action at law by the Flour City National Bank against Julius Wechselberg (plaintiff in error), Ernest S. Moe, and Charles H. Williams, as defendants below, for recovery of the amount due upon a promissory note for \$3,000, dated September 18, 1889, made by the Northwestern Collection Company to the Northwestern Collection, Loan & Trust Association, and indorsed to said bank. The alleged liability of the defendants below is based upon their acts in the incorporation of the Northwestern Collection Company as a corporation under the laws of Wisconsin, and the transaction at large of business thereunder, without having capital paid in as required by statute, whereby it is asserted that they became personally obligated to

pay indebtedness so contracted. The complaint alleges facts to state a liability created by the statute of Wisconsin, viz. section 1773, c. 86, which is the act providing for incorporations; and also charges that the defendants are liable "personally and as copartners in trade upon the obligations so contracted." Demurrer to the complaint was overruled (45 Fed. 547), and the defendants answered severally. The issues were tried before the court upon stipulation waiving a jury, and there were findings of fact and conclusions of law thereupon against all of the defendants; but Wechselberg alone sues out a writ of error.

The facts found, aside from jurisdictional and formal matters, may be summarized as follows (the portions to which exception is taken being placed in brackets], viz.:

On April 6, 1888, the plaintiff in error, with the other two defendants below, executed articles of incorporation forming the Northwestern Collection Company of Milwaukee as a corporation to do a general collection and reporting business, with capital stock fixed at \$5,000, divided into shares of \$25 each. These articles were duly filed and recorded as required by the statute; contained the required provisions, named the general officers to be elected by and from a board of three directors, stated their duties, and provided that any person might become a member or stockholder by subscribing to and becoming the owner of one share of stock, and, further, that "the corporators should compose the first board of directors." Certificate of incorporation was thereupon issued by the secretary of state, but no further steps were taken by any of the defendants to comply with the statutory requirements, no by-laws were adopted, no stock certificates issued or arranged for, and no stock was ever subscribed for or paid in by the defendants or any other person, and the noncompliance was known by each of the defendants. The defendants Moe and Williams, assuming to be president and secretary, respectively, of the corporation, immediately began to carry on a general collection business at Milwaukee, under this corporate name; and they, in the course of their said business, caused to be printed letter heads and business cards with statement of incorporation, and their names and offices as aforesaid, including therein the name of Julius Wechselberg as vice president, all of which were used and distributed during a year and a half of their operations. The plaintiff in error "knew all the time that Moe and Williams were carrying on said business in the name of said corporation." He took no part in the management ["but did not at any time, disavow his connection with the said corporation as incorporator, officer, or stockholder, until after the commencement of this action"]. He never received any profit or emolument from it, and "the evidence does not establish that he had actual knowledge that his name was used upon the letter heads," or that he was held out as an officer of the company; but ["under the circumstances, if he did not know it, he could have ascertained the fact by merely slight attention to the matter, and was guilty of negligence in not knowing it, having become a party to the incorporation, and knowing that the business was being carried on in the name of the incorporation by the other defendants, and consenting thereto, when no capital stock had been subscribed or paid in to his knowledge or in fact, as he was bound to know, he cannot shield himself from liability by reason of his negligent ignorance of the use of his name; and by uniting in the incorporation, and permitting and consenting to the transaction of business by and in the name of the incorporation without stock subscription or payment of any part of a stock subscription, he made himself liable for all debts lawfully contracted in the name of the incorporation"]. It is further found that the public representation of Wechselberg as vice president of this corporation was made known to the payee in the note in suit prior to the contracting of the debt for which it was given in renewal, but is not shown to have been known by plaintiff below until after the maturity of the renewal note. Also that the purported corporation made collections for and had active business connection with the corporation named as payee in said note, in which drafts were frequently drawn by the latter upon the former, and accepted and discounted through plaintiff bank. The note in suit was in renewal of one of these drafts so discounted, drawn September 11, 1889, and is a transaction of this purported corporation.

The corporation was wholly without capital or resources out of which to pay this debt. Both the payee and its assignee were ignorant of this want of capital and of noncompliance with any of the statutory requirements. The exceptions and assignments of error are directed to the portions of the findings of fact which are above quoted in brackets, and to each of the conclusions of law and the judgment.

Quarles, Spence & Quarles (Chas. Quarles, of counsel), for plaintiff in error.

Shepard, Haring & Frost and Wilson Vanderlip (Edward W. Frost and John R. Vanderlip, of counsel), for defendant in error.

Before WOODS, Circuit Judge, and BUNN and SEAMAN, District Judges.

SEAMAN, District Judge (after stating the facts as above). The plaintiff in error was held by the circuit court to be jointly liable with the other defendants below for the indebtedness contracted by their assumed corporation, the Northwestern Collection Company, in the absence of any capital stock. This liability was based upon the facts found in his relation and conduct as a corporation, and the court did not undertake to determine at the trial whether it arose under the statute or at common law. Corporations are entirely the creatures of statute, and, when duly formed, one of their chief characteristics, distinguishing them from partnerships and other joint ventures, is the exemption of the individual associates from liability for the corporate obligations, except as the enabling act may impose liability. This immunity, which is an important advantage of membership, can only be secured by compliance with the statutory requirements for incorporation. In the case of corporations organized for a purpose and under a law requiring capital stock, the capital becomes a fund to which creditors must look for satisfaction of debts. It is a substitute for individual liability, and constitutes a trust fund for the benefit of creditors. *Upton v. Tribilcock*, 91 U. S. 45; *Adler v. Manufacturing Co.*, 13 Wis. 57; 1 *Beach, Priv. Corp.* § 116. Capital stock is, therefore, the vital requirement of every business corporation, and its actual existence is usually placed by enabling statutes as a condition precedent to corporate existence. It is found and conceded in this case that there was no capital stock in fact, and no capital paid in or subscribed; that the articles of incorporation which were entered into by the plaintiff in error with the other defendants below prescribed \$5,000; that these articles were duly executed by the three parties, and duly filed and recorded; that without capital, and without the actual taking of any further steps towards organization, business was opened by Moe and Williams as actors, in the name of the assumed corporation; that this was known to the plaintiff in error, but he did not take part in their operations, or receive any profit or emolument; that printed matter was used and distributed, wherein the plaintiff in error was named as vice president, and, while "the evidence does not establish that he had actual knowledge" of this use of his name, it is found that "under the circumstances, if he did not know it,

he could have ascertained the fact by merely slight attention to the matter, and was guilty of negligence in not knowing it." Further, it is recited in the articles which were entered into that "the corporators should compose the first board of directors"; and, although such a provision would not control an organization effected by stockholders, who are empowered by the statute to elect directors, it may be considered as a fact tending to show intention or knowledge. The debt in question was incurred in the business so carried on, and in the line apparently contemplated by the articles.

The statute which authorizes incorporation for the purposes stated in these articles is chapter 86, tit. 19, of the Revised Statutes of Wisconsin, contained, with amendments, in 1 Sanb. & B. Ann. St. c. 86. Section 1771 provides that "three or more adult persons, residents of this state, may form a corporation in the manner provided in this chapter," for objects there named. Section 1772 provides: "In order to form such a corporation, the persons desiring so to do shall make, sign and acknowledge written articles," with declarations of (1) purpose, (2) name and location, (3) capital stock, if any, and number and amount of shares thereof, (4) designation of general officers and number of directors, (5) duties of officers, (6) conditions of membership, and (7) "such other provisions or articles, if any, not inconsistent with law, as they may deem proper." The section further provides: The original articles, or a verified copy, must be filed for record with the register of deeds of the county, "and no corporation shall, until such articles be so left for record, have legal existence." It also declares that "in stock corporation, persons holding stock, according to the regulations of the corporation, and they only, shall be members." A verified copy of the articles must also be filed with the secretary of state, or penalty is incurred. There was in this case formal compliance with the foregoing requirements, but entire failure to complete incorporation under the succeeding section. By section 1773 it is prescribed that until directors are elected the signers of the articles shall "have direction of the affairs of the corporation, and make such rules as may be necessary for perfecting its organization, accepting members or regulating the subscription to the capital stock"; that in stock corporations the first meeting may be held when half the capital stock is subscribed, and may be called by any two of the signers of the articles, upon certain notice, or be held without notice when all subscribers for stock are present. It then further provides: "No such corporation shall transact business with any other than its members, until at least one-half of its capital shall have been duly subscribed, and at least twenty per centum thereof actually paid in; and if any obligation shall be contracted in violation hereof, the corporation offending shall have no right of action thereon; but the stockholders then existing of such corporation shall be personally liable upon the same." Section 1775 declares: "Every such corporation, when so organized, shall be a body corporate," and have "the powers of a corporation conferred by these statutes," etc.

The question of common-law liability presents itself at the threshold of this inquiry, whether considered as a primary ground or for the purpose of interpreting the statute. As a primary ground, the plaintiff in error contends that it must be excluded here for two reasons: (1) Because the complaint is manifestly based upon the statute, and intends a charge of statutory liability; and (2) because there is a finding by the trial court of the existence of incorporation. It is sufficient answer to the first objection that it is raised here in the first instance; that the evidence was all received without exception for variance, and the facts are clearly established by the findings. Under the rule stated in *Wasatch Min. Co. v. Crescent Min. Co.*, 148 U. S. 293, 13 Sup. Ct. 600, approving the rule pronounced under the New York Code of Procedure in *Tyng v. Warehouse Co.*, 58 N. Y. 308, the objection cannot now stand "to shut out from consideration the case as proved." In Wisconsin, section 2669, Rev. St., provides that "no variance between the allegation in a pleading and the proofs shall be deemed material unless it shall actually mislead," and the decisions under it, in accord with the doctrine above stated, hold that "the variance may be wholly disregarded," and that "the pleadings may at any time be amended to conform with the issues really tried," or will be regarded on appeal as so amended. *Stetler v. Railway Co.*, 49 Wis. 609, 6 N. W. 303. With reference to the force of the finding, all of the facts are clearly stated, and it remains for the court of review to determine their legal effect. An expression of opinion by the trial court has suggestive value, but is not conclusive, where the facts are undisputed. The case is therefore open for any liability which may result from the facts established, and the only question on the writ of error is, do the facts found support the judgment?

By the common law there was no individual liability of the members of a corporation for corporate debts, beyond the enforcement of their agreed contributions to the capital stock. *Terry v. Little*, 101 U. S. 216; *U. S. v. Knox*, 102 U. S. 422; 1 Beach, Priv. Corp. § 143. Therefore, if complete corporate existence was obtained and perfected by the act of filing the articles of association, without compliance with any of the requirements of section 1773, the associates are not subject to common-law liability. On the other hand, it is well settled that an attempted or pretended incorporation, not perfected as the enabling act requires, does not confer this immunity, and all who are parties to the simulated corporation as associates or shareholders are held liable at common law for debts contracted under the corporate guise. While the courts have differed in naming this liability,—whether in the nature of copartners or resting "upon the ordinary principles of contract and agency" or upon fraud,—they agree in holding liable in some form all who are engaged in the defective corporate enterprise. *Fuller v. Rowe*, 57 N. Y. 23; *Pettis v. Atkins*, 60 Ill. 454; *Hill v. Beach*, 12 N. J. Eq. 31; *Coleman v. Coleman*, 78 Ind. 344; *Abbot v. Smelting Co.*, 4 Neb. 416; *Kaiser v. Bank*, 56 Iowa, 104, 8 N. W. 772; *Lawler v. Murphy*, 58 Conn. 313, 20 Atl. 457; *Johnson v. Corser*, 34 Minn. 355, 25 N.



W. 799; *Hospes v. Car Co.*, 48 Minn. 174, 50 N. W. 1117. This statute does not, in terms, declare that compliance with section 1773 shall be a condition precedent to corporate existence. If there were a decision by the supreme court of Wisconsin construing the statute with reference to the time or event in the proceeding upon which incorporation is perfected, that construction would be controlling; but the only case called to our attention in that view is *Harrod v. Hamer*, 32 Wis. 162. That arose under a previous act (chapter 73, Rev. St. 1858), which differs essentially from the instant statute in its method of incorporation, and in the status of the incorporators (who are thereby constituted stockholders), and therefore is not applicable here. The statute must be considered in its entirety to ascertain its meaning, and that exposition ought to be adopted, as stated by Mr. Justice Story, in *Minor v. Bank*, 1 Pet. 46, "which carries into effect the true intent and object of the legislature in the enactment." The purpose is clear that corporate being shall be dated from and conferred through the act of filing the executed articles of incorporation for record as one of the conditions precedent; but, while the statute refers to it as a corporation at that stage, a limitation is added that it shall not exercise corporate functions, viz. "the transaction of business with any others than its members," until it shall have provided capital stock in conformity with section 1773. Such is the view recognized in *Mining Co. v. Sherman*, 74 Wis. 226, 42 N. W. 226, where it is said that this statute "provides for the preliminary organization of the corporation, and then limits its power to enter upon its general business," by section 1773. The corporation has obtained the right to exist, but can only be said to have existence in a qualified sense, for it is not possessed of the attributes or privileges of perfected incorporation; and section 1775, which declares these powers and privileges, vests them only when organized as required by the preceding sections. A quotation from the brief of one of the learned counsel for the plaintiff in error (arguing against liability as a stockholder) well defines this embryonic status, and is adopted here. It reads (including italics) as follows: "The truth is that *no corporation was formed* except in a very limited and qualified sense. It is true the statute uses the word 'corporation.' It is, however, a bare, legal entity, which through *organization* may become a corporation, having members, and capable of transacting business. \* \* \* It may be likened to the hull of a ship, without rudder or masts or gearings." The public are authorized to treat it as a corporation from the recording of the articles, and may look to the recorded articles for its purposes and objects. Compliance with section 1773 is imposed upon the corporators in the first instance, and when they have provided for stockholders the duty devolves upon the latter, whose action is matter only of corporate record, and not of general public record. Until that provision of capital is furnished as a fund to take the place of personal liability, the intention is apparent to withhold the special privilege of complete incorporation which exempts the members from such liability. The inhibition is, in effect, against any transactions except

such as tend to organization,—i. e. perfecting incorporation,—and the purpose is to protect those who may be imposed upon by premature assumption of corporate functions, and not to save the corporation or its projectors from just liability. *Mining Co. v. Sherman*, supra. This is not like the technical requirement placed by a Michigan statute upon the officers to file their articles of association in a certain place,—simply forbidding business until compliance, without declaring any effect for noncompliance,—of which it was held in *Whitney v. Wyman*, 101 U. S. 392, that the provision was not made a condition precedent to incorporation; and it is not like the technical requirement found in the former Wisconsin statute that the officers should file a certificate of incorporation before transacting business, held in *Harrod v. Hamer*, supra, not a condition precedent; but the demand here is of the very essence of incorporation,—that there shall be capital stock and stockholders. A corporation cannot come into existence without members, and stockholders are the only members of a stock corporation.

In the light of the evident purposes of this enactment and of these distinctions, and considering that the requirements imposed by section 1773 are of the essence of corporate organization, and are followed by the declaration, in section 1775, of complete incorporation "when so organized," we are of the opinion that it was the legislative intent that full effect as a corporation should not obtain until compliance, and that the common-law liability is preserved up to that event. While section 1773 provides that any obligations contracted before compliance shall not give a right of action to the corporation, "but the stockholders then existing" shall be personally liable, this imposition is not in derogation of the common law, but is rather declaratory of or supplements it. Even as a statutory liability, it may be remarked in passing, that this is not penal in its nature, and does not call for the strict construction which is claimed in another branch of the argument for the plaintiff in error, but it is one of contract, which the members take upon themselves in forming a corporation, and is primary and absolute. *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. 263; *Coleman v. White*, 14 Wis. 700; *Day v. Vinson*, 78 Wis. 198, 47 N. W. 269. For the consideration here the statute must be taken in its entirety, as an enactment granting privileges. When privilege is asserted under it, the interpretation of the statutory prerequisites should be reasonable, and the legislative intent should be given effect, and not thwarted.

So construed, the parties who entered into the assumed corporate undertaking will be held to liability for obligations which have been incurred under that assumption. Is the plaintiff in error within that rule? He executed the agreement or articles by which he engaged with the other defendants "to form a corporation" which should have a capital stock of \$5,000. He was party to every step which was taken under the statute. Without his participation (or some third party), even the semblance of corporate existence could not have been obtained for the venture. This act, followed by the filing of the instrument, was a solemn acceptance, by the parties jointly, of the privileges of incorporation. In the argument for

plaintiff in error it is insisted that these corporators are merely nominal parties, and should not be regarded as contractors in any sense; that it has become common practice to take, for the time being, any persons who may be convenient for the purpose, leaving the real projectors to come in with the subscription for stock. Such view or practice is entirely foreign to the manifest intent of the statute, as the organization is placed entirely within control of the signers, and without their action to that end strangers cannot obtain admission as stockholders. They occupy a contract relation. It is true that that relation is absolved, or a new one formed, when organization is effected; that the office of corporator disappears when that of stockholder is taken on. It is also true that there may be an abandonment of the venture without any liability resting upon the corporators, but upon the condition imposed by the common law that no obligation shall have been incurred in the name of that relation, viz. by "assuming to act in corporate capacity." *Fuller v. Rowe*, 57 N. Y. 23. Had these articles read that the signers agreed to form a partnership with \$5,000 capital, instead of a corporation, there would have been no doubt of joint liability for contracts entered into by either in the copartnership name and within its scope. The agreement here is to form a corporation, with capital stock of \$5,000. It is made a public record as the statute requires. So far as the public is concerned, this record is the only evidence of incorporation which comes to notice. The corporate capacity there promised was forthwith assumed, as the plaintiff in error well knew; and he cannot be heard to evade liability upon the plea that they failed to put in the capital and perfect organization. *McHose v. Wheeler*, 45 Pa. St. 40. In behalf of the plaintiff in error it is the contention that he is not liable, because he did not participate in the business which was undertaken, and it is not found that he had actual knowledge of the use of his name as an officer. But it is found that "under the circumstances, if he did not know it, he could have ascertained the fact by merely slight attention to the matter, and was guilty of negligence in not knowing it." This imputes knowledge. If he remained ignorant of the use of his name in the face of such circumstances,—where he had given its use for the inception of the enterprise, and where slight attention would have brought him knowledge,—he is chargeable with notice. The culpable negligence bars the excuse of ignorance.

Upon this record all of the signers of the articles of incorporation have made themselves parties to the assumption of corporate powers, and they are jointly bound for the indebtedness which was therein contracted. Their liability is of the same nature which would be imposed if the original plan had been to form a partnership. *Cook, Stock & S.* § 235. The agreement which gave color to the assumed corporate action is the foundation. The reason for holding the liability is well stated in *Fredendall v. Taylor*, 26 Wis. 286, as springing "from the fact that there was no responsible body or corporation behind them." Having no principal, they bound themselves individually. *Lewis v. Tilton*, 64 Iowa, 220, 19 N. W. 911, is to the same effect.

It is not essential that parties dealing with the assumed corporation should have acted with knowledge or upon the faith of his relations. The rule stated in *Thompson v. Bank*, 111 U. S. 529, 4 Sup. Ct. 689, is not applicable. There it was sought to recover upon a copartnership debt from one who was not a partner in fact, but had been held out as such, without credit being given on the faith or with knowledge of such holding out. Recovery was denied, because there was no contract relation, and no ground for estoppel. In the case at bar there is primary contract liability, and it is not dependent upon the knowledge or understanding of those dealing with the purported corporation. *Pullman v. Upton*, 96 U. S. 328, citing *Adlerly v. Storm*, 6 Hill, 624; *Pierce v. Bryant*, 5 Allen, 91. In view of this determination of liability at common law, we are of opinion that judgment was properly entered against the plaintiff in error; and it is unnecessary to consider the question of statutory liability, which is well presented in the briefs and oral arguments. The judgment will be affirmed.

WOODS, Circuit Judge (dissenting). In considering whether a special finding of facts sustains a judgment it is to be remembered that all matters in respect to which the finding is silent are to be regarded as if expressly found against the party upon whom was the burden of proof. Of the two theories advanced in support of the judgment here in question, that of statutory liability was mainly relied upon at the argument, and apparently when the declaration was drawn. In support of that view it was insisted upon the authority of *Hawes v. Petroleum Co.*, 101 Mass. 385, that until the shares of stock had been taken by individuals, the incorporators of the company were the holders in common of the entire capital stock, and, not having paid in the required 20 per centum thereof, were personally liable, under the statute, upon the corporate contracts. There is, however, an essential difference between the statute of Massachusetts, under which that decision was made, and the statute of Wisconsin, with which we are now concerned. Under the latter there are two distinct stages in the process of incorporation. The first consists in the execution and recording of articles, signed by corporators, who may or may not become members or shareholders, while the second stage is complete only when subscribers have taken and paid 20 per cent. of the par value of one-half or more of the capital stock, and of their own number have chosen directors and other officers; it being expressly provided that "persons holding stock, and they only, shall be members." Under the Massachusetts statute—and, indeed, under statutes of Wisconsin concerning the formation of certain classes of corporations—there is no such distinction between a mere corporator and a member or shareholder of the body. In the case referred to, the articles of incorporation of the Anglo-Saxon Petroleum Company, it is to be observed, provided for stock in an aggregate amount, without division into shares, and, speaking with reference to that fact, the court said: "The stock not having been divided into shares or certificates issued, the associated members of the corporation were holders of the

whole capital stock in common; and, it would seem, upon the facts, agreed to be liable in equal proportions for such sum as may be decreed to be paid by them in this suit." In the case before us, Moe and Williams, by letter heads and otherwise, had represented themselves to be officers of the company, which they could not be unless they were stockholders, and were therefore estopped to deny the fact of membership which made them responsible under the statute. But the plaintiff in error was not a stockholder in fact, and he is not found to have done or to have authorized the doing of anything whereby he is estopped. The only fact in the case that can be regarded as tending to show his consent that Moe and Williams should use his name is the provision in the articles of incorporation that the incorporators should compose the first board of directors. But it was not competent, under the statute, to choose or appoint directors in that way, and the provision can fairly be said to signify no more than an understanding between the signers of the articles at the time of signing that when, if ever, they should complete the corporate organization by taking and paying for stock, they would elect themselves directors. If this provision "may be considered as a fact tending to show intention or knowledge," it is immaterial in a special finding, where the statement of ultimate facts only, and not of evidence, has significance. The record, however, leaves room for no question upon this point. Instead of showing affirmatively that the name of the plaintiff in error was used with his authority, the finding is express that "the evidence does not establish that he had actual knowledge that his name was used." The added statement, in the finding, "that under the circumstances, if he did not know it, he could have ascertained the fact by merely slight attention to the matter, and was guilty of negligence in not knowing it," is, I think, immaterial for the purpose of establishing liability either under the statute or by contract. The statutory liability is declared against stockholders only, and as the plaintiff in error was not a stockholder, either in fact or by estoppel, the judgment against him cannot rest upon that basis.

There is, in my opinion, no better support for the judgment on the theory of common-law liability. Wechselberg was not in fact a copartner of Moe and Williams in the business which they were doing, and I know of no principle or decision which would make him responsible for their acts or contracts, either severally or as a joint obligor. The opinion of the court, as I understand it, rests his responsibility ultimately upon the mere fact that he and they were the signers of the recorded articles of incorporation of the company in whose name they conducted business and executed the obligation sued on. But between his act of signing the articles and his supposed responsibility for the acts of the other signers done in the corporate name, before it was lawful so to use that name, there seems to me to be neither legal nor logical connection. The statute, it is agreed, imposes no obligation except upon stockholders; and in the articles of incorporation there is to be found no promise, covenant, or undertaking to be responsible for corporate contracts, whether made before or after complete organization, and

there is no expression or implication of authority given by one incorporator to the others to begin or to prosecute business in the corporate name in any mode, or as if it were a partnership name. No such result, it is clear, was intended by the plaintiff in error, and neither in law, equity, nor good morals do I perceive any justification for imposing liability upon him. It is found that he knew that Moe and Williams were doing business in the name of the corporation, without having complied with the statute; but it is not found that he knew that they were using his name, or that anything came to his notice which ought to have put him on inquiry. He did not, by signing the articles, make the other signers his agents to do anything whatever,—not even to take the steps necessary to perfect the corporate organization. Having no stock, he had no legal interest in what was done in that direction; and if the other signers had taken or allowed others to take the entire stock, to his exclusion, it would have been a breach of no obligation to him. Having no right in any of those particulars to control the course of the other incorporators, he was under no duty to the public to look after their conduct. He was, therefore, no more bound to make inquiry concerning what had been or was proposed to be done than were third parties who chose to deal either with the corporation or with Moe and Williams or with others assuming to use the corporate name. Others, as well as he, knew, or were bound to know, the provisions of the statute; and if they dealt with the corporation on the faith of its responsibility, without inquiry on the subject, they are not harmed if they are without recourse upon an individual who had no part in the transaction; and if they supposed that the organization of the corporation was or might be incomplete, and counted upon individual liability, it was equally their duty to know to whom, for that purpose, they might rightfully look. The articles of incorporation, if examined, would have shown that the plaintiff in error was a signer, but as, under the law, it was the right of the other two signers to call a first meeting of stockholders without notice to him, and to complete the organization without his participation, his participation beyond the fact of signing was not to be inferred, except from his own subsequent conduct. A rightful act is no warrant for a wrongful one. The stock book was open, it was to be presumed, to show who, if anybody, were shareholders, and if any one chose to trust to the representations of Moe and Williams rather than to inquire of Wechselberg himself whether his name was used with his consent, he can justly complain only of those who deceived him. Neither the defendant in error nor its assignor dealt with the plaintiff in error, or with others, on the faith of his name, nor were they in any way deceived by him.

The proposition that "all who are parties to the simulated corporation, as associates or shareholders, are held liable at common law for debts contracted under the corporate guise," is more broadly stated than any of the authorities cited in the principal opinion seem to justify. In *Fuller v. Rowe*, 57 N. Y. 23, for instance, it is held that, in order to charge one as an incorporator or as a partner, "it must be shown that he was so acting at the time the contract sued

on was made, or that upon some consideration he agreed to become liable with the others"; and I believe there is no case in which a subscriber to the articles or to the stock of a corporation, imperfectly organized, has been held personally responsible for contracts made in the corporate name, unless he had had some part in the making of the contract, or an interest in it, which would have bound him independently of his subscription to the articles or stock of the association. It was so held in *Rutherford v. Hill*, 22 Or. 218, 29 Pac. 546. To the same effect, as I read them, are *Fredendall v. Taylor*, 26 Wis. 286, and *Lewis v. Tilton*, 64 Iowa, 220, 19 N. W. 911. See, also, *Bank v. Palmer*, 47 Conn. 443. One may sign an agreement to form a partnership, but if he does not in fact become a member of the firm, nor authorize the use of his name, and has no part or interest in the business, he will not be responsible for the doings or contracts of the other signers of the articles if they pursue the enterprise and incur liabilities in the business and name of the proposed partnership. *Thompson v. Bank*, 111 U. S. 529, 4 Sup. Ct. 689; *Preston v. Foellinger*, 24 Fed. 680, and note. And it is difficult to understand how the signer of articles of incorporation, who takes no subsequent action or interest, and does not authorize the use of his name, can be held responsible for corporate contracts on the theory that he was a partner or joint contractor, when, if under the same circumstances he had signed an outright agreement to form a partnership, and thereafter had had no part or interest, he would not be responsible for contracts of his proposed partners in the business which had been agreed upon.

Upon the question of contract liability, the finding that by the use of slight diligence the plaintiff in error could have known of the use which was made of his name is no more relevant or material than upon the question of statutory liability. He gave the use of his name, it is true, "for the inception of the enterprise," but it was for a corporate enterprise, which was lawfully begun; and, the contrary not being found, it must be presumed that he neither intended nor assented to anything afterwards done in violation of the statute in conformity with which the initial steps in which he shared were taken. He was certainly not bound to anticipate, and nothing is shown to have come to his attention which ought to have caused him to suspect, an unauthorized use of his name. No one was misled in respect to his responsibility, and, if there had been, it would not, upon the facts found, have been through his fault. The fundamental error of the contrary view, as I conceive, is in the assumption that a signer of articles of incorporation like those in question owes a duty to the public which compels him, at the risk of personal liability, to prevent the making of contracts in the proposed corporate name without compliance with the statute, or beforehand, in some way not explained or shown to be possible, to disavow responsibility. But if, as it seems to be held, the recorded articles constitute a public statutory notice upon which every dealer will be presumed to have relied as proof of the individual liability of all signers of the articles for such contracts made by a part of the signers or by subscribers to the stock, it would seem clear that no

disavowal of responsibility, however publicly made, could be effective, in the absence of statutory provision therefor, unless shown to have come to the actual knowledge of the party to be affected. The doctrine is not in harmony with the familiar principles of agency which govern when it is sought to make one man responsible for the acts of another, and, if carried to its logical results, will establish in many cases, which need not be further illustrated, a liability on the part of signers of articles of incorporation which will be manifestly unjust, and for which until now I believe there has been no precedent. If the supposed duty of the signer of such articles to protect the public against the wrongs of other signers be rejected as unsound and fallacious, the finding of the court below that "by merely slight attention" the plaintiff in error "could have ascertained" the use which was made of his name, becomes immaterial, and the added inference, or conclusion of law, that he "was guilty of negligence in not knowing it," is without support. Where there is no duty there can be no negligence. It takes more than inattention to create an agency or to constitute fraud. The plaintiff in error, therefore, did not make himself party to "the assumption of corporate powers," and is not bound, either jointly or severally, upon the contracts of those who were guilty of so doing.

If a corporator is subject, under this statute, to the supposed liability, and if, on account of sickness, absence, inattention, or for any reason, he fails to disavow his connection with the corporation, or fails to repudiate an unknown, unsuspected, and unauthorized use of his name, when will his responsibility cease? Taking no part himself, to what extent will he be responsible for the good faith of steps taken by others in perfecting the organization? It is said "that the office of corporator disappears when that of stockholder is taken on." But suppose the corporator takes no stock, and another does, and becomes thereby liable under the statute, does the liability of the corporator cease, or is it necessary that one-half or more of the stock shall have been taken, and the required payment in cash made besides, before he can be released? Suppose the entire stock to have been taken by responsible, or say by irresponsible, subscribers, and directors and other officers to have been elected, but the necessary amount of cash not paid in, would the corporator who had taken no stock still be responsible? And, if compelled to pay an obligation for which stockholders were also liable, what right of contribution would he have against them, their liability being under the statute and his arising out of contract? The case may be stated in another way: This statute authorizes two classes of corporations, one with and the other without capital stock. The articles which the plaintiff in error signed provided for capital stock and for the admission to membership of any who should subscribe for and become owner of one share or more of the stock. The first meeting of the stockholders could be called only when one-half of the stock or more had been subscribed. Notice of that meeting was required to be given to stockholders, but not to incorporators. Directors or other officers could be elected only by the stockholders. No stock was ever subscribed for, and no directors or other officers



were ever elected. Only directors or other officers chosen and empowered to do so could make corporate contracts, beyond subscriptions to stock, and other steps necessary to complete the organization. The assumption by Moe and Williams to represent the corporation as directors or otherwise was therefore a sheer usurpation, and the contracts which they made in the corporate name, being totally unauthorized, were void as against the corporation, and bound nobody but themselves. This interpretation gives coherency and completeness to the statute, which imposes individual liability upon stockholders only. There was no necessity for doing more, because in such cases, without stockholders, there could not be a corporation with agents authorized to bind it; and for cases of attempts, like the one under consideration, to contract in the name of a corporation, without authority to bind it, there was no necessity to make provision, because all actually engaged in such an attempt are responsible on common-law principles, and no one who was not party to the attempt ought in good conscience to be made responsible by statute, or be so held by the courts on grounds outside of the statute. If the articles of incorporation in question had expressly forbidden the transaction of business with any other than its members until at least one-half of its capital stock had been duly subscribed and at least 20 per centum thereof paid in, it would hardly be contended that two of the signers, without the consent of the third, could bind him by contracts made by them in the corporate name. But the prohibition is in the statute, and the plaintiff in error is entitled to the benefit of it just as if it had been repeated in the articles which he subscribed. Ordinarily, the signer of articles of incorporation becomes a member or shareholder by the act of signing, and if it were conceded in such cases that the subscriber to the articles should be presumed to have participated or had an interest in business done in the name and within the scope of the organization, it would be only a *prima facie* presumption. *McHose v. Wheeler*, 45 Pa. St. 32. But, whether conclusive or only *prima facie*, it could have no application in a case like this, where the corporator could not be a member or have a legal interest until he had taken stock, which he could do or not, at pleasure, and where, though the preliminary organization of the corporation was complete, a valid corporate contract could not be made, because stock had not been subscribed and paid in to the amount required, and directors or other officers with authority to act had not been chosen.

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BOARD OF COM'RS OF HAMILTON COUNTY v. SHERWOOD.

(Circuit Court of Appeals, Eighth Circuit. October 8, 1894.)

No. 379.

1. WRIT OF ERROR—REVIEW—WAIVER OF JURY—SPECIAL FINDINGS.

A jury was waived by stipulation, and the case referred to a referee for trial, who filed a report containing his findings of fact and conclusions of law. The court then adopted each finding of fact made by the referee as findings of fact made by the court. *Held* that, on a writ of error to the judgment of the court, the questions for review were those only which

might have been reviewed if the trial had actually taken place before the court under written stipulation waiving a jury, and the court had made special findings of fact.

2. **SAME—DEMURRER—WAIVER BY ANSWERING OVER.**

Answering over and going to trial on the merits after a demurrer is overruled waives the point raised by the demurrer, where there is not an utter failure to state a cause of action, but a mere incompleteness or uncertainty of averment,—a failure to state some fact which should have been stated to make a technically good declaration or complaint.

3. **SAME—OBJECTIONS TO EVIDENCE—INDEFINITENESS.**

Objection made at the opening of the trial of an action at law, before a referee (a jury being waived), to the taking of any evidence, "for the reason that the petition failed to state facts sufficient to constitute a cause of action," is too vague and uncertain to be of any avail, as it fails to advise either the referee or the opposite party of the particular defect which rendered the petition insufficient. Sanborn, Circuit Judge, dissenting.

4. **SAME—VALIDITY OF COUNTY WARRANTS—ITEMIZED ACCOUNTS.**

Whether accounts for which county warrants sued on were issued were sufficiently itemized, as required by the statute (Gen. St. Kan. 1889, c. 25, § 28), to authorize the issuance of the warrants by the county commissioners, cannot be determined by a reviewing court, where the cause was tried without a jury, but the accounts or vouchers were not incorporated in the special findings, and the only findings in regard thereto were that the various vouchers were "itemized," "duly itemized," and, in some cases, "not very definitely itemized."

5. **SAME—UNVERIFIED ACCOUNTS.**

A county warrant issued by the board of county commissioners for an account which was not verified, though verification is required by the statute, is not utterly void; and a recovery may be had thereon unless it is shown to have been issued fraudulently, or without consideration, or for an indebtedness which the board was not authorized to contract.

6. **SAME—WARRANTS FOR CLERK HIRE—COUNTY CLERK'S SALARY.**

County warrants issued to a person hired by a county clerk to make out the tax roll of the county, and for extra clerk hire, are void, where the statute provides that the salary allowed the clerk shall be "in full of all services whatsoever by law required to be performed in his office." Gen. St. Kan. 1889, c. 39, § 12.

7. **SAME—WARRANTS TO COMMISSIONERS FOR SPECIAL SERVICES.**

A county warrant issued to one of the county commissioners for special services rendered "in certain county seat contest cases" is not rendered invalid by the mere fact that the services are found to have been rendered outside the county, nor can the court say that the county could in no event have such an interest in a county-seat contest that the commissioners would have authority to incur expenses in connection therewith.

In Error to the Circuit Court of the United States for the District of Kansas.

George Getty (C. N. Sterry, on the brief), for plaintiff in error.  
Almerin Gillett, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

**THAYER, Circuit Judge.** This was a suit on 63 county warrants that were issued for various purposes by the order of the board of county commissioners of the county of Hamilton, state of Kansas, during the years 1886 and 1887, and that had been duly assigned to James K. O. Sherwood, the defendant in error, who was the plaintiff in the circuit court. The petition contained 63 counts, each warrant having been declared upon separately. A written stipu-

lation was filed, waiving a jury, and the cause was referred to a referee for trial, who subsequently filed a written report containing his findings of fact and conclusions of law. The record shows that the circuit court "adopted each finding of fact made by the referee as findings of fact made by the court," and in view of that statement we have treated the case precisely as if it came to this court on a special finding of facts made by the trial court. *Boogher v. Insurance Co.*, 103 U. S. 90. The questions open for review on the writ of error that has been sued out are those, and none other, which might have been reviewed if the trial had actually taken place before the court under a written stipulation waiving a jury, and the court had made a special finding of the facts.

The statutes of Kansas, like the statutes of many other states, provide, in substance, that county treasurers shall pay warrants presented to them for payment, and shall mark the same "Paid," if there is money then in their possession sufficient to pay the same, and, if not, that they shall certify that fact on the back of the warrants presented, with the date of presentation, and that they shall also keep in a book a record of all warrants presented, showing the number, date, and amount of the warrant, and when presented and to whom payable, and that all warrants shall be paid in the order of their presentation, when funds come to their hands. *Gen. St. Kan. 1889, c. 25, § 69.*

The first point urged upon our attention is that a demurrer interposed to the petition on the ground that it did not state a cause of action should have been sustained, because there was no averment found in the petition that when the suit was commenced the county treasurer had money sufficient to pay the warrants, or that a sufficient time had elapsed for the collection of money wherewith to pay them. We need not stop to determine the merits of this contention, because the record shows that the county did not stand upon its demurrer when it was overruled, but answered the petition, and entered into a long, expensive, and tedious trial, whereby it waived the point raised by the demurrer, even if it had merit. We have once or twice decided, in accordance with the rule which now generally prevails, that a demurrer will ordinarily be waived by answering to the merits. Where it is apparent that the transaction out of which a cause of action is supposed to have originated could not give rise to a meritorious cause of action, the rule is, of course, different; but a mere incompleteness or uncertainty of averment—a failure to state some fact which should have been stated, to make a technically good declaration or complaint—will be of no avail in this court when it appears that after a demurrer was overruled the party answered to the merits, and went to trial on issues raised by his answer. *Rush v. Newman*, 7 C. C. A. 136, 139, 58 Fed. 158, and cases there cited; *City of Plankinton v. Gray* (decided at this term) 63 Fed. 415, and cases therein cited. In the present case the plaintiff in error attempted to save the same point last mentioned, after his demurrer had been overruled, and after he had answered, by an oral objection made before the referee "to the taking of any evidence for the reason that the petition failed to state facts suffi-

cient to constitute a cause of action or causes of action;" but even if the objection to the petition had not been already waived by answering over, as already decided, this latter objection was too vague and general to be of any avail. It did not advise either the referee or the opposite party of the particular defect in the petition which rendered it insufficient. It was simply a snare laid in the pathway of the unwary. We refer to what was said on that subject in *Insurance Co. v. Miller*, 8 C. C. A. 612, 614, 60 Fed. 254.

An objection is made to a large number of the warrants in suit upon the ground that the claims or accounts upon which they were issued were not sufficiently itemized to satisfy the requirements of the Kansas statute. The statute provides, in substance, that no account shall be allowed by the board of county commissioners "unless the same shall be made out in separate items and the nature of each item stated," etc. Gen. St. Kan. 1889, c. 25, § 28. The precise contention is that many of the claims when presented to the board of county commissioners for allowance were not itemized, or were not sufficiently itemized to conform to the statute, and that the warrants issued thereon are for that reason utterly void, and of no effect. This point cannot be considered, for the following reasons: We cannot determine whether the accounts were sufficiently or insufficiently itemized without inspecting them, and considering their exact form and contents. The special findings made by the trial court do not incorporate the accounts or "vouchers," as they are termed, into the findings, and do not attempt to state their contents. These so-termed "vouchers" are merely the evidence on which the special findings are based, and we are not required to consider the evidence, nor could we do so if we so desired. It is our function to decide whether upon the findings as made, accepting them as conclusive, the conclusion of the court was right. *Walker v. Miller*, 8 C. C. A. 331, 59 Fed. 869; *Burr v. Navigation Co.*, 1 Wall. 99, 102. The findings generally recite that the account on which the warrant therein referred to was issued "was itemized" or "duly itemized." In a few instances the finding is that the voucher was not "very definitely itemized," or language to that effect; but even in such cases the finding, as a whole, shows that the court concluded that the various vouchers had been sufficiently itemized, and we cannot review that conclusion of the trial court, the vouchers not having been incorporated into the findings so as to bring them before us for examination.

Another subject of contention is the nonverification of some of the accounts or vouchers on which certain of the warrants were issued. The special findings do show that a few of the vouchers were not verified, although the statute heretofore cited (section 28, c. 25, Gen. St. Kan. 1889) directs that they "shall be verified by affidavit setting forth that the same is just and correct and remains due and unpaid." The circuit court appears to have held that the provision is directory, and that, in a suit on a warrant which is issued on an unverified claim, there may be a recovery notwithstanding the defect in the voucher. This ruling is assigned for error. It is no doubt the law that if an auditing board, like the board of county commis-

sioners in Kansas, declines to audit a demand and to issue a warrant because the demand is not verified, its action will not be disturbed on an appeal from the board's decision, where such an appeal is allowed, or in a mandamus suit brought to compel it to audit the claim, even though the claim is shown in such mandamus proceeding to be just and correct. Such was the substance of the ruling in some of the cases cited by counsel for the plaintiff in error. *Christie v. Sonoma Co.*, 60 Cal. 164; *McCormick v. Tuolumne Co.*, 37 Cal. 257; *Board v. Tomlinson*, 9 Kan. 167; *Ryce v. Mitchell Co.* (Iowa) 21 N. W. 771. But it is a very different question whether a warrant is so utterly void that it will not even furnish the basis for a suit, no matter how just the claim may be, because the claim on which it was based, through inadvertence or otherwise, was not verified when presented to the auditing board. In considering the question whether a warrant is so utterly void, for want of verification, that it will not furnish the basis for a suit, we think that it will be more profitable to consider the nature and functions of a county warrant than to review the numerous cases in which courts have considered whether particular statutes were directory or mandatory. It is quite generally agreed that county warrants are not negotiable instruments, in such sense that a transfer of the same for value cuts off equities of defense which exist as between the original parties. They are orders directing the payment of a claim which has passed the scrutiny of the auditing board. They are therefore prima facie evidence of an indebtedness, like a written admission of a debt made by a private individual; but they are by no means conclusive evidence of an indebtedness, and do not bar a reinvestigation of the merits of the claim on which the warrant is founded when a suit is brought on the warrant. *Wall v. County of Monroe*, 103 U. S. 74; *Thompson v. Searcy Co.*, 6 C. C. A. 674, 57 Fed. 1030; *Leavenworth Co. v. Keller*, 6 Kan. 511, 523; *Mayor v. Ray*, 19 Wall. 468, 477; *Clark v. Polk Co.*, 19 Iowa, 248; *Clark v. Des Moines*, 19 Iowa, 199; *Shirk v. Pulaski Co.*, 4 Dill. 209, 211;<sup>1</sup> *Goose River Bank v. Willow Lake School Tp.* (N. D.) 44 N. W. 1002; *Capital Bank of St. Paul v. School Dist. No. 53 of Barnes County* (N. D.) 48 N. W. 363; *Miner v. Vedder* (Mich.) 33 N. W. 47. Moreover, the statutory affidavit required to be attached to a claim for which a warrant is demanded is not—in Kansas, at least—the sole evidence upon which an allowance of the demand is based. The statute of Kansas provides, in substance, that the affidavit shall not be construed to prevent the board of county commissioners from disallowing the account, in whole or in part, and that the board may require any other or further evidence of the justness of the demand that it deems proper. Gen. St. Kan. 1889, c. 25, § 28. The affidavit, therefore, is not, in contemplation of law, the sole cause of the commissioners' action in ordering the issuance of a warrant. In view of these considerations, we think that it would be unreasonable to hold that a warrant is utterly void, and that a suitor must be turned out of court when he sues upon the same, merely because

<sup>1</sup> Fed. Cas. No. 12,794.

the claim upon which it was founded was not verified. If the defendant shows, after the admission of the warrant in evidence, that the claim on which it was issued was not verified, that might be regarded as a sufficient reason for requiring the holder to show by other evidence that the warrant was issued upon a valid demand. We do not decide, however, that such proof does destroy the prima facie character of a warrant, but we are satisfied that it should in no event have any greater force or effect. Now, in the case at bar, an examination of the special findings shows that the court found, in every instance where the voucher was not verified, what the service was on account of which the warrant was issued; that the services charged for were actually rendered; that the amount of compensation charged was either fixed by law, or that the compensation claimed was reasonable; and such finding must have been based on testimony wholly outside of the warrant. The findings, therefore, are amply sufficient to support the judgment, even upon the theory last suggested, that the warrants had lost their evidentiary character because of the nonverification of the claims upon which they were issued. We think, however, that the true view of the case is that inasmuch as the board of county commissioners had a general power, under Gen. St. Kan. 1889, c. 25, § 16, "to examine, settle and allow all accounts chargeable against the county," the allowance of the accounts now in question was within the scope of the general powers of the board, and that its orders of allowance were not utterly void, as now contended, merely because the accounts were not verified when presented to the board for allowance. In other words, we think that the making of the statutory affidavit was not a prerequisite, without which the jurisdiction of the board to examine, settle, and audit the several demands did not attach. That view of the statute has never been taken by the supreme court of Kansas, so far as we are advised, and it has not sufficient foundation in reason to warrant us in adopting it. Undoubtedly, the board should require an affidavit to be made before proceeding to examine and allow a claim; but if it happens to overlook the statutory direction, and proceeds to audit a demand on evidence that is satisfactory to it, and to order the issuance of a warrant thereon, we are not prepared to say that the warrant is utterly void for want of jurisdiction in the board, and that a suit cannot be entertained on the warrant for that reason. Our view is that a suit may be entertained on a warrant issued under the circumstances last stated, and that a recovery can be had thereon against the county, unless it shows that the warrant was issued fraudulently or without consideration, or for some indebtedness which the board of county commissioners was not authorized by law to contract. We conclude, therefore, that no error was committed in entering a judgment on the warrants now in question.

It is finally contended that some of the warrants in suit were issued for purposes not authorized by law. In the discussion of this point we have only to inquire and to determine whether the prima facie case made against the county by the warrants themselves is overcome by facts disclosed by the special findings, which show

affirmatively that the warrants, or any of them, were illegally issued. We shall treat this branch of the case in the order pursued by counsel for the plaintiff in error, speaking of those warrants only to which he has specifically directed our attention. One warrant, in the sum of \$125, appears, from the special findings in relation thereto, to have been issued to a person who was hired by the county clerk to make out the tax roll of the defendant county for the year 1886. This warrant is said to have been issued illegally because it was the duty of the county clerk to have made out the tax roll in question for the salary allowed him by law. This point, in our judgment, is well taken. Section 84, c. 107, of the General Statutes of Kansas for the year 1889, clearly made it the duty of the county clerk to make out the tax roll; and section 12, c. 39, of the General Statutes, just as clearly provided that the salary allowed to the county clerk should be "in full of all services whatsoever by law required to be performed in his office." We think that there was no law which authorized the clerk to have this service performed by another person at the expense of the county. And for the same reason we also think that another warrant, in the sum of \$100, which appears to have been issued to the county clerk "for extra clerk hire in his office," should have been disallowed. Neither of these allowances seems to have been authorized by law, on the state of facts in relation thereto reported by the referee, and approved by the circuit court. Two other warrants, for a small sum each, are said to have been unauthorized because they were issued to pay the expenses of a special township election, which expenses were not legally chargeable against the county. We cannot sustain this contention, because in neither instance does the special finding of facts show that the election on account of which the expenses were incurred was a special township election. The findings give no information as to the character of the election, and for aught that we know the expenses may have been incurred at a general election, for the expenses of which the county was responsible. As heretofore remarked, we will not go behind the findings, and consider the evidence upon which they are based. A special objection is made to another warrant, for the sum of \$308, which appears from the findings to have been issued in favor of one of the county commissioners for special services rendered "in certain county-seat contest cases." The findings in relation to this warrant disclose no facts which tend to impeach it, except the statement that "the services were rendered outside of the county of Hamilton, in the contest of cases, and when the board of county commissioners was not in session." We are not prepared to say that in no event could the county have an interest in a contest concerning the county seat of the county, such as would authorize the board to incur any expenses in connection therewith; neither are we prepared to say that in no event can a county commissioner claim compensation for services rendered in relation to such a contest where the services are rendered outside of the county; and, as these are the only facts before us which tend in any wise to invalidate the warrant, we must hold that they are insufficient for that purpose. Another warrant,

in the sum of \$508, which is also challenged by counsel, appears to have been issued to the county clerk, and to have been turned over by him to the register of deeds, to pay the latter for preparing a numerical index of the county records. The services in question are found to have been rendered under a contract made by the board of county commissioners in behalf of the county; the index, when completed, was accepted by the county; and we have been unable to discover the shadow of a reason why the county should not pay for the same. Objection is made generally to some other warrants on the ground that they were unlawfully issued, but as the objections were not specially noticed in argument, and as they are fully answered by what has already been said concerning warrants that were issued under similar circumstances, we will not notice the general objection, but will conclude the discussion at this point. The amount included in the judgment on account of the two warrants above mentioned, which were illegally issued, is the sum of \$337.83, to which extent the damages assessed by the circuit court were excessive. The judgment was entered for the sum of \$5,991.59, whereas it should have been entered for the sum of \$5,653.76. Following a practice which was approved in *Railroad Co. v. Estill*, 147 U. S. 622, 13 Sup. Ct. 444, the judgment of the circuit court will be affirmed, at the cost of the plaintiff in error, in the sum of \$5,653.76, but it will not be affirmed as to the damages assessed in excess of that sum on warrants Nos. 221 and 324.

SANBORN, Circuit Judge (concurring). I concur in the result on the ground that the complaint states facts sufficient to constitute a cause of action, and that the positions taken in the opinion upon the other questions discussed are sound. I am of the opinion that the objection to the introduction of evidence on the ground that the complaint does not state facts sufficient to constitute a cause of action is sufficiently definite to raise the question of its sufficiency. *Rev. St. § 914*; *Gen. St. Kan. pars. 4172, 4174*; *Brown v. Smelting Co.*, 32 Kan. 528, 530, 4 Pac. 1013; *Bank v. Haden*, 35 Mo. 358, 362; *Morgan v. Bouse*, 53 Mo. 219, 221; *Monette v. Cratt*, 7 Minn. 234 (Gil. 176, 180); *Brown v. Manning*, 3 Minn. 35 (Gil. 13); *State v. Bachelder*, 5 Minn. 223 (Gil. 178); *Lee v. Emery*, 10 Minn. 187 (Gil. 151); *Drake v. Barton*, 18 Minn. 462 (Gil. 414); *Henderson v. Johns*, 13 Colo. 280, 285, 22 Pac. 461; *Plow Co. v. Webb*, 141 U. S. 616, 623, 12 Sup. Ct. 100; *Slacum v. Pomery*, 6 Cranch, 221.

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#### UNITED STATES v. HOWELL

(District Court, N. D. California. November 5, 1894.)

No. 3,040.

#### 1. COUNTERFEIT MONEY—POSSESSING AND PASSING—INDICTMENT—FAILURE TO SET OUT.

An indictment under *Rev. St. §§ 5431, 5457*, for possessing and passing counterfeit notes and obligations of the United States, sufficiently excuses the failure to set them out by alleging that the grand jury did not have



them in their possession or under their control, and did not know where they were, or that they were returned to defendant before the finding of the indictment, or that they were destroyed.

2. SAME—SUFFICIENCY OF DESCRIPTION.

In such case it is sufficient, in connection with allegations as to the place, time, and person to whom passed, to allege that the counterfeit notes and obligations were "United States notes" (i. e. greenbacks) of a certain denomination.

Martin D. Howell demurs to an indictment charging him with possessing and passing counterfeit money. Demurrer overruled.

Charles A. Garter, U. S. Atty. (Samuel Knight, Asst. U. S. Atty., of counsel), for the United States.

Reddy, Campbell & Metson and E. S. Pillsbury, for defendant.

MORROW, District Judge. This case came up on a demurrer to the indictment pending against the defendant, Martin D. Howell. He is charged, under sections 5431, 5457, Rev. St. U. S., with having in his possession and passing counterfeit notes and obligations and coins of the United States. A general demurrer is interposed to the indictment as a whole, and also specifically to each count thereof, 15 in number. It will, however, only be necessary to consider the objections urged to the eighth, thirteenth, and fourteenth counts, the demurrer being, as to the other counts, without merit. The three counts just referred to relate to counterfeit United States notes. The specific objections urged against these three counts are substantially: First, that the alleged counterfeit notes, claimed to have been in the possession of the defendant, are not sufficiently described; second, that no legal excuse is given why said alleged counterfeit notes are not more particularly described, and copies thereof inserted in the indictment. A third objection is made, which, however, goes only to the eighth and fourteenth counts, and that is that the acts therein charged are barred by the statute of limitations of the United States applicable to offenses not capital. In this respect it is sufficient to indicate that section 1044, Rev. St. U. S., which formerly provided a two-years limitation as to offenses other than capital, was amended in 1876, and the limitation enlarged to three years. Tested by the latter limitation, the acts charged are not barred from prosecution. Recurring to the other two objections made to the eighth, thirteenth, and fourteenth counts, it might be well briefly to refer to these three charges as they are set out in the indictment. That part of the eighth count, which is material to the questions raised by the demurrer, is as follows:

"That Martin D. Howell \* \* \* on the 25th day of February, 1892, at the city of Stockton, county of San Joaquin, \* \* \* did then and there knowingly, willfully, and fraudulently and feloniously keep and have in his possession three certain false, forged, and counterfeit notes and obligations of the United States of America, to wit, three certain false, forged, and counterfeit United States notes, each of said false, forged, and counterfeit notes purporting to be a United States note of the denomination of five dollars, issued by and under the authority of the laws of the United States (a more particular description of which said false, forged, and counterfeit notes and obligations is to the grand jurors aforesaid unknown). \* \* \*

The reasons for not setting out more particularly a description of the notes are given as follows:

"And the grand jurors aforesaid, on their oath aforesaid, do further present and say that the said false, forged, and counterfeit notes and obligations so kept and had in the possession of the said Martin D. Howell as aforesaid are not, and each of them is not, more particularly described herein, and copies thereof, and the tenors thereof, respectively, and of each thereof, are and is not herein set forth, for the reason that the grand jurors aforesaid have no knowledge or information as to where, in whose possession, or under whose control the said false, forged, and counterfeit notes and obligations, and each thereof, now are and is, and have and has been since the same were and was so kept and had in the possession of the said Martin D. Howell, as aforesaid," etc.

The thirteenth and fourteenth counts charge the defendant with passing separate counterfeit United States notes on two different occasions. The description of these United States notes is similar to that just quoted from the eighth count, but the reasons for not setting them out more particularly are somewhat different. The excuse contained in the thirteenth count is that the note therein referred to was returned to the defendant before the finding and presenting of the indictment, without the knowledge, connivance, or direction of the grand jurors, or any of them, or of the United States attorney for this district, or of any one on their or his behalf; and that they or any of them have no knowledge or information as to where, in whose possession, or under whose control the counterfeit note and obligation now is, or has been, since its said return. The excuse for not setting out more particularly a description of the counterfeit note in the fourteenth count is, briefly, that it was destroyed and wholly lost before the finding and presenting of the indictment. To recapitulate, in the eighth count the reasons given for not setting out the three counterfeit United States notes which are the subject of that charge according to their tenor, or more particularly, is that the grand jurors had them not in their possession or under their control; in the thirteenth count, that the counterfeit United States note was returned to the defendant before the finding and presenting of the indictment; and in the fourteenth count, that the counterfeit note therein referred to has been destroyed. I entertain no doubt that the excuses tendered and the reasons given therefor and contained in the three counts of the indictment, to which objections have been raised, are legally sufficient. While it is a stringent rule of criminal pleading that forged and counterfeited instruments or writings, which form the gravamen of the offense, must be set out in an indictment or information according to their tenor, yet there are circumstances constituting exceptions which compel a relaxation of this general rule. The authorities and text-books segregate the exceptions into the following general classes: (1) Where the prosecution has not in its possession, and is unable to procure, the instrument or writing; (2) where it has been destroyed or lost; (3) where it is in the possession of the defendant. *Com. v. Houghton*, 8 Mass. 107; *State v. Potts*, 9 N. J. Law, 26; *People v. Kingsley*, 2 Cow. 522; *State v. Gustin*, 5 N. J. Law, 744; *State v. Parker*, 1 D. Chip. 298; *People v.*

Badgley, 16 Wend. 53; Com. v. Snell, 3 Mass. 82. Also, Whart. Cr. Pl. (9th Ed.) § 176, p. 124; Bish. Cr. Proc. (2d Ed.) § 404, p. 197. These exceptions spring from the very necessities of the rule itself, and are designed, not to suffer criminals to cheat the law by reason of the fact that the prosecution may be handicapped in not possessing the forged and counterfeited instrument or writing, and unable, therefore, to set it out in *haec verba*; otherwise it would result that offenders who, by their good fortune or dexterity, could destroy or make away with the forged and counterfeited instruments or writings, as, for instance, the counterfeit United States notes in the case at bar, which constitute the very means by which it was sought to violate the law, would go unpunished. This would, in effect, be affording to forgers and counterfeiters an immunity from prosecution which never was intended to be tolerated in a civilized country. But although the prosecution, when a case presents facts coming within the recognized exceptions, is excused from setting out the instrument or writing in *haec verba*, yet it is still under an affirmative duty to the defendant, and in fact it may be stated that, to bring a case within the exceptions, there are two conditions inseparably connected therewith: (1) The reasons for not setting out the instrument or writing in *haec verba* must appear in the indictment itself, and these must be sufficient in law to excuse the failure to set out according to the tenor. (2) Even though the reasons for not setting out in *haec verba* or describing the instrument or writing more particularly may be legally sufficient, the indictment must still contain such a description of the forged and counterfeit instrument or writing as will sufficiently tend to identify and individualize it, so that the defendant may be advised of the charge against him. Concerning the first proposition, as already stated, I entertain no doubt that the excuses given, and the reasons thereof, contained in the indictment, are legally sufficient.

We now proceed to the second proposition. It is contended by counsel for defendant that the description of the notes is insufficient to apprise the defendant as to the particular kind of obligation or security of the United States he is charged with possessing and passing in violation of law. The chief object of an indictment or information is to apprise the defendant clearly and fully with what he is accused, so that he may prepare for his defense, and also, in case of his conviction or acquittal, avail himself of that fact to be protected from further prosecution. *U. S. v. Cruikshank*, 92 U. S. 542, 558. Would the averments of the indictment in the three counts referred to relating to the description of the counterfeit United States notes subserve these objects? I think they would. Analyzing the three counts objected to (and in this respect they are all identical); and we find (1) that the particular kind of obligation of the United States is specified, and (2) the denomination of such obligation is set out. It is averred in all three counts that the counterfeit obligations of the United States which the defendant is accused of possessing and passing purported to be United States notes, and that they were of the denomination of five dollars. It must be remembered, in this connection, that United States notes are not

private, but they are public, obligations, provided for by acts of congress. They are what are commonly known as "greenbacks," a particular and distinct kind of obligation of the United States. The well-known public character of this obligation of the government would, it seems, not necessitate the specific description which private obligations ordinarily require; but, giving the defendant the benefit of any doubt upon this matter, and placing, for the purposes of this demurrer, public and private notes and obligations upon the same level so far as their identification is concerned, I am still of the opinion that they are sufficiently described and referred to, in connection with the other facts averred, to inform the defendant of the charge intended to be preferred against him, and to enable him to prepare for his defense. That the term "United States notes" is sufficiently specific, and refers to a well-known and defined obligation of the government, is made clear by the following section (section 5413, Rev. St. U. S.): "The words 'obligation or other security of the United States' shall be held to mean all bonds, certificates of indebtedness, national currency, coupons, United States notes," etc. Had the indictment simply alleged that the counterfeit notes were obligations of the United States, and had gone no further, it would, confessedly, be subject to the same infirmity which I held fatal in the former indictment; for the defendant would not be apprised of the kind of counterfeit obligations of the United States he is charged with having had in his possession and with passing. It might be a bond, or a coupon, or a United States treasury note, or a national bank note, or a gold or silver certificate, or a United States note. But the present indictment has provided against this by specifying the particular kind of governmental obligation, and also its denomination. In indictments for having in possession and for passing counterfeit coins no more specific allegation as to the character of the coins would be required. But this is not all. The contention that the defendant is not sufficiently apprised of the character of the government obligation respecting which he is charged is weakened when we observe that the day when he committed the alleged violation of law, the place where, and, in the case of passing of counterfeit notes, the persons upon whom he passed them, are distinctly alleged. These averments certainly assist very materially in identifying the several United States notes, and in apprising the defendant of the charge against him, so that he may be advised whether, at the time, place, and under the circumstances stated, he did or did not commit the alleged offenses; and when an indictment does this, and is free from any technical defect which is held to be fatal, I do not see how the defendant can be prejudiced. While the description of the counterfeit United States notes may not be as full and complete as defendant desires, and is such that, in the absence of a legal excuse for not setting them out according to their tenor, or more particularly, the indictment would be fatal in that respect, still I am of the opinion that, in view of the fact that the notes were not in the possession of the grand jurors, and were beyond their control, the description is sufficient to bring home to the defendant, in connec-

tion with the other facts set out, the nature of the accusation preferred against him. I do not see that he is prejudiced in not getting a more minute description of the notes. Especially is this true as to those United States notes which, it is stated in the indictment, were returned to or remained in the defendant's possession. The demurrer will therefore be overruled.

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MacKNIGHT v. McNIECE.

(Circuit Court, S. D. New York. October 4, 1894.)

1 PATENTS—BILL FOR INFRINGEMENT—DEFENSES.

It is no defense to a bill for infringement that defendant did not designedly order an infringement, but left his superintendent to make the article according to his own judgment.

2. SAME—WITNESSES TO PRIOR INVENTION AND USE—WHEN TO BE NAMED IN ANSWER.

Rev. St. § 4920, only requires that the answer shall name the persons who are claimed to have previously invented, or had knowledge of, the thing patented, and does not make it necessary to give the names of the witnesses who are to testify to such prior invention or use.

3. SAME—INVENTION—ARTIFICIAL PAVEMENTS.

In making artificial stone pavements, the turning down of two layers of the material, instead of one, to form a curb, does not involve invention. Neither does making an obtuse angle, instead of a right angle, at the meeting point of the pavement and curb, nor the making of a forwardly projecting bead or molding to serve as a guard to protect the curbing and arris from the impact of wheels when backed against the curb.

4. SAME—INVENTION AND PRIOR USE—ARTIFICIAL PAVEMENTS.

The MacKnight patent, No. 373,295, for improvements in artificial pavements, *held* void as to the first claim, because of prior use, and as to the second claim, for want of invention.

5. SAME—INVENTION.

The MacKnight patent, No. 387,308, for improvements in artificial pavements, *held* void as to claims 2, 3, and 4, for want of invention.

This was a suit by John W. MacKnight against James McNiece for infringement of patents for artificial pavements.

Frank V. Briesen, for complainant.

John H. V. Arnold, for defendant.

TOWNSEND, District Judge. This is a bill in equity for the infringement of claims Nos. 1 and 2 of letters patent No. 373,295, dated November 15, 1887, and of claims 2, 3, and 4 of letters patent No. 387,308, dated August 7, 1888; both said patents being for improvements in artificial pavements, and the complainant being the patentee. The defenses are noninfringement, want of invention, and anticipation.

Infringement of both patents is proved by the testimony of one Steinman, who testified that, while foreman for the defendant, he, acting under instructions from defendant, laid pavements which, according to his description, were of such character as to be covered by said claims of said patents. His testimony is supported by that of the expert Du Faur. No testimony or evidence in contradiction of these statements has been offered, and the infringe-

ment must be taken as proved. Even if the defendant, as claimed by his counsel, had left the superintendent to make the pavement according to his own judgment, and had not designedly ordered an infringement, this would not be a defense in this action, although such facts might avail in an action for a penalty. *Taylor v. Gilman*, 24 Fed. 632.

The first claim of patent No. 373,295 is for "a pavement consisting of a series of layers, of which the upper layer is curved downward at the curb." In the second claim "the two uppermost layers are curved downward at an obtuse angle at the curb, and overlap the lowermost layers." In patent No. 387,308, the second claim is for "a combination of an artificial pavement with a composite curbing, d', having a bead, e, that projects forward beyond the line of the curbing." This bead is also designated in the specification as a "projection" or "nose," and is once spoken of in the evidence as a "molding." Its purpose is to serve as a guard against the impact of wheels of vehicles when backed up against the curb, and thus save the curbing proper and the arris from being injured. The third claim is for "a combination of an artificial pavement, having an upper layer, d, with a composite curbing, d', joined to the upper layer at an obtuse angle, and provided with a forwardly projecting bead, e, and with the groove, e<sup>2</sup>." The essence of the improvement in these three claims is the addition of this bead or projection.

Plaintiff objected to the testimony, generally, of defendant's witnesses as to anticipation, on the ground that they were not named in the answer. Defendant claimed that they were called to show, not any prior invention, but simply the state of the art, and thereby that the alleged invention of the complainant was really no invention at all; citing *Machine Co. v. Keith*, 101 U. S. 479. And the defendant claims also that, if it was necessary to name such witnesses in his answer, "complainant should have given notice that upon the final hearing he would move to strike from the record the testimony of these witnesses, so that the defendant might have moved for an amendment of his answer by the inserting of their names." Defendant cites no authority for this latter position. Judge Woodruff, in *Elm City Co. v. Wooster*, 6 Fish. Pat. Cas. 452, 4 O. G. 83, Fed. Cas. No. 4,415, allowed such evidence to stand, on the ground that complainant's brief did not contain a motion to strike out, but decided the case in favor of complainant on the whole testimony. *Machine Co. v. Keith*, 101 U. S. 479, holds that "an objection to the examination of a witness should state specifically the ground of the objection, in order that the opposite party may have the opportunity of removing it if possible," and adds that if this had been done in that case the defendant might have postponed the examination, and moved to amend his answer. It makes no reference to any requirement of notice of a motion to strike out. Complainant's brief mentions the fact that the witnesses are not named in defendant's answer, and says that such witnesses, or their principals, must invariably be named in the answer, in order to apprise the complainant of the contemplated de-

fense. Otherwise, the objection is not insisted upon in complainant's brief, and the testimony of the witnesses is carefully discussed therein. But the provisions of section 4920, Rev. St., only require notice of the names and residences of the persons alleged to have invented, or to have had the prior knowledge of, the thing patented, and where and by whom it had been used. It does not require the names of the witnesses who are to testify to such prior invention or use. *Machine Co. v. Keith*, supra.

The testimony of Gough was objected to by complainant, and is too indefinite and uncertain to prove prior use. The testimony of Schmidt was objected to, but he testifies to prior use by Graham & Son at Madison avenue and Seventy-Sixth street in 1886, and there was no specific objection to the testimony as to their use. The testimony of J. H. Dryer was objected to, but his testimony shows prior use in Central park in 1870 by the department of public parks, to which there was no specific objection; also, prior use by one Philips, of New York, at Helmboldt's block, Long Branch, state of New Jersey, in 1872, to which there was no specific objection. The firm of Becker & Downs is named in the answer, with a statement that the first names of the partners were unknown to defendant. Alexander R. Becker, one of the firm, testifies to prior use by A. T. Meyer in 1884, at the Hoffman Arms, Madison avenue and Fifty-Ninth street, New York City. He does not testify to any prior use by the firm of Becker & Downs, although he does to prior use by himself. This A. T. Meyer, however, was named in the answer, which makes his testimony admissible. Julius Hopke testified to the same effect, and both Becker and Hopke stated that complainant was superintendent of the work for A. T. Meyer at that time. Hopke also testified to prior use at Long Branch in 1871, at the Helmboldt block, and there is no specific objection made to this testimony. Asher T. Meyer is named in the answer, and his son, Louis G., testified to use by him at 23 East Seventy-Fourth street, at Fifty-Ninth street and Madison avenue, and at Fifty-Fifth street and Broadway, all in the summer of 1884, and that complainant assisted upon one of them. No contradiction whatever of this testimony is offered, and I must accept these facts as proved.

The prior use testified to was mainly the making of the upper layer of the pavement and the curb in one piece. If the construction testified to by the witnesses differs from the first claim of patent No. 373,295, it would seem that complainant, who superintended the laying of some of the pavements, might have explained the difference by testimony. I find that the first claim is void by reason of prior use.

The second claim of patent No. 373,295 merely makes two layers, instead of one, turn down to form a curb, and provides for an obtuse angle where the curb and pavement meet. The second, third, and fourth claims of patent No. 387,308 add only a bead or projection, a groove below the bead, and in the third claim include the obtuse angle, and, in the fourth, a series of layers. Turning down two layers, instead of one, does not involve invention. Neither

does making an obtuse angle, instead of a right angle, at the meeting point of the pavement and curb, nor the making of a forwardly projecting bead. Complainant has introduced no evidence whatever to show that his pavement was more useful by reason of the alleged inventions, nor has defendant introduced any testimony on this point. Defendant's counsel, on the hearing, accounted for the deficiencies in their evidence by stating that defendant had disappeared, and could not be found. If the above claims include any advance beyond the prior art, it consists merely in an improvement in degree or finish by the use of ordinary skill in the extended application of well-known processes or devices, and cannot be held to involve invention. *Walk. Pat. § 25 et seq.; Trimmer Co. v. Stevens*, 137 U. S. 423, 11 Sup. Ct. 150; *Mill Co. v. Walker*, 138 U. S. 124, 11 Sup. Ct. 292; *Johnson Co. v. Pacific Rolling-Mills Co.*, 2 C. C. A. 506, 51 Fed. 762; *Wilson v. Copper Co.*, 4 C. C. A. 484, 54 Fed. 495; *Westinghouse v. Electric Light Co.*, 63 Fed. 588. Let the bill be dismissed.

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BRADDOCK GLASS CO., Limited, et al. v. MACBETH et al.  
(Circuit Court of Appeals, Third Circuit. November 2, 1894.)

No. 14.

1. DESIGN PATENTS—NOVELTY.

The novelty of a design is to be tested, not by investigation of the means employed for its creation, but by ocular comparison of the design itself with the prior designs, which are alleged to be substantially the same.

2. SAME—INFRINGEMENT.

A design will be held to be an infringement where it unquestionably produces the same effect upon the eye as that of the patented design.

3. SAME—INJUNCTION.

The fact that defendants have ceased manufacturing within the district is no reason for refusing equitable relief from the infringement of a design patent, where an individual defendant and the officers of defendant company are still associated in the general business without the jurisdiction of the court.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

This was a suit by George A. Macbeth and George A. Macbeth & Co. against the Braddock Glass Company, Limited, and W. R. McCloy, for infringement of the Dietrich design patent for lamp chimney tops, No. 14,373, granted October 30, 1893, to George A. Macbeth, assignee of Henry Dietrich. A preliminary injunction was granted (54 Fed. 173), and on final hearing a decree was rendered for complainants by the circuit court, with the following opinion (Buffington, District Judge; Acheson, Circuit Judge, concurring):

This bill was filed by George A. Macbeth and the firm of George A. Macbeth & Co. against the Braddock Glass Company, Limited, and W. R. McCloy, for alleged infringement of design patent No. 14,373, for lamp chimneys, granted October 30, 1893, to Henry Dietrich, assignor to George A. Macbeth, who was the licensor of complainant firm. After issue joined and proofs taken, the letters were assigned to the George A. Macbeth Company, a corporation, which fact was set forth in a plea wherein it was alleged the bill had become defective for want of proper parties. To this plea complainants filed an answer, alleging that before said plea a reassignment had been made by the



George A. Macbeth Company to said George A. Macbeth of the letters patent, so far as the territory embraced in the infringement complained of was concerned. A motion to strike off this answer was denied, and leave given complainants to file a supplemental bill, which was done, and to it plea and answer were filed. It was then stipulated the replication already filed should stand to the answer to the supplemental bill, the plea be set down for argument, and the testimony considered as though taken after supplemental bill filed.

This case concerns three chimneys known as Braddock Nos. 1, 2, and 3, respectively. By stipulation it is admitted they were made and sold by respondents prior to the filing of the bill. In defense it is alleged the letters were not granted for the same invention for which Dietrich applied; that his application was unlawfully changed by amendment; novelty and patentability in the design were denied, as also infringement thereof. In the plea to the supplemental bill it is further alleged that respondents' works, with all tools for making the devices complained of, and all manufactured stock thereof, were burned nearly two years prior to filing the plea; that respondents have done no work in this district since, and the principal officers have all moved to the state of Indiana; that, an accounting having been waived at bar, no ground for equitable relief now exists. The validity of the Dietrich patent has heretofore been passed upon in this circuit in *Macbeth v. Evans*, at Pittsburgh, and in *Macbeth v. Gillinder*, at Philadelphia (54 Fed. 169), and requires no further discussion. The anticipation now urged in the prior use at the Independent Glass Company factory was heard on affidavits, when a preliminary injunction was asked for, and the conclusion reached that the making by the Independent Company of chimneys with small crimps did not begin until it was suggested to Ward, the manager, by the sight of a chimney having the Dietrich design, and the opinion was expressed that respondents' witnesses were mistaken in the year. *Macbeth v. Glass Co.*, 54 Fed. 173. The testimony of these affiants when called on the stand and cross-examined in the subsequent stages of the case has made this even more clear, and satisfies us of the correctness of the conclusion then reached. It was held at the same time that Exhibits Braddock Nos. 1, 2, and 3 were infringements, and an injunction was granted. While a number of witnesses have since been called by complainants to show that, giving the attention an ordinary purchaser does, they would have bought the enjoined chimneys under the impression they were buying the Dietrich or "pearl-top" design, yet respondents have called none to prove the contrary. We see no reason, either from the testimony or from our own examination of the enjoined devices, to differ from the conclusion then reached as to infringement. Nor is there any reason why the injunction should not be made permanent, though respondents have ceased manufacturing in this district. Mr. McCloy, a defendant, and the other officers of the respondent company, are still associated in the glass business, and that they are now without the jurisdiction is possibly the more reason why, in this protracted litigation, there should be a decree and injunction which would avoid further litigation on the same subject-matter between the same parties in another tribunal. In such decree and injunction Mr. McCloy should be included. The bill was against him personally. He filed a "joint answer" with the Braddock Glass Company, Limited, and did not deny his personal liability. They joined in their defense by a joint and several plea, and the proofs show he was the active managing officer of the limited partnership. By stipulation, made before any testimony taken, it was admitted the three chimneys noted "were made and sold by the defendants prior to the bringing of the bill." To restrict the decree to a limited partnership, whose solvency, even to the extent of costs, is questionable, would be to ignore the issues and stipulation upon which the case was conducted. While it is a disputed question whether a manager of a company is personally responsible for infringing acts, it is universally conceded that such officers may be enjoined against future infringement. 3 Rob. Pat. 79. Nor do we think the rights vested in complainants by the grants of the letters patent are affected by the proceedings shown in the file wrapper. Dietrich's first application and drawing showed three distinct designs. The application was rejected because only one could be embraced in a design patent.

Two of them were withdrawn (neither of which has any resemblance to the infringing device), the application was amended to conform therewith, and thus amended and based on the remaining design was prosecuted and duly allowed. We see no objection to this course of procedure, followed at the suggestion of the patent office authorities, and upon the entire case we are of opinion the complainants are entitled to a decree.

The cause is now heard on defendants' appeal.

Wm. L. Pierce, for appellants.

James I. Kay and George H. Christy, for appellees.

Before DALLAS, Circuit Judge, and WALES, District Judge.

DALLAS, Circuit Judge. By the decree appealed from it was adjudged that the letters patent No. 14,373, granted to George A. Macbeth, assignee of Henry Dietrich, on October 30, 1883, for designs for lamp chimneys, is valid, and that it had been infringed by the defendants below; and thereupon a perpetual injunction and the payment by the defendants to the complainants of \$250, being the minimum damages provided for in the act of congress of February 4, 1887, together with the costs of the suit, were ordered.

The only assignments of error which have been pressed are as follows:

"(1) The court erred in holding that it was patentable merely to double the number of crimps at the top of a chimney. (2) The court erred in holding that respondents' chimneys infringed. (3) The court erred in permitting the filing of a supplemental bill." "(6) The court erred in sustaining complainants' bill."

The decree does not embody a finding "that it was patentable merely to double the number of crimps at the top of a chimney," and that position is not taken in the opinion of the circuit court, nor is it necessary, or even pertinent, to its conclusion. The argument for the appellants would be of greater force if the patent in suit, instead of being for a design, was for the mechanism of its construction. It has been made plainly obvious to us, and seems to be fully recognized by the trade, that the appearance of the patented design is very different from that of any other which had previously existed; and, this being so, the method of its production is irrelevant. The novelty of a design is to be tested, not by investigation of the means employed for its creation, but by ocular comparison of the design itself with the prior designs which are alleged to be substantially the same, and when tried by this test the novelty of the design covered by the patent in suit is made quite apparent.

The second assignment presents, conversely, the same question as the first, and for like reason cannot be sustained. The designs of the appellants unquestionably produce the same effect upon the eye as that of the appellees, and therefore the former conflict with the latter.

The argument submitted in connection with the third assignment, and the ground upon which it is based, are stated in the appellants' brief as follows:

"No equitable relief was required at the time of filing of the supplemental bill. For twenty months the defendants had been out of business, \* \* \* and the complainants were not entitled to an injunction. There was, therefore, no basis of equitable relief."

*Root v. Railroad Co.*, 105 U. S. 189, is relied upon as an authority for this contention, but does not support it. In our opinion, the point was rightly disposed of by the learned judge below, who said:

"Nor is there any reason why the injunction should not be made permanent, though respondents have ceased manufacturing in this district. Mr. McCloy, a defendant, and the other officers of the respondent company, are still associated in the glass business, and that they are now without the jurisdiction is possibly the more reason why, in this protracted litigation, there should be a decree and injunction which would avoid further litigation on the same subject-matter between the same parties in another tribunal."

The sixth assignment does not set out the particular error intended to be alleged. It therefore does not conform to the eleventh rule of this court, and, according to that rule, might be wholly disregarded. But we have fully examined the record, and considered the argument on behalf of the appellants, and are not convinced that any error is disclosed or has been made to appear. Therefore the decree is affirmed, with costs.

NOTE. For other cases involving a construction of this patent, see *Geo. A. Macbeth Co. v. Lippencott Glass Co.*, 54 Fed. 167; *Macbeth v. Gillinder*, *Id.* 169, 171.

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STAHL v. WILLIAMS.

(Circuit Court, D. Connecticut. November 2, 1894.)

No. 708.

1. PATENTS—INVENTION—SALES AS EVIDENCE OF UTILITY.

The fact of extensive sales is entitled to greater weight as evidence of utility and invention when the article is of a kind (in this instance, an egg incubator) which purchasers are not likely to be induced to buy by reason of alluring trade-marks, attractive finish, or the energy of traveling salesmen.

2. SAME—CONSTRUCTION OF PATENT.

That a device shows a marked advance in utility over all previous devices, and goes at once into extensive use, is sufficient to bring it within the rule that where a number of persons have been engaged in repeated, but unsuccessful, efforts to accomplish a certain result, and one of them finally succeeds in devising the necessary means, the courts will not be inclined to adopt such a narrow construction of his patent as would be fatal to the validity thereof.

3. SAME—INFRINGEMENT—EQUIVALENTS—INCUBATORS.

Where the object was to cause the water entering the heating tank of an incubator to flow along the sides thereof, when first entering, and while at its highest temperature, thus causing an equal distribution of heat, *held*, that the use of pipes to conduct the water along the sides was the equivalent of partitions running through the tank, and accomplishing the same purpose.

4. SAME.

The Stahl patent, No. 368,249, for improvements in incubators, construed as to the third claim, and the same *held* valid and infringed.

5. SAME.

The Halstead patent, No. 258,295, for improvements in incubators, construed, and *held* not infringed as to claims 6 and 7.

This was a suit by George H. Stahl against Albert F. Williams for infringement of certain patents for improvements in incubators. A preliminary injunction was heretofore denied. 52 Fed. 648.

John J. Jennings, for complainant.

Mitchell, Hungerford & Bartlett, for defendant.

TOWNSEND, District Judge. In the hearing on this bill in equity for alleged infringement of various patents, complainant relied upon the third claim of letters patent No. 368,249, granted to him August 16, 1887, and upon the sixth and seventh claims of letters patent No. 258,295 granted May 23, 1882, to Augustus M. Halstead, and assigned to him; both of said patents being for improvements in incubators. The defendant contends, as to each of the patents in suit, that the state of the art requires such a limited construction that it does not include the form of incubator manufactured by him. A motion for a preliminary injunction was heard, and was denied. 52 Fed. 648.

The object sought to be attained, as stated by the patentee, was the provision of a greater amount of heat at the sides of the interior of the incubator. This was accomplished by the use of two vertical partitions extending inwardly from one end almost to the other of said hot-water tank near its opposite sides, so arranged that the water, when at its highest temperature, entering the tank near the outer walls of the apparatus, would flow longitudinally along the outer sides of the tank, and return through its middle to the heater, thus equalizing the temperature. Said third claim is as follows:

"In an incubator, as a means of uniformly heating its interior chamber, the flat tank overlying said chamber, and provided with the two partitions extending from one end nearly to the other on opposite sides of its middle, in combination with the external heating vessel, the two pipes, *a*<sup>3</sup>, leading from its top into opposite sides of the tank outside of the partitions, and the return pipe, *a*<sup>4</sup>, located at the same end of the tank, and extending from a point between the partitions to the base of the heater, whereby the hot water is delivered in two currents along the sides of the tank, and returned through its middle to the heater."

In order to determine the construction to be put upon this claim, it will be necessary to examine the state of the prior art. Patent No. 245,121, granted to Edward E. Bishop, August 2, 1881, shows partitions. The patentee states that they are designed to make the water flow evenly over the entire surface of the tank. The main partition extends from one end along the center of the tank, and has a branch running at right angles on one side. The heated water is not thereby first conducted to the sides of the tank, but it enters by a pipe at one end of the tank, near its center, and passes around the other end, and back to a discharge pipe, its flow being directed towards the outer side and portion of the end near said discharge pipe by said branch partition. It also shows a hot-water pipe extending outside and around the tank for the purpose of keeping the air space around said tank and the egg chamber at a suitable temperature. Patent No. 296,413, granted April 8, 1884, to Frank Humphreville, shows no heating pipes, but various partitions, which are designed to cause the water to circulate from the center of one end of the tank along said end, the two sides, the further end, and then over the remaining surface of the tank to a discharge pipe at said further end. There is no proof that this apparatus was capable of successful operation. Patent No. 349,749, granted September 28, 1886, to Frank Rosebrook, shows partitions similar to those shown in the Humphreville patent, but less complex in construction. It also shows hot-water pipes out-

side of said tank. These three patents were cited by the patent office as anticipations of the third claim as originally made. Thereupon the patentee inserted the following disclaimer:

"I am aware that heating pipes have been variously arranged to maintain a uniform temperature in an incubator; but a flat tank with partitions, such as herein shown and described, has been found to give the result desired in a more satisfactory manner, and at a less cost."

Much reliance is placed by defendant upon the language of this disclaimer. I think, however, in view of the Bishop and Rosebrook patents, that it should not be construed as an admission that pipes extending through the tank for maintaining a uniform temperature are old, but may fairly be limited to the class of pipes referred to in said patents, namely, those located outside the hot-water tank. The other patents relied on to show that heating pipes have been used in the tank itself were not referred to as anticipations. The applicant, therefore, had no occasion, on that account, to insert a disclaimer as to them.

Patent No. 193,490, granted July 24, 1877, to Thomas M. Davis, shows three curved delivery pipes extending into the tank from the end nearest the heater towards the opposite sides.

It is contended in support of the validity of the patent in suit that the prior patents hereinbefore considered and claimed as anticipations were mere paper patents, and that it does not appear that any of them were capable of practical successful operation. Said prior patents are also the property of the complainant, and are included in the bill. That the device of the patent in suit marked an advance beyond all previous devices is evident. Its utility is established by undisputed testimony. The sales of complainant's incubators, since the adoption of the improvement herein claimed, have increased from 300 to 10,000 or 12,000 per annum. It is claimed that the number of incubators containing this heater is greater than that of all the other makes combined. I am inclined to give greater weight to the evidence of utility, because it is not open to the objection suggested in *Duer v. Lock Co.*, 149 U. S. 216, 223, 13 Sup. Ct. 850. The class of persons who use incubators are not likely to be induced to buy by reason of an alluring trade-mark, attractive finish, or the energy of the traveling salesman. The rival incubators are operated side by side at the country fair, and the practical farmer may count the eggs and hatching chickens, and reduce the question of comparative utility to a mere mathematical exercise.

Again, the question of utility is one not of a theory, but of a condition. Theoretically it might seem as though the partitions of Rosebrook or the pipes of Davis must produce equally perfect distribution of heat throughout the chamber, but the complainant, responding to the public demand for the better results accomplished by the device of the patent in suit, is forced to discard the other partitions and pipes, and the defendant has not seen fit to imitate them in his device. This patent seems to fall within the settled rule that where a number of persons have all been engaged in repeated, but unsuccessful, efforts to accomplish a certain result, and one of them finally succeeds in devising the necessary means, and

secures a patent therefor, the courts will not be inclined to adopt such a narrow construction as would be fatal to the validity of such patent. *Manufacturing Co. v. Adams*, 151 U. S. 139, 145, 14 Sup. Ct. 295; *The Barbed-Wire Patent*, 143 U. S. 275, 283, 12 Sup. Ct. 443, 450. The defendant's incubator shows the two delivery pipes extending into the tank from the end nearest the heater, parallel to the sides of the tank, and nearly to the further end, and a discharge pipe at the end nearest the heater. The question presented is whether this construction is equivalent to that embraced within the third claim of the patent. It is urged that the pipes in defendant's device do not extend from the top to the bottom of the tank, so as to divide the water on their opposite sides; that they do not deliver the water, when at its highest temperature, along the opposite sides of the tank; and that they do not operate to cause currents of water to flow along the opposite sides of the tank and to return through the middle. But assuming that these statements are correct, it does not necessarily follow that the pipes of defendant's device are not the mechanical equivalents of complainant's partitions. The question is whether they perform the functions covered by the patent in suit in substantially the same way to obtain the same result. If the pipes cannot be considered as partitions, within the meaning of the claim, yet they serve to divide and confine such water as is received within the tank, and to cause it to flow, when at its highest temperature, parallel to the opposite sides of the tank. That some of the water flowing from the heater may not pass through the middle of the tank, seems immaterial. In each the outlet is so located that the main current must flow substantially through the center of the tank. The difference in flow of the water is only trifling and incidental. Each device secures the same result by the same operation. In each the current of hot water is, by means of conduits which serve to partition off or keep apart said current from the main body of water, introduced or delivered, as stated in the specification, "when at its highest temperature, near the outer walls of the body, so that the heat is distributed and the temperature equalized within the apparatus in a satisfactory manner." The patentee says he describes the invention "without limiting myself to the precise construction and arrangement of parts shown." It is evident from the language used by the patentee that the function to be accomplished by the channels or partitions of the patent in suit was not necessarily to heat the sides of the tank, but, as is clearly stated by the expert for complainant, "to distribute the heat within the incubating chamber of the apparatus in such a manner as to equalize the same therein; and this is accomplished by warming the sides of the interior of the incubating chamber, where the heat is more quickly absorbed than at the center, to a greater degree than at the center." Inasmuch as this function is accomplished by the device of defendant in substantially the same way, I think it infringes the third claim of said patent.

After an examination and independent consideration of the case presented under the sixth and seventh claims of letters patent No.

258,295, granted May 23, 1882, to Augustus M. Halstead, I see no reason to modify the views expressed at the hearing on the motion for a preliminary injunction. Said claims are as follows:

"6. In an egg-holding tray, the combination, with the wires or cross bars, of a web of muslin or similar material on which the eggs rest, and which is movable, so as to turn the eggs, substantially as set forth.

"(7.) The combination, in an egg holding and turning tray, of cross wires or bars, a web, and a roller upon which the web may be wound, substantially as set forth."

The specification and drawings are limited to a construction in which the eggs lie between cross wires and are supported by a netting. Where the web covered by the claims in suit is employed, it is described and shown as passing around the netting and below the cross wires. Rollers on which the eggs rest are disclaimed. In the defendant's device there is no netting; the web passes around and above the rollers; the eggs are supported by the rollers, and the web is used to turn the eggs. The defendant's construction, therefore, does not infringe said claim. The prior art shows several constructions embodying the principles involved in the operation of defendant's device. Let a decree be entered for an injunction and an accounting upon the third claim of patent No. 368,249.

# PITTSBURGH REDUCTION CO. v. COWLES ELECTRIC SMELTING & ALUMINUM CO.

(Circuit Court, N. D. Ohio, E. D. November 9, 1894.)

## 1. EQUITY—REHEARING—NEW EVIDENCE.

A rehearing will not be granted to allow the introduction of evidence which, by due diligence, could have been introduced at the original hearing, on the ground that the party and his counsel were misled as to the real issue by the arguments of the opposing counsel.

## 2. PATENTS—ANTICIPATION—ALUMINUM BY ELECTROLYSIS.

The Hall process of making aluminum by electrolysis, after dissolution of alumina in fused cryolite (letters patent No. 400,766), is patentable, even if the solubility of alumina in fused cryolite was previously well known, alumina having never previously been disrupted by electrolysis into its constituent parts. 55 Fed. 301, affirmed.

## 3. SAME.

Discovery of the fact that fused cryolite would freely dissolve alumina, which was essential to Hall's process, was not anticipated by the discovery of De Ville that cryolite would dissolve or flux alumina to a slight extent, he having compared its power to dissolve alumina to that of fluoride of sodium and fluor spar, the former of which would, and the latter was supposed to, dissolve about 1 per cent. of alumina, though fluor spar has since been discovered to dissolve about 25 per cent. of alumina. 55 Fed. 301, affirmed.

On rehearing. Denied.

For former opinion, see 55 Fed. 301.

W. Bakewell & Sons and George H. Christy, for complainant.

M. D. Leggett and Loren Prentiss, for defendant.

Before TAFT, Circuit Judge.

TAFT, Circuit Judge. This is a bill to enjoin the infringement of a patent for a process of making aluminum by electrolysis, and to re-

cover damages. The case has been heard on its merits, and a decree rendered sustaining the patent, finding that the defendant has infringed it, and referring to a special master the question of damages. The opinion of the court is reported in 55 Fed. 301. A motion is now made by the defendant to reopen the case, for leave to introduce new evidence, and for a rehearing. The opinion on the merits was filed on January 20, 1893, and a decree entered in accordance therewith shortly afterwards. Defendant then took an appeal to the circuit court of appeals, under the seventh section of the court of appeals act, providing for an appeal from an interlocutory order granting an injunction. When the appeal was called in the circuit court of appeals in June, 1893, it was dismissed by the appellant. The master then proceeded with the hearing of evidence on the question of damages. Pending this hearing, both the counsel for the defendant company who had argued the case on the merits in this court died. Thereafter the present counsel for the defendant offered evidence before the master, which the master correctly ruled to be irrelevant on the issue of damages, and only relevant with respect to the merits of the controversy already decided by the court. Counsel for the defendant, by agreement with opposing counsel, brought the question of the admissibility of this evidence before the court, and the action of the master was sustained. On June 21, 1894, the motion for rehearing now to be decided was filed in the words following:

"And now comes the defendant, and files this, his amended motion for a rehearing in this case; and, for grounds for granting the same, the defendant states as follows, namely: (1) That, upon the original hearing of this cause upon the questions as to character and validity of the patent in suit, it was claimed and represented by the complainant that there was an important difference between the solution of the alumina in the fused cryolite bath under the patent in suit and the fusion of alumina with cryolite as a flux in electric smelting, and that the patent in suit was for the solution of alumina in the fused cryolite bath, and not for the fusion of alumina with cryolite as a flux in electric smelting, which representation and claim the defendant believed to be true, and was thereby led into the trying of the case on its part upon that basis, and to rely upon its right, in case it should become necessary, to set up the process of electric smelting with the use of cryolite as a flux under electric smelting patents belonging to the defendant, as a standard of the comparison as to the cost of so manufacturing aluminum, as compared with the process under the patent in suit. That, upon the hearing in damages, the complainant objected to the introduction of evidence as to such comparative cost of manufacturing aluminum, upon the ground that the use of cryolite as a flux in electric smelting was the same as the solution in a fused cryolite bath under the patent in suit, and that all such testimony was thereupon stricken out by the court, and all further testimony on the subject was disallowed; that, by the means above set forth, the defendant was entirely deprived of the benefit of such testimony in any way. In law and justice, he is now entitled to the use of the same upon the questions as to the validity or scope of the patent in suit, and the infringement of the same by the defendant. (2) That the court erred in finding and holding that the testimony in the cause showed that alumina was not dissolved in the cryolite bath of the soluble anode process to any appreciable amount, and also in finding and holding that the defendant operated said soluble anode process improperly and unfairly in respect to the soluble anodes being partly above and partly within the bath, and holding that the same should have been entirely immersed in the fused bath; whereas, in truth and in fact, it is the uniform custom in using anodes, whether soluble or otherwise, to place them



partly in and partly above the bath, as shown in the drawings attached to the Hall and Bradley patents; and whereas, also, in fact, the alumina is or may be dissolved in ample amounts in said soluble anode process in such fused bath of cryolite,—all of which the defendant can fully establish as clear and positive facts, and will do so, if allowed the opportunity, and that the defendant will also fully prove that as much alumina will be and is dissolved in such fused bath in such soluble anode process whether anodes are entirely immersed as when used in the manner which the defendant used them. The defendant asks that, upon the granting of such rehearing, the parties may be allowed to introduce all such further testimony as may be relevant in such rehearing, and that the defendant may have leave to amend its answer accordingly."

The ground of the first paragraph of the motion, as elucidated in the oral presentation of it, is peculiar. It is, in effect, that complainant's counsel by their argument misled the defendant and its counsel into taking a wrong view as to the issue of the cause; and now, having discovered the real issue to be something other than it was supposed to be, defendant wishes to adduce more evidence and make further argument on the new issue heretofore successfully obscured and concealed from the defendant, its counsel, and the court by the ingenuity of complainant's counsel. Defendant's present counsel expressly disclaims the slightest intention to impeach the good faith or professional skill of defendant's former counsel, but merely contends that in this case the arguments on behalf of complainant were so persistently sophistical and calculated to mislead that a serious mistake was made by the solicitors for defendant. The ground for the second paragraph of the motion is, in effect, that the court made an error in holding that the De Ville process for making aluminum by electrolysis was not an anticipation of the complainant's process, which error it is proposed to show more fully by subsequent experiments made by the defendant, and now offered in evidence.

The rules which govern the court in granting a rehearing in a cause like this, after a full hearing and decree on the merits, are well settled. In *Baker v. Whiting*, 1 Story, 218, Fed. Cas. No. 786, Mr. Justice Story, in a full discussion of the subject, holds that a rehearing for the purpose of admitting new evidence can only be granted when it would be granted on a bill of review after final decree. In *Purcell v. Miner*, 4 Wall. 519, the supreme court quote and follow Lord Chancellor Bacon's rule with reference to a bill of review:

"No bill of review shall be admitted except it contain either error in law appearing in the body of the decree, without further examination of matters in fact, or some new matter which hath arisen any time after the decree, and not on any new proof which might have been used in the decree so made. Nevertheless, upon new proof that is come to light after the decree was made, which could not possibly have been used at the time when the decree passed, a bill or review may be granted by the special license of the court, and not otherwise."

See, also, *City of Omaha v. Redick*, 63 Fed. 1-6.

It is not claimed by counsel for the defendant that the new evidence sought to be put in is evidence which could not have been brought before the court by due diligence at the original hearing. By the rule quoted, therefore, the motion fails to present a case for

the action of the court. It is expressly held by Mr. Justice Story in *Baker v. Whiting*, supra, that the error of judgment or mistake of law by counsel as to the pertinency or force of evidence furnishes no ground for a rehearing. This rule has been followed in a number of cases. Among them may be noted decisions by Judge Woodruff in *Ruggles v. Eddy*, 11 Blatchf. 524, Fed. Cas. No. 12,118, and by Mr. Justice Blatchford in *De Florez v. Reynolds*, 16 Blatchf. 397, Fed. Cas. No. 3,743. See, also, *Beach*, Mod. Eq. Pr. § 835, and cases cited. A rehearing is never granted to present cumulative evidence, or for the reiteration of old arguments. *Dunham v. Winans*, 2 Paige, 24; *Pfanschmidt v. Mercantile Co.*, 32 Fed. 667; *Beach*, Mod. Eq. Jur. § 836, and cases cited. It results from the foregoing principles that, on the face of the motion, no case is made for a rehearing. In order that no injustice may be done to the defendant, however, the court has examined fully all the evidence submitted, and read with care the arguments of counsel, and is clearly of the opinion that, even if all the evidence proposed now to be submitted to the court had been before the court at the time of the original hearing, the same result would have been reached.

A full description of Hall's process is given in the opinion of the court already filed. To state it shortly, the double fluoride of sodium and aluminum is placed in a crucible lined with carbon, and heated to a state of fusion. The poles of an electric dynamo are connected with this bath. The negative pole connects with the carbon lining of the crucible, and makes that the cathode, while the positive pole is connected with a piece of carbon suspended over, and extending down into, the fused mass forming the anode. Alumina—that is, the oxide of aluminum—is added to the double fluoride after fusion, and freely dissolves in it. An electric current of from four to six or seven volts is passed through the mass, causing the electrolysis or chemical disruption of the alumina into its constituents,—oxygen and the metal aluminum. The oxygen gathers at the anode, while the aluminum is deposited on the carbon lining of the crucible of the cathode, and is dipped out of the bath. The claim of the patent which was held to be infringed was as follows:

"As an improvement in the art of manufacturing aluminum, the herein-described process, which consists in dissolving alumina in a fused bath, composed of the fluorides of aluminum and sodium, and then passing an electric current by means of a carbonaceous anode through the fused mass, substantially as set forth."

In this patent, Hall expressly disclaims any intention to make a claim for the apparatus. He seeks a monopoly only for the process. He maintains that his process was novel in two respects: First. In that he dissolved alumina in the fused double fluoride of sodium and aluminum as freely as sugar dissolves in water; that, until he discovered that alumina would thus freely dissolve in this bath, it had never been known. And, secondly, that no one had ever before succeeded in disrupting the constituent elements of alumina by an electric current. The defendant in the original hearing attempted to show by quotations from the works of a French chemist named De Ville that it was well known as far back as 1859 (27

years before Hall made his discovery) that cryolite, which is a common form of the double fluoride of sodium and aluminum, found in Greenland, would dissolve alumina. Quotations from other authors who followed De Ville were also relied on for the same purpose. These quotations are set forth in the opinion of the court referred to, and are there commented on. De Ville described in his work a process for making aluminum by electrolysis. One of the alternative methods suggested by him was a fused bath of cryolite, with an anode of compacted alumina and carbon. The current disrupted the fluoride of aluminum in the cryolite, sending the aluminum to the cathode and the fluorine gas, its other constituent, to the anode, where it united with the aluminum of the alumina in the anode to make fluoride of aluminum, and regenerated the bath. The oxygen of the alumina, thus released, united with the carbon to form carbonic acid gas. In this way, aluminum was continually deposited at the anode, and the fluoride of aluminum in the bath was kept constant. It was held by this court—First. That the quotations from De Ville and subsequent authors did not show that cryolite would dissolve any more than a very small per cent. of its own volume and weight of alumina. And, secondly, that the De Ville process for making aluminum by electrolysis was wholly different from the Hall process (the one in suit), in that the Hall process electrolyzed alumina, while the De Ville process electrolyzed cryolite; that in the Hall process alumina was freely dissolved, without the electric current, while in the De Ville process the alumina was solid and hard, until it was subjected to the electrical chemical treatment above described; that the former was a success, while the latter was an entire failure, as a practical mode of making aluminum. There were many other questions in the case than the two above stated, but these are the points upon which it is sought to introduce new evidence and to make a new argument. The evidence which the defendant now seeks to bring to the court's attention consists of certain patents issued to the Cowles Brothers and to Bradley for the reduction of refractory metallic ores by electric currents of great intensity, of quotations from books on chemistry to show that cryolite was known to the art for many years before Hall's alleged discovery as a suitable flux for the reduction of alumina, and of subsequent experiments with the De Ville electrolytic process. Cowles' patents describe an electric furnace into which he introduces the aluminum compound mixed with small granular particles of carbon. An intense electric current is passed through the furnace, and is carried by the granulated carbon. A degree of heat is thereby produced which is intended to smelt the aluminum compound, and to permit an alloy with some other metal, as copper. The Bradley invention contemplates the introduction of the refractory ore into a furnace in which are a movable carbon anode and a cathode. These are placed so near together at the beginning of the operation that, when the current is applied, an electric arc is formed between them. The arc generates enough heat to melt the ore near the anode and cathode, and this melted portion of the ore thereafter carries the current, and gradually effects the

melting of the entire mass of ore in the furnace. As soon as any part of the ore is melted, electrolysis is intended to take place. The gist of the invention is the use of the electric current, first to fuse the refractory ore, and subsequently to electrolyze it, and disrupt it into its constituent parts. A fuller description of the Cowles and Bradley patents is contained in the opinion of this court in *Lowry v. Aluminum Co.*, 56 Fed. 488. The Cowles patents, here relied on, were in evidence at the original hearing. The Bradley patents were not introduced in evidence, though well known to defendant and its counsel. The present claim of the defendants is that, as cryolite was a well-known flux for alumina, it was mere mechanical skill, and involved no discovery or invention, to use alumina in the Cowles and Bradley furnace (which were patented some years before the patent in suit), with cryolite as a flux; that the use of cryolite as a flux for alumina in the Cowles or Bradley furnaces must result in the electrolysis of the alumina, and the deposit of the aluminum at the cathode, and would be the patent process claimed by complainant. It is pressed upon the court by the present counsel for the defendant that the use of cryolite as a flux is the same as its use as a dissolvent for alumina, and that the mistake made by the former counsel for the defendant and by the court was in supposing that the use of a flux in the smelting operation was different from the use of the same material as a fused dissolvent. No such distinction, even if it is maintainable, was conceded by the former counsel for the defendant, or taken by the court. In a very elaborate argument by defendant's counsel at the original hearing, great stress was laid by them on De Ville's use of cryolite in his chemical process for the manufacture of aluminum to free the globules of the metal from a film of alumina which prevented the union of the globules into a button, and which was formed by the attraction of the aluminum and the oxygen, in the moisture developed in the process, for each other. This was, speaking strictly and technically, the use of cryolite as a flux with which to attract and draw to itself the obstructing alumina. It was treated by all the counsel in the case and by the court as showing that, to the extent to which it removed the alumina from the globules of aluminum, the cryolite was a dissolvent of the alumina. But it was held by the court that the experiment only showed that the cryolite would dissolve a small per cent. of its own volume and quantity of alumina, and gave no indication that alumina would dissolve as freely as sugar in water in fused cryolite or any other double fluoride of sodium and aluminum. It may be conceded, therefore, for the purpose of this argument, that, if cryolite had been shown to be a free flux for alumina in the reduction of aluminum, it would not be a new discovery to melt aluminum in fused cryolite. The decision of the court rested on the degree of the fusibility of alumina in cryolite, which De Ville's description of his process and that of those who follow him show to be a very small per cent., and did not suggest the very large per cent. of fusibility which Hall discovered, and which his process requires. It is utterly immaterial, therefore, whether the cryolite be called a "flux" or a "dissolvent" of the

alumina, because, in either case, the extent to which De Ville's experiments showed that it could dissolve or flux alumina was very small. As stated in the original opinion in this case:

"If cryolite only dissolved one per cent. of its weight in alumina, Hall's process would never have been heard of. The difference between what Hall discovered and what was known before him in this regard is the difference between complete knowledge on a subject and so little as to be wholly useless and not to suggest further inquiry. It is impossible, if De Ville had any knowledge that alumina could be dissolved in cryolite, as Hall found, that he should not have made a note of it, for all the experts agree that he observed most carefully, and noted exactly all that he observed."

But it is said that the court reached its conclusion as to the small per cent. of alumina which De Ville found cryolite would dissolve by inferring from De Ville's writings and those of subsequent chemists that cryolite would dissolve about as much alumina as the fluoride of calcium (commonly called "fluor spar"), and by assuming that fluor spar would not dissolve more than 1 per cent. of alumina. It was in evidence at the hearing by one of defendant's experts that fluor spar would not dissolve more than 1 per cent. or  $1\frac{1}{2}$  per cent. of alumina. Evidence is now sought to be adduced to show that, by actual experiment, fluor spar will dissolve 25 per cent. in its own weight of alumina. The person making the experiment was not submitted to cross-examination, and yet from his own statement it appears that the result was only obtained after the application of a very high degree of heat, and was a surprise to the operator in whose first experiment but  $4\frac{1}{2}$  per cent. was dissolved. The statement of defendant's expert in the evidence at the hearing showed what was then known concerning the solubility of alumina in fluor spar. The matter was only important in the construction of De Ville's language, and as, in the art, it was supposed that fluor spar dissolved but a small per cent. of alumina, even down to the time when defendant's witness testified, it is entirely irrelevant and immaterial what subsequent experiments have developed. Another standard of comparison suggested by De Ville's description of his experiment was the solubility of alumina in fluoride of sodium, which he used often for the same purpose as the cryolite. That will dissolve even less than 1 per cent., as defendant's witness testified; and it is not now proposed to show this to be a mistake. The evidence which has been introduced by the defendant consists of the deposition of another expert and further quotations from De Ville's works and from subsequent chemists. Everything which has been shown is carried back to the process for making aluminum by chemical reactions discovered by De Ville, and which was the only practical process until Hall's process by electrolysis was discovered to the world. The evidence is simply cumulative, and does not at all change the conclusion of the court with reference to its effect. Neither the Bradley nor the Cowles patents contain the slightest suggestion that cryolite should be used as a flux for the refractory alumina, and no evidence is sought to be introduced that any one ever actually used cryolite in furnaces for that purpose. The question presented by the defendant, therefore, is exactly the same as that which the court originally passed upon, and which was

fully argued to the court by able, industrious, and faithful counsel, on elaborate briefs and evidence, and was fully considered by the court. There was no mistake of counsel; there is no issue which was obscured by the arguments of complainant's counsel; and this is only an attempt to introduce evidence of a cumulative character to the same point decided against the defendant, with no showing that such cumulative evidence was not within the control of the defendants, or could not have been produced by reasonable diligence. The fact is that the strongest quotation, upon which the expert called by the defendant relies, is that which is quoted in full in the opinion of the court already delivered. It is said that the court made an error in supposing that the globules of aluminum produced by De Ville's chemical process, which refused to unite because of a film of alumina on their surface, were washed off by the cryolite which De Ville introduced into the process for the purpose of facilitating union of the metal globules. The expression "washed off" may not have been the most fortunate one. The court did not suppose that the cryolite was introduced into the process after the globules had been formed, because De Ville expressly states that the cryolite was put into the original mixture. But De Ville says that the action of the cryolite was to remove and dissolve the film of alumina which formed on the surface of the globules of the aluminum as soon as they were exposed to the moisture; and, in the sense of dissolving off of the surface of the globules this thin, slight, and imperceptible film of alumina, the action of the cryolite may properly be described as washing off the alumina. It is to be observed that in De Ville's process no alumina was used at all; that its presence in the process, and its obstruction to a union of the metal particles, were matters of conjecture by De Ville, supported, it is true, by his finding a slight amount of alumina in the slag or refuse after the metal was removed. There was but a trace of alumina in this slag, and yet, in order to accomplish De Ville's purpose of dissolving the alumina, he found it necessary to introduce five parts of cryolite to ten parts of fluoride of aluminum and two parts of sodium. This shows conclusively that the amount of alumina which the cryolite dissolved in this experiment was a very small percentage of the cryolite used. It should be remarked, moreover, that the Hall process would still be a patentable process, and the only one known for practically making aluminum by electrolysis, even if it had been well known that alumina would freely dissolve in fused cryolite; for it was conclusively shown by the evidence that never before Hall did it, had alumina been disrupted by electrolysis into its constituent parts. It therefore follows, even if the conclusion already reached is not well founded as to the effect of the evidence touching the solubility of alumina in fused cryolite, that Hall's patent would still be a valid one.

This brings us to the second ground of the motion; namely, that the court erred in the view which it took of De Ville's process of making aluminum by electrolysis. The argument on this head is a mere restatement of the old arguments made on the original hearing, and deserves no further notice. The difference between the

De Ville process and the Hall process for electrolyzing aluminum is made as plain as the court can make it in the opinion filed on the merits, and nothing that has been said on the argument of this motion in the slightest degree shakes the court's views on that point. The experiments reported do not make the case different in any respect.

The motion for a rehearing is denied.

# OFFICE SPECIALTY MANUF'G CO. v. COOKE & COBB CO.

(Circuit Court, S. D. New York. September 28, 1894.)

This was a suit in equity by the Office Specialty Manufacturing Company against the Cooke & Cobb Company for the infringement of letters patent No. 217,909, granted to F. W. Smith and J. S. Shannon, July 29, 1879, for a paper holder; letters patent No. 312,086, granted to William H. Clague, February 10, 1885, for a paper file; and letters patent No. 331,259, granted to J. S. Shannon, November 24, 1885, for an index for paper files. Heard on motion for a preliminary injunction.

Frederick R. Church, for complainant.  
W. C. Donn, for defendant.

LACOMBE, Circuit Judge. As to patents Nos. 312,086 and 331,259, there have been no prior adjudications sustaining them. It is true that very many letter files embodying the devices described in them have been sold, but such letter files appear also to have contained other devices as well. In view of the small cost of the articles, and the multitude of other varieties of letter files on the market, the mere fact that there have been extensive sales is very unsatisfactory evidence of a public acquiescence in the validity of the patents. Patent No. 217,909 appears to have been twice sustained by Judge Blodgett (*Shannon v. Printing Co.*, 9 Fed. 205; *Schlicht & Field Co. v. Chicago Sewing Mach. Co.*, 36 Fed. 585); but there was before him neither the "English file" nor the Dixon patent, which are introduced here. Neither of these, it is true, is an anticipation; but, when examined in connection with the other patents which were before Judge Blodgett, they make the question of patentable invention, to say the least, a doubtful one, and a preliminary injunction, therefore, should be denied.

# N. K. FAIRBANK CO. v. CENTRAL LARD CO.

(Circuit Court, S. D. New York. October, 1894.)

## 1. TRADE-MARK—DESCRIPTIVE NAME—"COTTOLENE."

The word "Cottolene," designating a substitute for lard composed of cotton-seed oil and the product of beef fat, is not so descriptive of the substance and quality of its component parts that it cannot be used as a trade-mark.

## 2. SAME—INFRINGEMENT.

The use of the word "Cottoleo" on the tierces and tubs containing a compound of cotton-seed oil and the product of beef fat is an infringement of the trade-mark "Cottolene" previously registered for the sale of the same substance, and used in marking tierces and tubs.

## 3. SAME.

It is no defense to a suit for infringement of the trade-mark "Cottolene" by the use of the word "Cottoleo" that defendant sold under his own name, and made no attempt, other than by use of the word "Cottoleo," to sell his goods as if manufactured by plaintiff.

**In Equity.** Bill by the N. K. Fairbank Company against the Central Land Company for an injunction to restrain the infringement of a trade-mark. Granted.

Sullivan & Cromwell and Rowland Cox, for complainant.

A. E. Blackmar, for defendant.

TOWNSEND, District Judge. This is a bill in equity for an injunction against the infringement of the complainant's trade-mark "Cottolene" by the use of the word "Cottoleo." The complainant began the manufacture of the article, and devised and registered the word "Cottolene" as a trade-mark in 1887. It obtained a large and increasing business. In May, 1892, its sales amounted to 1,000,000 pounds a month. Cottolene is a substitute for lard. It is composed of cotton-seed oil and the product of beef fat. Beef fat or suet, under heat and pressure, yields two products, oleostearine and oleomargarine. The former is a solid, and is used in making a substitute for lard. The latter is more nearly a liquid, and is used in making a substitute for butter. The word "oleo" is used when colloquially among merchants to indicate either oleomargarine or oleostearine. At the time when defendant, in 1892, commenced the manufacture of cottoleo, which is identical in composition, character, and appearance with cottolene, other articles made of the same ingredients were on sale in the market under various names other than "Cottolene," such as "Lardine," "Cotton-Oil Lard," "Panteleia," "Golden Beef Drippings," "Beef Frying Fat," etc. These facts were known to the defendant. The compound in question was well known, and defendant had a right to manufacture and sell it. Defendant sold under its own trade-name, and, except in the use of the word "Cottoleo," stenciled on tierces and tubs, did not simulate the labels or packages used by complainant. This article, however, is frequently sold in tierces to bakers, and in tubs to grocers, who sell it to customers from such tubs by the pound; so that the customer does not necessarily see the package at all. It seems clear that "Cottolene" is a proper and valid trade-mark. Although it may suggest cotton-seed oil, it is not sufficiently descriptive to render it invalid as a trade-mark under the recent decisions. The rule that names suggestive of the nature or composition of articles may be valid trade-marks if not too accurately descriptive of their character or quality has been applied in *Burnett v. Phalon*, 9 Bosw. 192, to the use of the word "Cocoaine;" in *Manufacturing Co. v. Ludeling*, 22 Fed. 823, to "Maizena;" in *Leonard v. Lubricator*, 38 Fed. 922, to "Valvoline;" in *Battle v. Finlay*, 45 Fed. 796, to "Bromidia." A more recent case is *Keasbey v. Chemical Works*, 37 N. E. 476, decided by the court of appeals in New York since the argument of this case. The trade-mark in question in that case is "Bromo Caffeine." This was held to be a valid trade-mark in the supreme court, which decision was overruled by the general term, and cited by the defendant in support of its contention that "Cottoleo" was a descriptive word. This article, called "Bromo Caffeine," made by the plaintiff in that case, was found to contain caffeine, bromide of potassium, and other substances. The opinion



in the appellate court says that bromide "might refer to bromide of potassium, or bromide of sodium, or to any other bromide, or to bromine," and thus stated its conclusions:

"We think this case comes within the doctrine of those cases which have protected the words of the trade-mark, although they suggested more or less the composition, quality, or characteristics of the article."

It also seems clear that the word "Cottoleo" is sufficiently similar to "Cottolene" to infringe it. When the printed word, as well as the sound, is considered, the resemblance is as great as that of "Cellonite" to "Celluloid" (Celluloid Manuf'g Co. v. Cellonite Manuf'g Co., 32 Fed. 94); "Wamyesta" to "Wamsutta" (Wamsutta Mills v. Allen, Cox, Man. Trade-Mark Cas. 660); "Maizharina" to "Maizena" (Manufacturing Co. v. Ludeling, 22 Fed. 823); "Saponiti" to "Sapolio" (Enoch Morgan's Sons Co. v. Wendover, Cox, Man. Trade-Mark Cas. 713). See, also, *Estes v. Leslie*, 29 Fed. 91, in which "Chatterbook" was held to infringe "Chatterbox."

Defendant's counsel does not seem to seriously controvert these propositions. His defense is novel and ingenious. He says that complainant can have no better case here than he would have if his trade-mark had been "Cottoleo," and the defendant had used the same word; and he maintains that "Cottoleo" is so far a descriptive word that it cannot be used as a trade-mark. He says:

"If such an alleged trade-mark would not have prevented the defendant from using the same word, certainly a trade-mark claimed in any other word cannot prevent the defendant from using it."

He says that, as this was a new compound when complainant began to manufacture it, they could not, by their choice of a name adopted as a trade-mark, restrict any parties thereafter manufacturing in their choice of descriptive words. He says that defendant was justified in using a word which was euphonious, and which indicated the ingredients of which the product was composed, and that no trade-mark claimed or owned by the complainant can abridge that right.

The questions, as stated by defendant, then are: First. Is "Cottoleo" so far a descriptive word that it could not be used as a trade-mark? Second. Where a manufacturer originating a new compound has given it a name suggestive of some of the ingredients, but a valid trade-mark, may a later manufacturer adopt a name similar in appearance and sound, provided the same is so far descriptive of the article that it would not be valid as a trade-mark? Defendant's counsel, in support of his contention that "Cottoleo" is a descriptive word, quotes the following, among others, as having been held descriptive, and therefore invalid as trade-marks: "Cherry Pectoral" (*Ayer v. Rushton*, 7 Daly, 9); "Taffe Tulu" (*Colgan v. Danheiser*, 35 Fed. 150); "Rye & Rock" (*Van Beil v. Prescott*, 46 N. Y. Super. Ct. 542); "Straight Cut" (*Ginter v. Tobacco Co.*, 12 Fed. 782); "Mascassar" (*Rowland v. Breidenbach*, 1 Cox, Man. Trade-Mark Cas. 386); "Cresylic Ointment" (*Soap Co. v. Thompson*, 25 Fed. 625); "Iron Bitters" (*Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625); figures "1" on cigarettes composed of two

kinds of tobacco (*Kinney v. Allen*, 1 Hughes, 106, Fed. Cas. No. 7,826). But in these cases and the others cited by defendant the words claimed as trade-marks were either originally descriptive, or had become incorporated into the English language so as to be recognized as descriptive of the article, and therefore incapable of exclusive appropriation.

The evidence shows that the word "Cottoleo" is not formed in accordance with any established rules for the formation of a new word. "Cott" is merely suggestive of cotton oil. It does not describe it, and "oleo" may describe or refer to oleomargarine as well as to oleostearine, or to other oils. "Oleo" is ordinarily used as a prefix, and not a suffix; and it is shown to be the rule in coining compound words that the name of the more important article is placed last. There were various other words in common use describing the product when the defendant coined the word. It does not, therefore, come within the principle of those cases where there is only a single name to designate the new article, or where the new name is used merely as descriptive of the article. Defendant's theory that, where a suggestive trade-mark has been adopted, another desiring to obtain the benefit of the trade-mark may coin a word not already in the language, and not made according to the regular rules for coining new words, yet sufficiently indicative of the quality and character of the article to be invalid as a trade-mark, and sufficiently like the trade-mark in use to obtain the benefit of an infringement, seems to open the door for ingenious fraud. Under the circumstances of this case, the conduct of the defendant in rejecting all existing names, and in coining a new name, which conveys to the eye and ear so close an imitation of complainant's trade-mark seems to indicate a design to impose his article upon the public as that of the complainant, or, at least, to obtain the substantial benefit of complainant's trade-mark. It is well settled that the inventor of an arbitrary or fanciful name may apply it to an article manufactured by him to distinguish his manufacture from that of others, and that the subsequent use of such word by the public to denote the article does not deprive the originator of such word of his exclusive right to its use. *Selchow v. Baker*, 93 N. Y. 59; *Ausable Horse-Nail Co. v. Essex Horse-Nail Co.*, 32 Fed. 94; *Manufacturing Co. v. Read*, 47 Fed. 712. Neither does the fact that the defendant sold under its own name, and made no attempt, other than by the use of the word "Cottoleo," to palm off his goods as those of the complainant, constitute a defense. *Roberts v. Sheldon*, 18 O. G. 1277, Fed. Cas. No. 11,916, and cases there quoted; *Sawyer v. Horn*, 1 Fed. 24; *Hier v. Abrahams*, 82 N. Y. 519; *Battle v. Finlay*, 45 Fed. 796. It seems to be the law that, when manufacturers have educated the public to ask for a certain article by its trade-mark name, they have acquired the right to insist that products manufactured by others shall not be given to the public under that name. It is just that it should be so, for the benefit derived from such name can only be obtained by faithful service in furnishing articles of recognized value. Moreover, if the trade-mark name might be adopted by others, inferior articles might then be

produced and sold under it; and thereby the value to manufacturers of the reputation of the name used by them as a trade-mark would be destroyed.

There will be the usual decree for an injunction and an accounting.

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THE HARRY BROWN.

THE BEAVER.

THE HARRY BROWN et al. v. MOREN et al.

(Circuit Court of Appeals, Third Circuit. October 15, 1894.)

No. 13.

ADMIRALTY—COLLISION BETWEEN TOWS IN MISSISSIPPI RIVER.

The steamers B. and H., each having in tow several coal barges, were proceeding down the Mississippi river. The B., which was ahead, tied up at S. landing, but lower down than, as claimed by the H., she should have done in pursuance of an agreement alleged to have been made between them. When the B. passed the point where the H. claimed she should have tied up, the H. was a mile or more further up the river, saw the B.'s movements, and had ample room to avoid her, but instead, followed the B.'s course so closely that, after the latter was tied up, the tows collided, and two barges of the B.'s tow and one of the H.'s were sunk. *Held* that, assuming the agreement as to the place for the B.'s tying up to be proved, the B.'s violation of it did not contribute to the collision, and that the H. alone was in fault.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

This was a libel by John Moren and Michael Munhall, owners of two coal boats, against the steamer Harry Brown, for damages sustained in a collision. A petition was filed by Harry Brown and Samuel S. Brown, copartners trading as W. H. Brown Sons, claimants of the steamer Harry Brown, against the steamer Beaver, charging the latter with responsibility for damage to the coal boats and also to the steamer Harry Brown. The district court rendered a decree for libelants, apportioning the damages between the two steamers. The claimants of the steamer Harry Brown, and William J. Wood, Thomas J. Wood, Harry McDonald, and the Lysle Coal Company, claimants of the steamer Beaver, appeal.

George C. Burgwin, for the Harry Brown.

W. B. Rodgers, for the Beaver.

George C. Wilson, for appellees.

Before ACHESON and DALLAS, Circuit Judges, and BUTLER, District Judge.

BUTLER, District Judge. The suit is for damages resulting from a collision between tows of coal barges, in the Mississippi river, one of which was in charge of the Brown and the other of the Beaver. The district court having found the respondents jointly liable and decreed accordingly, each appealed, and assigned as error the failure to find and hold the other alone responsible.

There is no doubt of Moren's and Munhall's right to recover; the question is, who is responsible for the collision? The libellants supposed the Brown was, and accordingly attached her. She however, accused the Beaver with causing the accident, and had her summoned to answer not only for Moren's and Munhall's loss but also for loss suffered by herself—the Brown. The contest is therefore between the Brown and Beaver.

The district court found the former in fault for running too near the latter, and the latter in fault for failure to observe an agreement to "tie up" at a particular point in the river; which failure the court thought contributed to the collision.

We agree with the court in finding the Brown in fault. Was the Beaver also in fault? Assuming that the alleged agreement existed, does it appear that the Beaver failed to observe it? In substance it was that she should "tie up" for the night as near the upper end of Sweet Home landing (which extends a considerable distance along the river) as was reasonably practicable and safe, in the existing state of the water. No exact point was named or could be. Its selection was necessarily left to the Beaver. She tied at the designated landing. But did she tie as high up as was practicable and safe? The witnesses disagree about it. Those called on her behalf say she did. Her pilot, who had experience with the landing, says he tied as high up as he could—as high as his boat and tow could get in, and find opportunity. It is difficult to see a motive to do otherwise. He had nothing to gain by going lower, and the further down he ran, the nearer he approached to swift water. If there was a proper place to tie three or four hundred yards higher up, as contended, it seems reasonable to believe the Brown would have tied there. She saw the Beaver go by, and was far enough away to provide for going in. There was no reason why she should go below the Beaver in pursuance of the alleged agreement, if the Beaver failed to observe it. Her pilot was unable to explain why she did not stop there, but suggested that darkness was approaching. There is nothing in this suggestion. It was as light for her as for the Beaver, and both "tied up" later, below. It seems therefore, impossible to say that the Beaver did not observe the alleged agreement.

But granting she did not, her failure is of no consequence unless it contributed to the collision; and we are unable to see how it did. The Brown was not misled. There is no reason to believe her course would have been different if she had known from the beginning that the Beaver was going below, or that the collision would not have occurred if she had stopped above. She was more than a mile ahead in plain view, as the pilot and master of the Brown admit. They saw her pass the point where they say she should have stopped. What excuse therefore have they for running into her? They could have stopped at this place if it was a suitable one, or if they preferred to go on could have run at a safe distance towards the other side. The channel was of ample width. The suggestion of an adverse current is unimportant; it did not exist at this point; and would afford no excuse if it did. It was their

duty to know the channel and its currents, and to govern their movements accordingly. Intending to pass the Beaver, they should have kept well over, especially in view of the unwieldy tows in charge; but instead of doing so they followed the Beaver's course so nearly, that when the danger became apparent it could not be escaped. They were then probably embarrassed by the adverse current, for which they should have provided higher up.

The decree of the district court must be reversed and a decree entered against the Harry Brown in favor of John Moren and Michael Munhall for \$3,775.41 with interest from October 4, 1890, together with the costs in the district court, and of the several appeals.

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THE RESCUE v. THE GEORGE B. ROBERTS, et al.

(District Court, E. D. Pennsylvania. November 12, 1894.)

1. SALVAGE SERVICES—WHAT CONSTITUTE.

Where a barge, which was the only one of a tow of seven not stranded and sunk, was drifting in a severe storm, without motive power of any kind or an anchor suited to the occasion, and it is probable she would have sunk had she not been rescued by libelant, and conveyed to harbor, the service of libelant is a salvage service, though the barge was staunch and well constructed, and might have survived the storm, and it was possible she would have been picked up by others if libelant had not rescued her.

2. SALVAGE—COMPENSATION.

A tug rescued a barge adrift in a severe storm on Chesapeake Bay, off Ft. Carroll, and conveyed her to Baltimore. The time occupied was brief, and the expenses to repair the damage sustained in the work were small. The value of the barge and cargo was about \$3,700. *Held*, that \$800 was a just compensation.

Libel by Vivian Phillips, managing owner of the steam tug Rescue, against the canal barge George B. Roberts and her cargo of coal.

Curtis Tilton, for the Rescue.

John G. Johnson and J. Wilson Bayard, for the George B. Roberts.

BUTLER, District Judge. August 12, 1893, the tug "Stella" started with seven barges in tow, the "Roberts" being one, on a voyage from Baltimore to Philadelphia. Encountering a very severe storm, off Ft. Carroll, on Chesapeake Bay, she turned back, and after remaining in harbor at North Point creek during the night, she continued her course to Baltimore. On her way up five of the barges broke adrift, the Roberts among them, and all save the latter foundered and sank. The tug was unable to afford any aid, all her efforts, being required to take care of herself and the balance of her tow. While the Roberts was helplessly drifting before the wind and waves, the libelant who was coming up to Baltimore went to her relief, and making fast a hawser, (with some difficulty) conveyed her to that place.

The respondent does not deny liability for the service, but denies that it was a salvage service which should be compensated ac-

cordingly. This presents the only question involved. How it should be decided depends upon the testimony respecting the "Roberts" situation, whether she was in peril or not. The testimony respecting this is conflicting, and irreconcilable. A discussion of it would be unprofitable. It is simply a question who should be believed. A careful examination of all the evidence has satisfied me that the Roberts was in serious and immediate peril. She was adrift in a very severe storm, without motive power of any kind, without an anchor suited to the occasion, and was at the mercy of the wind and waves. It is improbable that even a much heavier anchor than the one she carried would have held her, and if she had been held it is more than probable that she would have sunk either from filling with water, or the shifting of her cargo which had already produced a serious list. Smaller vessels dragged much heavier anchors during the storm. When taken in charge she was helpless, and in serious danger of suffering the fate that overtook the other barges torn from the tow. It is true she was staunch and well constructed for a boat of her class; but she had little chance of weathering such a storm. Indeed that she was in peril is sufficiently attested by the fate of the other barges torn loose. Of course it is possible she might have been picked up by others if the libellant had not come to her rescue, or that she might have ridden out the tempest; but such possibility is immaterial; it is much more probable she would have gone to the bottom. That her tug the "Stella" would have returned from Baltimore in time to save her I do not believe. That the storm was very severe is put beyond question by the undisputed evidence of its consequences. The lower streets of Baltimore were flooded, and the running of cars stopped by the waves driven up: several vessels were wrecked or disabled and others torn from their anchorage and stranded in that vicinity. Indeed the consequences to this tow, alone sufficiently attests the violence of the storm.

The libellant rendered salvage service, and must be paid accordingly. While he encountered some risk it was not very serious; the time occupied was very brief, and very little expenditure was necessary to repair the damage sustained in the work. In view of all the circumstances, (the value of the barge and her cargo, which was about \$3,700 included) I think \$800 a just compensation. There is no rule by which the value of the services in such cases can be accurately measured. At best the award must be the result of an intelligent guess. I may be allowed to say in passing that I incline to believe the award in most cases is more likely to be too high than too low; and that I am not much influenced by what courts have allowed in other instances where the facts, though bearing a general resemblance, are not the same.

I attach no importance to the circumstance that the Roberts left Baltimore after the storm without settling with the libellant. She left on her voyage broken up by the weather, in pursuance of her usual business and habit; and not with intent I think to shirk responsibility.

A decree may be prepared accordingly.

THE ORANGE.<sup>1</sup>

## NEW YORK CENT. &amp; H. R. R. CO. v. THE ORANGE.

(District Court, S. D. New York. July 21, 1892.)

## COLLISION—STEAM VESSELS CROSSING—RULE 23—DUTY OF PRIVILEGED VESSEL—CONTRARY SIGNAL—CHANGE OF COURSE.

A tug was crossing the North river from Hoboken to New York, and heading a little above the New York slip of the ferryboat O. The O. left her slip, and, when some distance out in the river, gave two whistles to the tug. The evidence for the ferryboat was that, at the time when the signal was given, the ferryboat was heading nearly across the river, and had the tug well on her starboard hand. The tug's pilot testified that, when the whistles were given, the ferryboat was a little on his port bow, swinging up stream, so that he thought her signal was a mistake for one whistle, whereupon he answered with one, and ported his helm. The vessels almost immediately came in collision, the tug being struck on her port side and sunk. *Held*, on the evidence, that the ferryboat's signal was proper under the circumstances, and the tug was bound, under rule 23, to do nothing to thwart her maneuver, and hence was in fault for her contrary signal, and for changing her course to starboard; that the ferryboat, having stopped and reversed on hearing the contrary signal from the tug, and thus having done all she could do to avoid the collision, was not in fault therefor.

In Admiralty. Libel for collision.

Carpenter & Mosher, for libellant.

Leon Abbett, Jr., for claimant.

BROWN, District Judge. The above libel was filed to recover damages for injuries to the libellant's tugboat No. 3, sustained in a collision with the ferryboat Orange, a little before 2 p. m. of December 30, 1891, about 800 or 1,000 feet off the ferry slip at the foot of Barclay street, New York. The tug was unincumbered and bound from Hoboken for the libellant's docks a little above the Barclay street slip. She had come down the North river as far as Pavonia ferry, keeping a short distance from the Jersey shore, and then made across the river, heading, as the pilot says, for about the Courtlandt street ferry, though I am not satisfied of the accuracy of this statement. When on this course, and a considerable distance off from the Chambers street pier, she observed the ferryboat Orange, bound from Barclay street to Hoboken, coming out of her slip, and got from her a signal of two whistles, indicating that she would go to the westward of the tug. The pilot of the tug, considering the course of the Orange unusual in the situation, and in the very high northwest wind and strong tide, answered with one whistle and ported his helm. In about 45 seconds afterwards the boats were in collision, the stem of the ferryboat striking the tug at nearly right angles a little aft of amidships on her port side, and damaging her so that she sank.

The most important difference in the testimony is in regard to the heading of the two boats at the time the contrary signals were

<sup>1</sup> Decree affirmed by the circuit court of appeals, without opinion, (June 7, 1894), upon opinion of district judge.

exchanged. The pilot of the tug testifies that the ferryboat was at that time a little on his port bow, swinging to the northward and eastward, and heading pretty nearly up river, so that he supposed her two whistles to have been given by mistake for one whistle. The claimant's witnesses contend that the Orange, when she gave her signal of two whistles, was heading nearly across the river, having the tug well on her own starboard hand, and seeing the tug's starboard side.

The disinterested witnesses, including the libellant's witness Wilson, pilot of the Cyclops, seem to me to confirm the claimant's account rather than that of the libellant. The weight of testimony is with the respondent, so far at least as that the ferryboat at the time of exchanging the whistles was heading well over towards the Jersey shore, and pointing not above Pavonia ferry. The ferryboat must, therefore, have been heading at least four points across the river, and could not have been heading, as the pilot of the tug testifies, for his port quarter. If the situation was such as the pilot of the tug describes, it seems to me impossible that the collision could have happened. For he immediately ported his wheel and continued it so until within 100 or 200 feet of the ferryboat. He was going through the water at the full speed of 10 knots, besides a three-knot ebb tide, and he changed his course nearly eight points. Had the Orange been heading as he says she was, she must have passed well clear of him to the eastward.

1. In the position which the weight of evidence establishes, namely, that at the time the signals were exchanged, the tug was well on the starboard bow of the ferryboat, it follows, whether the ferryboat was nearly directly ahead of the tug, as the libellant claims, or on her starboard hand, as the respondent's witnesses allege, that the two whistles of the ferryboat in such a wind and tide were a correct and proper signal for her to give; and that the tug, if she did not keep any more to port in order to assist the ferryboat's maneuver, was at least bound under rule 23 to do nothing to thwart or embarrass it by giving a contrary signal, or by changing her course to starboard. The tug was light, unincumbered, and easily handled; she could move rapidly in any direction; and I must, therefore, hold her in fault for her contrary signal, and for her change of course and thwarting maneuver without justification. For the change of course was so great as to show that but for that change no collision would have happened.

2. It is contended that the ferryboat was in fault because, as it is said, she did not stop and reverse. The witnesses for the tug are mistaken on this point. The proof is undoubted that the ferryboat did stop and reverse immediately upon hearing the contrary signal from the tug. The pilot of the Cyclops says that she slowed, but he did not think she reversed. The time that elapsed between the signal of the tug and the collision was so short that but little reversal was possible. The boats were approaching each other at the rate of about 14 miles an hour, or 1,400 feet per minute; and as they were distant only about 900 or 1,000 feet when the whistles were exchanged, the time between the signals and collision would be but about 45 seconds. The



engineer of the ferryboat testifies that he got part of a turn backwards. In so short an interval I cannot find any substantial delay, or any neglect to reverse promptly. The collision arose, I think, wholly from the misapprehension of the pilot of the tug as to the expected course of the ferryboat; from his mistake in giving a contrary signal, and from his change of course to starboard. Manifestly except for this, no collision would have occurred. As the ferryboat had no reason to anticipate this course by the tug, and the moment it was perceived did all she could to avert the consequences of it, I must hold her without fault, and direct a dismissal of the libel, with costs.

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## WEBSTER v. DISHAROON.

(District Court, D. Maryland. May 26, 1894.)

## COLLISION—VESSEL NAVIGATED BY OWNER PRO HAC VICE—OWNER'S LIABILITY IN PERSONAM.

Master running vessel on shares, paying all wages and expenses, and having sole control of navigation, is owner pro hac vice, and for collision resulting from negligence of himself or crew the owner is not liable in personam. *Thorp v. Hammond*, 12 Wall. 416, applied.

This was a libel in personam for collision, filed by John P. Webster against A. C. Calvin Disharoon.

Thomas S. Hodson, for plaintiff.  
Beverly W. Mister, for defendant.

MORRIS, District Judge. This is a libel in personam, brought by the owner of the schooner *Ida Virginia* against the owner of the schooner *Margie J. Franklin* to recover the value of the schooner *Ida Virginia*, which became a total loss because, during a storm, the schooner *Margie J. Franklin* dragged her anchor, and drifted down on her, and injured her so that she had to slip her cable, and went ashore. The allegation in the libel is that the *Margie J. Franklin* was not provided with sufficient anchors and cable to hold her in a storm, and that sufficient anchors were not put out on her, and sufficient cable was not paid out, and the collision was occasioned by a want of care and skill on the part of her crew. Prior to the filing of this libel in personam, the same libelant filed a libel in rem for the same cause of action against the *Margie J. Franklin*. The owner did not claim her, and did not stipulate, and she was sold pendente lite, but brought only \$45, which was not sufficient to pay the costs. She was bought in for the benefit of her owner, the respondent in the present case. The answer, among other defenses, alleges that the schooner was not under the management of the owner at the time of the collision, but was being run on shares by her master, George W. Webster, who was to receive two-thirds of her earnings, out of which he was to provide and pay the crew and all her running expenses, and had sole control of her navigation; and that, said Webster being the owner pro hac vice, the respondent, as owner, cannot be held responsible in personam for the damages resulting from this collision.

It is clear that the master of the Margie J. Franklin must be regarded as her owner pro hac vice. He sailed her on shares, and had sole control of her use and navigation, employed and paid her crew, and provided them food. I know of no case which has disturbed the authority of *Thorp v. Hammond*, 12 Wall. 416, in which it was held that for damages resulting from a collision the owner pro hac vice is liable, and the general owner is not. The vessel is liable in rem, but the general owner is not liable in personam. It is urged in this case that the general owner was bound to make his vessel seaworthy, and properly equip her, and that the drifting in this case occurred because the Margie J. Franklin was not equipped with sufficient anchors and cables. I do not find that the drifting resulted from the insufficiency of the cables or anchors. The storm arose on Sunday night, after midnight, and the collision occurred after daylight Monday morning. The master had gone ashore on Saturday, to his home, leaving the schooner in charge of her crew of oyster dredgers. He left her held by her larger anchor and 15 fathoms of chain. When, from the force of the storm on Sunday night, the Margie J. Franklin began dragging, her crew did not let out more chain, although there was 30 fathoms to the larger anchor, and did not get out the smaller anchor, which had about 25 fathoms of chain, until after the collision. The master testifies that the owner had told him that only 15 fathoms of the chain to the larger anchor was in good order, and not to pay out more. This is denied by the owner, but, even if it were true, there is no reason why the smaller anchor should not have been put out, and there is no proof that the two would not have held her; and it is only a supposition that, if all the chain to the larger anchor had been paid out, it would have broken. If the chain had broken, that would have been proof that it was in bad order, or, if the master had been on board, and had refrained from paying out the chain because it was in bad order, it might be contended that the vessel had been allowed to drag because of the insufficiency of the chain. But nothing of that sort appears. The crew on board did nothing. They neither put out the smaller anchor in time, nor did they pay out more chain on the larger anchor. It is not proven that the two anchors would not have been sufficient if they had been used. There was ample time to have gotten out the second anchor, as the vessel was dragging from about 3 o'clock until after daylight. The master, as owner pro hac vice, was liable for this neglect, and not the general owner, and the libellant's remedy against the general owner was exhausted when he libeled the vessel in rem.

## UNITED STATES v. PETERSON.

(District Court, E. D. Wisconsin. October 23, 1894.)

**FEDERAL COURTS—JURISDICTION—HIGH SEAS.**

The district court of the Eastern district of Wisconsin has no jurisdiction of an indictment for an assault committed on a vessel on Lake Huron within the boundary of the jurisdiction of the Eastern district of Michigan.

On Demurrer to Indictment against John G. Peterson.

J. H. M. Wigman, U. S. Atty.

Markham & Nickerson, for defendant.

SEAMAN, District Judge. An indictment is presented charging the defendant, master of the schooner Belle Brown, for an assault with a dangerous weapon upon one of the crew. It is alleged that the vessel belonged to a citizen of the United States, and the assault was committed thereon, "on waters on the high seas, and within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, to wit, upon the waters of Lake Huron." The defendant demurs to the indictment, alleging that this court is without jurisdiction of the offense charged; and, for the purpose of having the question determined at this stage, the district attorney requests that the following undisputed facts be considered as though set forth in the indictment: That the vessel was within 25 or 30 feet of a bridge pier, known as "Spencer's Pier," in the state of Michigan, on the west shore of Lake Huron, where the offense was committed; that the crew were warping the vessel to the pier, for landing, by means of rope and tackle; that it was upon the open waters of the lake, and not in any harbor or bay. So considered, the question of jurisdiction is fairly presented.

Section 5346, c. 3, tit. 70, of the United States Revised Statutes provides:

"Every person who, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state, on board of any vessel belonging in whole or in part to the United States, or any citizen thereof, with a dangerous weapon, or with intent to perpetrate any felony, commits an assault on another, shall be punished by a fine of not more than three thousand dollars, and by imprisonment at hard labor not more than three years."

An act of congress of September 4, 1890 (26 Stat. 424, c. 874), provides for the punishment of any person who commits offenses mentioned in the chapter which contains the above section, upon United States vessels, "being on a voyage upon the waters of any of the Great Lakes" (naming them, and including Lake Huron), or connecting waters; and "the circuit and district courts of the United States, respectively," are vested with the same jurisdiction in respect of such offenses that they possess in respect of offenses in said chapter.

The recent decision of the supreme court in *U. S. v. Rodgers*, 150 U. S. 249, 14 Sup. Ct. 109, is based upon section 5346, as the offense there charged arose prior to the enactment of 1890, and the opinion

states that the latter act does not enter into consideration. It was held that the Great Lakes came within the general designation of "high seas," and that the district court of the Eastern district of Michigan had jurisdiction of an offense described in section 5346, which was committed upon an American vessel while in the Detroit river, and beyond the boundary line between the United States and Canada, and hence within the territorial limits of the Dominion of Canada. If the statute of 1890 had been in force at the time of the alleged offense, it is not probable that any question would have been raised on the state of facts there shown, for the power of congress to legislate with reference to the Great Lakes, as within the admiralty jurisdiction of the United States, is now firmly established. The opinion of Justice Brown, while district judge, in the Case of Byers, 32 Fed. 404, clearly states this power of congress, and seems to have suggested the legislation of 1890. That decision is only overruled by the Rodgers Case in so far as it held that the Great Lakes were not within the designation of "high seas" under the statutes then existing.

In view of the controlling force of the provision contained in the second section of the third article of the constitution of the United States, I deem it unnecessary to enter into an inquiry with reference to the distance of the vessel from the Michigan shore, or of the effect of any attachment of her lines to or near the pier while warping the vessel for a landing. The constitutional provision requires that the trial of all crimes "shall be held in the state where the said crime shall have been committed; but, when not committed within any state, the trial shall be at such place or places as the congress may by law direct." The contention is, in support of the indictment, that the words "out of the jurisdiction of any particular state," as recited in section 5346, do not qualify the term "high seas" therein, but only the localities which are subsequently named. On the open coast of the ocean there is no extension of the territorial boundaries of the state, except the marine league, conceded by international law for certain purposes, well defined in *Manchester v. Massachusetts*, 139 U. S. 240, 11 Sup. Ct. 559. Even there, as stated in 1 Bish. Cr. Law, § 143, where an offense is committed "upon seas washing an open coast, and within the marine league belonging to the territory of the state, still it is punishable as committed against the United States." See *U. S. v. Grush*, 5 Mason, 290, Fed. Cas. No. 15,268, for a clear exposition by Mr. Justice Story of the original statute of 1825 (now section 5346), and of which that distinguished judge was the reputed author. But it is unnecessary to decide whether the terms "out of the jurisdiction of any particular state" would qualify or apply to the term "Great Lakes," as employed in the act of 1890, because it is clear that the vessel was within the limits and jurisdiction of the courts of the United States for the Eastern district of Michigan, when the alleged offense was committed, and hence within the constitutional inhibition of trial in this court.

By section 538, Rev. St. U. S., the Eastern district of Michigan "includes all the territory and waters of said state not included within" the boundaries there given of the Western district, which leaves the

waters of Lake Huron in the Eastern district. By treaties between the United States and Great Britain, a certain line through the center of Lake Huron was established as the national boundary line, but with jurisdiction retained by each nation over its vessels, as a portion of its territory, while navigating such waters, irrespective of the boundary line. The act admitting the state of Michigan as one of the states of the Union establishes the same line as the easterly and northerly boundary line of that state. In *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 13 Sup. Ct. 110, it is clearly recognized that the limits of the states bordering upon the Great Lakes extend to the center of the lakes, respectively. In *U. S. v. Bevans*, 3 Wheat. 336, Chief Justice Marshall says the extent of jurisdiction which a state possesses "is coextensive with its territory; coextensive with its legislative powers." It is held in *U. S. v. Rodgers*, supra, that this boundary line does not change the character of the lakes as high seas, nor impair "the jurisdiction of the United States to regulate vessels belonging to their citizens navigating those waters, and to punish offenses committed upon such vessels," but this remark is only with reference to the right or assertion of national jurisdiction, which becomes paramount to that of the state in matters of national commerce and navigation. The actual limits of the state are not changed by this view. The place of this alleged offense is within the state of Michigan, and within the territory assigned to the district and circuit courts of the Eastern district of Michigan. In *U. S. v. Jackalow*, 1 Black, 484, the supreme court states the rule which governs here:

"Crimes committed against the laws of the United States out of the limits of a state are not local, but may be tried at such place as congress shall designate by law, but are local if committed within the state. They must then be tried in the district in which the offense was committed."

There the alleged offense occurred upon Long Island Sound, which is recognized and charged as of the "high seas." The issue, as there declared, was whether or not it was committed outside the jurisdiction of any particular state, "because, if not, inasmuch as it was not committed within the state of New Jersey [where the indictment was found], the circuit court of the district of that state had no jurisdiction." The case of *U. S. v. Dawson*, 15 How. 467, states the same rule imposed by this constitutional provision. The statute (section 730, Rev. St. U. S.) under which this jurisdiction is asserted is clearly in accord with this provision, as it authorizes trial in a district where the offender is found or first brought, in case the offense be committed "out of the jurisdiction of any particular state or district," and not otherwise.

The question here presented would not arise in a case of offense committed upon the open coast of the ocean or great seas forming external boundaries of the nation, because the boundaries of the state and district are not extended upon such waters, as they are upon the Great Lakes and upon Long Island Sound. The constitutional provision would have no room for application to the former case, but it does apply to the latter. Whether Lake Huron be regarded as high seas, in the light of the *Rodgers* decision, or as one of the Great Lakes, under the legislation of 1890, the boundaries and

jurisdiction of the Eastern district of Michigan are not changed, but extend to the center of the lake, and include the place of this alleged offense. To confer jurisdiction upon this court, it must appear that the offense was committed outside the Michigan boundary line, beyond the Eastern district of Michigan; and I am inclined to the opinion that the indictment must so allege where an offense upon Lake Huron is charged. Upon the admitted facts, the demurrer must be sustained. The second indictment is within the same rule, and demurrer is sustained.

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DANAHY v. NATIONAL BANK OF DENISON.

(Circuit Court of Appeals, Seventh Circuit. November 27, 1894.)

No. 171.

FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP—NATIONAL BANKS.

Federal courts have no jurisdiction of an action by a national bank on a note, where the record does not show diverse citizenship.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Assumpsit by the National Bank of Denison against Daniel Danahy. Plaintiff obtained judgment. Defendant brings error.

Joseph P. Rafferty (James Maher, of counsel), for plaintiff in error. D. H. Pinney, E. R. Eldridge, and E. J. Wilbur, Jr., for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

JENKINS, Circuit Judge. A review is here sought of a judgment rendered in a suit upon certain promissory notes claimed to have been made by the firm of Danahy & McDonald. We are constrained to reverse this judgment without passing upon the merits of the controversy, and for want of showing of jurisdiction in the court below. The allegation of the declaration is as follows:

"The National Bank of Denison, a corporation, complains of Daniel Danahy and Donald J. McDonald, late partners under the firm name of Danahy & McDonald, defendants in this suit, summoned," etc., "of a plea of trespass on the case on promises."

There is no allegation in the declaration of the citizenship of either the plaintiff or the defendant. There is no other allegation of the incorporation of the plaintiff than that stated. We are asked to take judicial notice that the defendant in error is a national bank, because of its name. If we could do this, it would not avail. Formerly, a national bank could sue or be sued in the courts of the United States in the district in which it is established, without respect to the citizenship of the opposite party. Rev. St. § 629, subd. 10; *County of Wilson v. Bank*, 103 U. S. 770, decided in 1880. But under the act of July 12, 1882 (22 Stat. 162, § 4), and the act of 1887 (24 St. 552), as corrected and re-enacted in 1888 (25 Stat. 433), all national banking associations shall, for the purposes of suit,

"be deemed citizens of the states in which they are respectively located, and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state." Under the first of these acts it was held that a suit can neither be brought in nor removed into the United States courts unless a similar suit could be entertained by the same court by or against a state bank in like situation with the national bank, and that under that law nothing in the way of jurisdiction could be claimed by a national bank because of the source of its incorporation. *Bank v. Cooper*, 120 U. S. 778, 7 Sup. Ct. 777. It is clear that, in order to confer jurisdiction, the diverse citizenship of the parties to the suit must appear by the record, and this cannot be waived. This has been so often declared by the supreme court as now to be elementary. The jurisdiction need not necessarily be averred in the pleadings, if it otherwise affirmatively appears by the record. *Railway Co. v. Ramsey*, 22 Wall. 322. We have therefore searched the record to discover if jurisdiction might be saved, and the case decided upon its merits. We find, however, no evidence of the citizenship of the plaintiff in error. He states in his testimony that he lives at Aurora, Ill.; but "residence" and "citizenship" are not synonymous terms. *Robertson v. Cease*, 97 U. S. 646; *Cameron v. Hodges*, 127 U. S. 322, 8 Sup. Ct. 1154; *Anderson v. Watt*, 138 U. S. 694, 702, 11 Sup. Ct. 449; *Timmons v. Land Co.*, 139 U. S. 378, 11 Sup. Ct. 585. We have been asked, in case we should be compelled to reverse this judgment upon this ground, to remand the case with leave to amend the declaration to show jurisdiction conformable to the facts. This we are authorized to do by *Robertson v. Cease*, 97 U. S. 646, 651. The judgment will be reversed for failure in the record to disclose jurisdiction, with direction to permit amendment of the declaration in the assertion of jurisdictional facts, and to award a new trial.

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ANDREWS et al. v. THUM et al.

(Circuit Court of Appeals, First Circuit. June 23, 1894.)

No. 89.

1. APPEAL—WHO MAY TAKE.—PERSONS CONDUCTING DEFENSE.

In a suit for infringement of a patent, brought against vendors of the alleged infringing articles, the manufacturers assumed and carried on the defense, pursuant to a contract with the nominal defendants to carry on said defense to final judgment. *Held*, that they had a right to appeal from a final decree without the special consent of the nominal defendants.

2. SAME—TIME OF TAKING—PETITION FOR REHEARING.

In a suit for infringement of a patent, brought against vendors of the alleged infringing article, the manufacturers assumed and carried on the defense, and, after entry of an interlocutory order for an injunction and an account, moved to reopen the case and dissolve the injunction, for reasons touching the merits. Pending the motion the nominal parties caused to be entered a final decree for a sum settled between them as damages. The motion was subsequently heard by the court on its merits and denied. *Held*, that the motion must be held to be in effect a petition for a re-

hearing under rule 29, so that the time to appeal from the decree ran from the date when the motion was denied, not from the entry of the decree.

3. SAME—NOTICE—TIME OF SERVICE OF CITATION.

That the citation was served less than 30 days before the return day is not ground for dismissing the appeal, notwithstanding Rev. St. § 999.

4. SAME—TIME OF FILING RECORD—DISMISSAL.

That the record was not filed in the appellate court by or before the return day, and an order enlarging the time for filing it was not made or asked for until after that day, is not ground for dismissing the appeal, where the record has been filed, and the cause docketed, before the motion to dismiss is made.

5. SAME—MOTION TO DISMISS.

From a decree for complainants in a suit for infringement of a patent, the persons carrying on and interested in the defense appealed in the names of the nominal defendants. Complainants moved to dismiss the appeal for the reasons, besides others, that the assignment of errors filed was based upon a patent not set up in the answer; that the appeal was an attempt to appeal from a decision of the court below refusing a petition, after an interlocutory decree, for a rehearing, asked for upon the same patent, such refusal having been on the merits, and a matter of discretion; that appellants were estopped from appealing from the final decree, it having been agreed upon by stipulation between complainants and the nominal defendants, and the damages assessed by such agreement having been paid; that they were estopped therefrom, also, by having failed to appeal from the interlocutory decree, which granted an injunction, within the 30 days allowed therefor, and by the payment of the amount of the final decree; and that they had not acted in good faith, and had attempted to defraud the nominal defendants by offering to suppress certain evidence for a consideration to be paid them by complainants. *Held*, that these matters were not grounds for dismissal, being, so far as pertinent, appropriate only to the hearing on the merits.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit by Otto Thum and others against John A. Andrews and others for infringement of patents No. 278,294 and No. 305,118, issued to said Otto Thum, for fly paper. The alleged infringement consisted in the sale by defendants of fly paper manufactured by Benjamin F. B. Willson, carrying on business under the name of Willson & Co. Upon complainants' threatening suit against defendants for such infringement, John W. F. Willson and said Benjamin F. B. Willson had entered into an agreement with defendants that, in case any suit should be brought against defendants for infringement of letters patent by the use or sale of such fly paper, the said Willsons would assume the defense of said suit, and carry on the same to final judgment at their own sole expense, and, in case plaintiffs should succeed in any such suit, said Willsons would pay all sums that defendants should be ordered or adjudged to pay as damages, profits, or cost of suit. In accordance with this agreement the Willsons assumed and carried on the defense of this suit. The circuit court rendered an interlocutory decree for complainants on February 7, 1893. 53 Fed. 84. On May 6, 1893, the Willsons filed a motion for defendants to reopen the case, for the purpose of introducing a prior patent to a third party, alleged to be precisely similar to complainants' patent, and a motion to dissolve the injunction. On May 13, 1893, on a stipulation by complainants,



and the nominal defendants consenting thereto, a final decree was entered for complainants for \$2,500 as damages and profits and as costs of suit, and on May 15, 1893, complainants acknowledged satisfaction thereof. On June 23, 1893, the motions to reopen the case and to dissolve the injunction were heard and were denied. The Willsons filed a prayer for appeal and an assignment of errors on November 17, 1893. The appeal was allowed on February 5, 1894, and on the same day, the bond on appeal having been approved, a citation to complainants was issued, returnable March 1, 1894. The citation was served on February 21, 1894. On March 5, 1894, an order of the circuit court of appeals was made, enlarging the time for docketing the cause and filing the transcript of record to March 9, 1894. The order was filed on March 8, 1894, and the record was filed and the cause docketed in the circuit court of appeals on March 9, 1894. On March 20, 1894, complainants filed a motion to dismiss the appeal, as follows:

"Now come the appellees (complainants in the court below), and move to dismiss the appeal in the above-entitled case for the following reasons, to wit: (1) Because the record was not filed in this court on or before March 1st, the return day of the citation. (2) Because the orders of his honor, Judge Colt, extending the time for the filing of the record to March 7, 1894, at four o'clock p. m., and further extending such time to March 8, 1894, at 12 o'clock noon, were without authority of law, and are therefore void, because (a) the orders were entered after the return day of the citation, and the motion was made after the record should have been filed in the court above; (b) appellees' right to docket and dismiss under rule 16 of this court had attached, and could not be divested without a hearing; (c) said orders were entered without notice to parties or argument; (d) under the statute constituting this court (sec. 11), the rules and practice on appeal of the supreme court of the United States are made applicable, and the court has no authority to vary from such practice where it is established. (3) Because the parties moving for this appeal are not parties to the cause, and have no authority to appear herein. (4) Because the parties defendant, nominal appellants and necessary parties in this court, did not institute these proceedings, and are not joined in the appeal or in the appeal bond. (5) Because no petition has been presented, by the parties moving for this appeal, praying leave of court to intervene. (6) Because no petition or order of severance has been filed in the court below. (7) Because the assignment of errors filed in this cause is based upon a patent not set up in the answer. (8) Because this appeal is an attempt to appeal from the decision of the court below refusing a rehearing, the petition for rehearing having been based upon the same patent without amending the answer; and the rehearing, having been refused upon the merits and being a matter of discretion, is not subject to appeal. (9) Because, upon the final decree entered in the court below, appellants in this court (defendants in the court below) are estopped to appeal, inasmuch as the decree agreed upon by stipulation has been executed, and the damages assessed by agreement have been paid in full, and such damages, having been paid under a decree, cannot be recovered. (10) Because the citation was not served the statutory time before the return day of the writ. (11) Because, by section 7 of the act creating the circuit courts of appeals, the interlocutory decree was appealable within thirty days of its entry, and appellants elected not to appeal from the decree granting an injunction, and, having paid the amount of the final decree, are therefore estopped. (12) Because the parties bringing this appeal have not acted in good faith, and have attempted to defraud the defendants in the court below, nominal appellants in this court, in this: that they offered in writing to suppress all evidence in their possession affecting the validity of the letters patent in said hearing, for a valuable consideration to be paid them by the complainants, as evidenced by the

affidavits of Thomas J. Johnston and Otto and William Thum, hereunto annexed, to which affidavits and exhibits annexed appellees ask leave to refer upon the argument of this motion. For all of these reasons appellees pray that this appeal be dismissed, with the costs to the appellants, and pray leave to refer to the accompanying affidavits referred to therein in support of this, their motion."

The affidavits referred to in this motion contained averments tending, with the exhibits annexed, to establish the charges made in the twelfth paragraph of the reasons therein stated for dismissing the appeal.

John M. Perkins, for appellants.

Thomas J. Johnston, for appellees.

Before PUTNAM, Circuit Judge, and WEBB, District Judge.

PUTNAM, Circuit Judge. This is a motion to dismiss an appeal in a patent cause. The bill was brought against the vendors of the alleged infringing article. With the consent of the nominal defendants, the manufacturers assumed and carried on the defense in the circuit court, so that the ultimate result, when reached, will constitute *res adjudicata* as against them. After the manufacturers had so far embarked in the defense as to involve essentially their own interests, the permission to conduct it became irrevocable, unless they failed to conduct it properly, or to give indemnity or comply with other reasonable terms, if asked under proper circumstances. There is no suggestion in the record calling for the consideration or application of any of these qualifications.

An interlocutory order for an injunction and an account was, after a trial on bill, answer, and proofs, entered February 7, 1893. Thereupon, the manufacturers, who were defending, filed, May 6, 1893, a motion to reopen the case and dissolve the injunction, for reasons touching the merits. Meanwhile, without consulting the manufacturers, the nominal parties caused to be entered May 13, 1893, a final decree, as follows:

"Inasmuch as it appears that the parties have settled the money payments ordered by the interlocutory decree, it is hereby ordered, adjudged, and decreed that reference to a master be waived, and that defendants be ordered to pay to the complainants the sum of \$2,500 as damages and profits to be recovered by the complainants of the defendants herein, and as costs of suit."

On the 23d day of June, 1893, the court heard on its merits the motion filed May 6, 1893, and denied it. This left the injunction in full force, and, so far as concerns it, a judgment which binds the manufacturers, unless reopened on appeal or otherwise. The manufacturers took this appeal in the names of the nominal defendants within six months from June 23, but not within that period from May 13, 1893.

The objection based on the time within which the citation was made returnable is met, in every phase, by *Seagrist v. Crabtree*, 127 U. S. 773, 8 Sup. Ct. 1394.

The motion filed May 6, 1893, and heard after the entry of the decree of May 13, 1893, must be regarded as in effect the same as a petition for a rehearing, filed after judgment, under our rule 29. It was heard on its merits without objection, and can have

no other possible effect. It was entirely lacking form, but in the federal courts, when substance is preserved, defect of form is easily waived, as was done in this case. Holding the proceeding to have operation under rule 29, the appeal was seasonably taken. *Smelting Co. v. Billings*, 150 U. S. 31, 14 Sup. Ct. 4; *Voorhees v. Manufacturing Co.*, 151 U. S. 135, 14 Sup. Ct. 295.

That the appellees have mistaken the application of the rules of this court touching the time of filing the record has been settled since *Owings v. Tiernan*, 10 Pet. 24.

The right of the manufacturers to take this appeal without the special consent of the nominal defendants is denied. That, under the circumstances, justice requires that they should be allowed to take it cannot be disputed. We need not determine whether the right to take an appeal is ordinarily implied in a general authority to defend, under the circumstances of this case, because here the formal contract between the nominal defendants and the manufacturers obliged the latter to carry on the defense to "final judgment," and after the manufacturers became involved in the litigation, and needed to protect themselves, as well as the nominal defendants, their rights were necessarily concurrent with their liability. "Final judgment," in this agreement, evidently means a determination by the ultimate tribunal; otherwise, the manufacturers might unjustly have left their customers to their own fate in an appellate tribunal, which would be contrary to the spirit of the contract.

The other points made on the motion to dismiss, so far as they have any pertinency, are appropriate only to the hearing on the merits.

Motion to dismiss denied.

# **BALTIMORE TRUST & GUARANTEE CO. v. MAYOR, ETC., OF CITY OF BALTIMORE.**

(Circuit Court, D. Maryland. November 13, 1894.)

## **1. MUNICIPAL CORPORATION—CONTRACTS.**

Municipal corporations, invested with full power to control and regulate the use of their streets, do not exceed their powers in making, by ordinance, irrevocable contracts, not exclusive in character, for the use of such streets for purposes of public comfort and convenience.

## **2. CONSTITUTIONAL LAW — IMPAIRMENT OF CONTRACTS — MUNICIPAL CORPORATION.**

A legislative grant, made either directly by the legislature, or indirectly, through a municipal corporation duly authorized so to act, and accepted by the grantee, constitutes a contract, the terms of which cannot be altered, without the mutual consent of the parties, except as the right to repeal or alter is reserved in the enactment itself, or existed in constitutional or legislative provisions; and an impairment of such a contract by a law of the state passed by the legislature, or by a municipality authorized by it, or acting under a statute supposed to give the power, is a violation of section 10, art. 1, of the constitution of the United States.

## **3. SAME.**

The city council of B., whose general powers included the power to exercise full control over the streets of the city, and regulate their use by railway tracks, passed an ordinance granting leave to a street-railway company to construct tracks in certain streets, including a double track in L. street, upon certain conditions to be performed by the company, which ordinance was accepted by the company. Subsequently, the

state legislature, in view of a doubt of the authority of the city council to pass such ordinance, ratified the same by an act which also provided that the city council should have the same power in reference to its amendment or repeal as it would have in respect to an ordinance passed under its general powers. The railway company mortgaged its railway and railway tracks, including the line authorized by said ordinance, to the complainant, to secure an issue of bonds, and proceeded to construct the line. While the construction was in progress, the city council of B. repealed so much of the ordinance as authorized a double track on L. street. *Held*, that such ordinance, having been accepted by the company, constituted an inviolable contract between the municipal corporation and the company; and since the general powers of the city council, as above stated, did not include power to repeal an ordinance creating a contract, and as the ratifying act gave no power to repeal beyond the general powers, the repeal was an impairment of such contract, and a violation of section 10, art. 1, of the constitution of the United States. Morris, District Judge, dissenting.

Bill by the Baltimore Trust & Guarantee Company, trustee, against the mayor and city council of Baltimore. On final hearing.

Steele, Semmes & Carey, for plaintiff.

Thomas G. Hayes and Wm. S. Bryan, Jr., for defendant.

Before GOFF, Circuit Judge, and MORRIS, District Judge.

GOFF, Circuit Judge. The bill in this case was filed by the Baltimore Trust & Guarantee Company against the mayor and city council of Baltimore. The plaintiff is a corporation organized under the laws of the state of Maryland, and defendant is the public municipal corporation of Baltimore city in that state. On the first day of September, 1892, the Lake Roland Elevated Railway Company executed a certain indenture, in which the plaintiff is trustee, for the purpose of securing the payment of the principal and interest of 1,000 first mortgage coupon bonds, of the denomination of \$1,000 each, payable in the gold coin of the United States of America, the principal being due on the 1st day of September, 1942. By this deed the Lake Roland Elevated Railway Company granted and conveyed to the Baltimore Trust & Guarantee Company, and to its successor in the trust thereby created, all the railway and railway tracks owned, used, occupied, and enjoyed by said company, including the line of railway authorized to be constructed by the North Avenue Railway Company of Baltimore City, by virtue of Ordinance No. 23, approved April 8, 1891, of the ordinances of the mayor and city council of Baltimore, which authorized the construction of double tracks on Lexington street, in Baltimore, from the corner of Charles and Lexington streets (the city terminus of the railway system of the Lake Roland Elevated Railway Company), eastwardly, along Lexington street, to where it corners with North street. On the 3d day of August, 1892, the board of directors of the Lake Roland Elevated Railway Company contracted for the construction of that road, agreeing to pay therefor the said 1,000 bonds, aggregating \$1,000,000, and \$100,000 in cash, which action of the board of directors was subsequently, at a meeting of the stockholders of that company held August 6, 1892, duly ratified. In accordance with this contract and the order of the railway company, the mortgage was duly executed, dated September 1, 1892; the bonds also bearing that date. After

the execution and recordation of the mortgage, all of said bonds were duly executed, certified by the Baltimore Trust & Guarantee Company, as trustee, left with the trustee (for purposes connected with said indenture and the building of the road), and afterwards, on the order of the board of directors thereof, delivered to the contractors then engaged in constructing the line. After the work had commenced, when a considerable portion of the road had been finished, and after large expenditures had been made for labor and material for the uncompleted part on which work was then being prosecuted, and after the bonds had been, as before mentioned, delivered, the defendant, on November 18, 1892, by Ordinance No. 1, of that date, repealed so much of the ordinance of April 8, 1891, No. 23, as authorized the placing of double tracks upon Lexington street between North and Charles streets. The plaintiff claims that the effect of this repealing ordinance has been to take away part of the security of the bonds so placed in its custody as trustee, causing the value of the same to materially decrease, and therefore the plaintiff, "in the interest, for the protection, and at the request of all the bondholders, for the purpose of protecting them from an irreparable injury, files this bill."

The Lake Roland Elevated Railway Company was formed and duly organized under the laws of the state of Maryland, by an agreement of consolidation between the North Avenue Railway Company of Baltimore City and the Baltimore, Hampden & Lake Roland Railway Company, which said two companies were corporations created under the laws of that state, the former under the general corporation laws, and the latter by an act of the general assembly. By an act of 1890 (chapter 217) of the general assembly of Maryland, the charter of the North Avenue Railway Company of Baltimore City was amended, by authorizing it to lease, purchase, or aid other roads. In the general railway act, under which that company was incorporated, it was provided "that no railroad company shall be allowed to pass through the city of Baltimore without the consent of the municipal authorities"; and therefore the said North Avenue Company made application to the mayor and city council of Baltimore for consent to the use of certain streets of that city, including the right to lay and maintain double railway tracks on Lexington street, from North street to Charles street, so that it might thereby reach its proposed terminus at the corner of Charles and Lexington streets.

An ordinance was offered in the council on the 17th day of November, 1890, properly referred, considered, and reported, and on April 8, 1891, passed and approved, now known as "Ordinance No. 23." By it the North Avenue Railway Company was authorized "to lay down and construct double iron railway tracks for the purpose of its business" on a number of the streets of Baltimore, including that portion of Lexington before mentioned. This right, so granted, was upon certain conditions, expressly set forth in the ordinance, to the performance of which the North Avenue Railway Company bound itself by accepting the ordinance, and which was assumed by the Lake Roland Elevated Railway Company, by virtue of the agreement of consolidation under which it succeeded to all of the corporate

rights of the North Avenue Railway Company. The following are among the terms and conditions set forth in said ordinance: That the North Avenue Company shall permit other railway companies to use its tracks upon certain conditions; that it shall carry over its lines, free of charge, passengers who present transfer tickets from any other city passenger railway company connecting with it; that it shall at all times keep the space between its tracks, and two feet on each side thereof, in good repair, and whenever any portion of any street upon which its tracks shall be laid shall be repaved, the company shall pay the entire expense of repaving such space with such pavement as the mayor and city council shall prescribe; that the company shall permit all electric light, telephone, telegraph, or other wires on North street to be strung on its elevated structure; that the company shall be liable for the payment of the park tax, and be subject to all the general regulations then existing or thereafter to be made relative to city passenger railways not inconsistent with said ordinance; that the mayor and city council of Baltimore shall have the privilege, within two years after the expiration of fifteen years from the passage of said ordinance, to purchase the stock and interest of said company, with such appurtenances to the same as the mayor and city council might deem proper.

Before the Lake Roland Company began the erection of its elevated railway on North street, it was necessary for it to obtain from the general assembly of Maryland a ratification of Ordinance No. 23, which was done by chapter 112, Acts 1892, in the following words:

"Be it enacted by the general assembly of Maryland: Section 1. That Ordinance No. 23, of the mayor and city council of Baltimore, approved April 8, 1891, be, and the same is hereby, ratified and confirmed; this ratification to have the same effect as if the mayor and city council of Baltimore, at the time of the passage of said ordinance, had been fully authorized by the general assembly to pass said ordinance, and to grant each and all of the powers and privileges therein contained; the said mayor and city council to have the same power and control hereafter, in reference to the enforcement, amendment or repeal of said ordinance, as it has or would have, in respect to any ordinance passed under its general powers."

This act certainly removes all doubt as to the power of the city authorities to pass Ordinance No. 23; and, if the right did not exist before, this action of the legislature cures the defect, and makes the grant of the mayor and city council valid, subject to their right to enforce, amend, or repeal, possessed by them under their general powers.

The plaintiff insists that Ordinance No. 23, by which the North Avenue Company was authorized to lay and maintain double tracks on Lexington street (it having been accepted, and large expenditures of money made thereunder), constitutes an inviolable contract between the municipal corporation and the company, the terms of which cannot be altered or impaired without the consent of both parties thereto; and that, consequently, the repealing ordinance of November 18, 1892, is in contravention of the tenth section of the first article of the constitution of the United States (that part thereof which forbids a state from passing a law impairing the obligation of contracts), and is therefore void. The defendant claims that no

federal question is involved in this controversy, and that this court is without jurisdiction of the case. I am clearly of the opinion, for reasons that will be stated fully as I proceed with its consideration, that this court has jurisdiction of this case, and consequently the demurrer of defendant to the bill will be overruled.

I now come to the consideration of Ordinance No. 23. Did its enactment and acceptance constitute a contract of the character claimed by the plaintiff, and, if so, has such contract been impaired by the repealing ordinance of November 18, 1892? These questions are to be answered as the law is found to be applicable to the facts I have stated. The defendant insists that Ordinance No. 23 was a mere license to the railroad company to use the streets designated in it for railroad purposes, subject to modification or repeal at the will of the municipal authorities of the city of Baltimore; also, that the court of appeals of the state of Maryland, prior to the passage of said ordinance, had decided that the mayor and city council of the city of Baltimore could not pass an irrevocable ordinance, which decision, it is claimed, under the rules of construction relating to such matters, became part of the city's agreement with the railroad company. In support of this contention, the cases of *Rittenhouse v. Mayor, etc.*, 25 Md. 337, and *State v. Graves*, 19 Md. 351, are cited. I have examined them carefully, considering the facts in each in connection with the opinions of the court relating thereto; and I am convinced that it was not the intention of the court of appeals to hold as the defendant here claims, but that it really designed to and did announce the now well-established doctrine that municipal corporations, so far as their own internal affairs are concerned,—such as opening, closing, and grading streets, or constructing buildings for public use in a particular manner, or at a certain place,—can pass no irrevocable ordinance. The court in those cases did not regard the ordinances as contracts, but considered them municipal enactments or regulations, revocable at the pleasure of the city, as the public interest might demand.

It may be admitted that, as the general railway act of the state of Maryland was passed after the adoption by the people of that state of the constitution of 1867, the right is reserved to the general assembly to repeal, alter, or amend the charters of the North Avenue Railway Company, and of the Lake Roland Elevated Railway Company; and also it may be conceded that if the general assembly of Maryland had repealed the ordinance relative to double tracks upon Lexington street, or authorized the mayor and city council of Baltimore to do so, then there would be no impairment of the obligation of the contract relied on in this case, and that the plaintiff would not be entitled to the relief sought. It is certainly true that the general assembly has not directly legislated relative to the modification or the repeal of said Ordinance No. 23. The question next to be answered is, has the mayor and city council, under the authority of the general assembly, done so? That the municipal authorities of the city of Baltimore, in passing the repealing ordinance, acted under supposed legislative authority, and not in the exercise of a right under their general powers to repeal a mere

license or rule of regulation, is, I think, clear. That they have not the right, under their general powers, to repeal an ordinance passed by them, by which a contract has been created, is also clear; and as their only legislative grant of powers to repeal limits such action, so far as Ordinance No. 23 is concerned, to their general powers, it is quite evident that the authority under which they acted in passing Ordinance No. 1 was supposed, and not real. I cannot agree with counsel for defendant that authority can be found in chapter 370, Acts 1890, and in chapter 112, Acts 1892, General Assembly of the State of Maryland, giving the mayor and city council of Baltimore the power to amend or repeal Ordinance No. 23; but after hearing their arguments, and reading the opinion of the city solicitor relative to their power under said legislation (a copy of which is found in the record of this cause), I can readily understand why the municipal authorities of that city supposed that they had power from the general assembly to pursue the course they did. It is true that by the Acts of 1890 (chapter 370) it is provided that the mayor and city council of Baltimore shall have power to regulate the use of the streets, lanes, and alleys in that city, by railway or other tracks, gas or other pipes, telegraph, telephone, electric light, or other wires and poles, in, under, over, or upon the same; but except in regard to underground conduits for wires, for which purpose it seems to have been enacted, I do not find that it gives any additional authority to said officials, so far as the use of the streets of Baltimore and the regulation of the same are concerned. It has been conceded for years—long recognized as the law—that the mayor and city council of Baltimore have full control over the streets and highways of that city, and the act of 1890 has been held to be “an amplification of their general power over, and right and duty to regulate and maintain the streets and highways of the city for the use of the public.” The general railway act of 1876 gave the municipal corporation of Baltimore the general power to consent or to refuse assent to the use of its streets by railroad tracks, and, independent of this, it has been held for years that such municipalities have that general power without the direct authority of the legislature, so far as local or street railways are concerned. *Dill. Mun. Corp.* (4th Ed.) § 724; *Hinchman v. Railroad Co.*, 17 N. J. Eq. 75; *Jersey City & B. R. Co. v. Jersey City & H. R. Co.*, 20 N. J. Eq. 69; *Atchison St. Ry. Co. v. Missouri Pac. Ry. Co.*, 31 Kan. 661, 3 Pac. 284; *Brown v. Duplessis*, 14 La. Ann. 842; *State v. Corrigan Consol. St. Ry. Co.*, 85 Mo. 263.

The rule of construction, with respect to legislative grants to corporations, relied on by the defendant, may be conceded,—“that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public.” *Minturn v. Larue*, 23 How. 435; *Barnett v. Denison*, 145 U. S. 135, 12 Sup. Ct. 819; *Hamilton Gaslight & Coke Co. v. Hamilton City*, 146 U. S. 258, 13 Sup. Ct. 90; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659.



Did chapter 112, Acts 1892, to which I have already alluded, and to which, in connection with the rules and authorities just cited, I will again refer, justify the repeal of Ordinance No. 23? So far as it relates to the right to repeal, does it give to the defendant any power additional to that possessed by the city authorities before its passage? It seems to me that it does not, so plainly so that it is rather strange it should be seriously contended to the contrary. What right to amend, alter, or repeal did the city possess, under its "general powers," prior to the date of said enactment? In this case it has just such right, and no more, as it reserved in Ordinance No. 23. The general assembly, by said chapter 112, did not intend to reserve to the city authorities any additional or absolute right of amendment or repeal, but is careful to limit them to the "same power and control" as they would have under their "general powers." If an ordinance passed by them does not constitute a contract, but simply relates to affairs as to which the city alone is interested, then, under their general powers, their right to amend or repeal it is without limit. If a contract has been created by the ordinance, then the right to amend or repeal is such as was reserved to the city in the enactment itself. The only clause in Ordinance No. 23 providing for changes in or amendments to it is in the following words: "And shall be subject to all the general regulations now existing or hereafter to be made, relating to city passenger railways not inconsistent with this ordinance." I do not find the right to repeal in this reservation, but simply the right to regulate, provided that the regulations proposed are not inconsistent with the terms of the ordinance. The right to regulate will not be held to mean the right to repeal or materially modify, or, in effect, to prohibit, the exercise of privileges previously granted by the state and city, or to impair the obligation of a contract or destroy vested rights. I think that municipal corporations, invested with full power to control and regulate the use of their streets, do not exceed their powers in making irrevocable contracts, not exclusive in character, for the use of said streets for purposes relating to the public comfort and convenience; and, also, that a legislative grant made either directly by the legislature, or indirectly through a municipal corporation duly authorized so to act, constitutes a contract between the parties thereto, the terms of which cannot be altered without their mutual consent, except so far as the right to alter, amend, or repeal is expressly reserved in the grant itself, or existed in constitutional or legislative provisions at the time of its passage. Were this not so, there would be but little security for investments made on the faith of such grants, and no inducement to those controlling capital to make improvements absolutely necessary for the health and happiness of the people, and for the progress and prosperity of the country. Justice requires that such legislative enactments, when the grantees thereof have accepted the same and acted thereunder, should become absolute and irrevocable contracts, which neither party thereto will be permitted to revoke, nor allowed to disregard or add conditions thereunto more onerous than those first imposed.

I find from the decisions involving the questions I have been con-

sidering that where rights and privileges have been lawfully granted to and accepted by either a private or public corporation, and valuable improvements have been made on the faith of such grant, a contract has been thereby entered into, the impairment of which by a law of the state making such grant, passed by the legislature thereof, or by a municipality authorized by it, or acting under the authority of a statute supposed to give the power (the right so to do not having been reserved), is forbidden by section 10 of article 1, of the constitution of the United States. *Trustees v. Woodward*, 4 Wheat. 518; *Chicago v. Sheldon*, 9 Wall. 50; *Shields v. Ohio*, 95 U. S. 319; *New Jersey v. Yard*, Id. 104; *Railroad Co. v. Richmond*, 96 U. S. 521; *Wright v. Nagle*, 101 U. S. 791; *Greenwood v. Freight Co.*, 105 U. S. 13; *Railroad Co. v. Delamore*, 114 U. S. 501, 5 Sup. Ct. 1009; *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manuf'g Co.*, 115 U. S. 650, 6 Sup. Ct. 252; *Waterworks Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273; *Sioux City St. Ry. Co. v. Sioux City*, 138 U. S. 98, 11 Sup. Ct. 226; *St. Louis v. W. U. Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485; *Saginaw Gaslight Co. v. City of Saginaw*, 28 Fed. 529; *Coast Line R. Co. v. Mayor, etc., City of Savannah*, 30 Fed. 646; *Citizens' St. R. Co. v. City of Memphis*, 53 Fed. 715; *State v. Corrigan Consol. St. Ry. Co.*, 85 Mo. 263; *City of Burlington v. Burlington St. Ry. Co.*, 49 Iowa, 144.

I do not think it necessary, having reached the conclusions indicated, to consider other questions referred to in the pleadings and argument of this case, among them those of *res adjudicata*, of acquiescence, and of the police power of municipalities. I will simply add that, as the plaintiff in this case was not a party to the case in the state courts between the Lake Roland Elevated Railway Company and the mayor and city council of Baltimore, it is not bound by the judgment rendered therein; that even if the railroad company did acquiesce in the repeal of Ordinance No. 23, which is not at all apparent, this plaintiff would not be concluded thereby; and that, as I hold Ordinance No. 23 to be a contract of the character described, it will be profitless to now consider the police powers of the municipal authorities of the city of Baltimore. In declaring this result, I am constrained to dissent entirely from the opinions delivered by the court of appeals of Maryland in the case of *Lake Roland El. Ry. Co. v. City of Baltimore*, 77 Md. 352, 26 Atl. 510, construing the legislation of the general assembly of that state and the ordinances of the mayor and city council of Baltimore relating to this controversy. The judgment of that deservedly distinguished tribunal, announced after careful consideration, and reaffirmed after additional deliberation, caused me, as I examined this case, to doubt the correctness of the conclusion I found myself reaching, and forced me again to reflect on the facts and study the authorities pertinent thereto. A careful re-examination of this case led me to conclude that my brothers had compelled me, in the discharge of my judicial duty, to differ with them. In construing the statutes of a state, we follow, as a rule, the interpretation placed thereon by its court of last resort; but, when connected therewith is involved also the construction of the federal constitution and the security of the interests

protected by it, we feel impelled to rely upon the decisions of the supreme court of the United States. We may add that should we, under such circumstances, be without the guidance of that court, we would in that emergency beg to be permitted to think and act for ourselves, indulging the hope that our conclusion would accord with the decision of the state tribunal; and we would be unworthy of the respect of those with whom we differ, and deserving of the contempt of all who agree with us, should we, under such circumstances, decline to enter such decree as, in our judgment, the true interpretation of the federal constitution requires us to announce.

A decree will be passed as indicated in this opinion, in substance as prayed for in plaintiff's bill.

MORRIS, District Judge (dissenting). I am unable to concur in the opinion of the circuit judge. The powers of the city of Baltimore to pass ordinances with respect to its public highways are only such as the legislature has given to it. It has been given power to pass ordinances promoting the interests and insuring the good government of the city; to open, grade, and pave its public highways; and by the act of 1890 (chapter 370) it was given the power "to regulate the use of the streets, lanes and alleys in said city by railway or other track, gas or other pipes, telegraph, telephone, electric light or other wires or poles"; and, also, it has such further powers as have been given to the city in respect to railroads on its streets by the general railroad law, so far as that law is applicable to city passenger railways. That law (Code, art. 23, § 169), originally passed in 1876 (chapter 242), provides that, in locating any railroad to occupy any street, it shall be competent for the municipal authorities to agree with the railroad company upon the manner, terms, and condition upon which the street may be used or occupied, and further provides that no railroad company shall be allowed to pass through the city of Baltimore without the consent of the municipal authorities. Possessing the powers just enumerated, the city passed the Ordinance No. 23, known as the "North Avenue Ordinance," approved April 8, 1891. It contains the authority under which the Lake Roland Elevated Railway Company, as the successor of the North Avenue Railway Company, has constructed its electric road in Baltimore city. It is an elaborate ordinance, containing many provisions and conditions. It authorized a double iron railway upon the streets mentioned in it, including Lexington street between North and Charles streets. It directs that the tracks shall be laid under the supervision and direction of the city commissioner, and has other provisions regulating the laying of the tracks. It provided, among other things, that, if any final judgment for damages done to property by the construction of the elevated portion of the road was not paid in 60 days, the owner should have the right to enjoin the operation of the railway; also, that, within two years after any successive period of fifteen years from the passage of the ordinance, the city should have the right to buy out the railroad company at a fair valuation. These and other

provisions seem to indicate that the city, in passing this ordinance, could not have been legislating in the exercise of a power derived from its general powers to regulate the use of its streets, but must have been "agreeing" with the railroad company, as empowered by the general railroad law, as to the terms, manner, and conditions upon which the railroad company might use the streets designated, and as to the terms upon which it would consent to such use.

This ordinance was before the court of appeals of Maryland in *Koch v. Railway Co.*, 75 Md. 222, 23 Atl. 463, and was treated by that court as one which the city could validly pass except as to the elevated structure to be constructed on about three-quarters of a mile of its line. As to this, the court of appeals held (January 28, 1892) that it came within the prohibition of the general railway law of the state (Code, art. 23, § 186), which provided that no elevated railroad should be constructed except under a special charter of the general assembly. Thereupon, for the purpose of curing this difficulty, the legislature was applied to and passed the act approved March 17, 1892 (chapter 112). This act recites that, by City Ordinance No. 23, the North Avenue Railway Company was duly authorized and empowered to construct, maintain, and operate an electric railway, with the rights and privileges and subject to the terms and conditions in said ordinance set forth, with the right to elevate its tracks on North street; "but before the railway company can elevate its tracks on North street it is required by law that the sanction of the general assembly of Maryland should be given to said ordinance so far as it relates to the elevation of its tracks;" and thereupon it enacts that the ordinance is ratified and confirmed, "this ratification to have the same effect as if the mayor and city council of Baltimore, at the time of the passage of said ordinance, had been fully authorized by the general assembly to pass said ordinance and to grant each and all of the powers therein contained; the said mayor and city council to have the same power and control hereafter in reference to the enforcement, amendment or repeal of said ordinance as it has or would have in respect to any ordinance passed under its general powers." The Lake Roland Company, as successor to the rights of the North Avenue Company, proceeded to construct the road under the terms of this ordinance; but before the railroad was completed, and before it was operated, the city council passed Ordinance No. 1, approved November 18, 1892. It recites that by Ordinance 23 the railroad company had been authorized and licensed to lay double iron railway tracks on Lexington street between North and Charles streets; and "whereas, it appears to the mayor and city council of Baltimore that the public safety and convenience and the proper regulation of the use of the streets requires that there shall not be more than one iron railway track laid down, constructed or maintained on said portion of Lexington street," and after a further recital that notice had been given by the city officials to the railroad company before the tracks were laid that they would be detrimental to the public interest, and that the mayor would, as soon as the city council met, recommend the revoking of the authority to lay such double tracks on Lexington street, it proceeds to enact that the ordinance, so far

as it authorizes the laying of double tracks on Lexington street, be repealed, and authorizes the maintaining and use of one track only. It is this repeal, enacted, as the city claims, by virtue of its powers derived from the state legislature, which the complainant contends is an impairment of an existing contract between the city and the Lake Roland Elevated Company within the prohibition of the federal constitution.

The act of 1892 (chapter 112), as I understand it, goes to the extent of a recognition by the legislature (as had before been held by the court of appeals of Maryland) that Ordinance 23, except as to the elevated structure, was, when it was passed, a valid exercise of general powers which were vested in the city; and the act provided that, so far as any ordinance passed under those general powers was subject to amendment or repeal by the city, this ordinance should remain so. This proviso, if it has any effective force, must, it seems to me, have reference to some supposed power of the city in its governmental capacity for the public welfare to require the railroad to be constructed or operated or restricted in some manner different from the precise manner set out in the ordinance; some change of speed differing from that provided in the ordinance, some change with respect to its overhead electric wires, or some change in the location of the tracks on the streets. If it had no reference to some such alteration or modification of the terms of the ordinance, the insertion and enactment of the proviso would seem to have been idle and nugatory.

It may be conceded that, under the general railroad law, the city had the power to "agree" with the railroad company as to the use of the streets, and, under that power, to make the agreements embodied in Ordinance 23; but, in my judgment, that agreement was necessarily made subject to the rule that, except by express authority from the legislature, the city, being but a trustee of the public highways for the benefit of the public, could pass no irrevocable ordinance depriving itself of its power to regulate the use of the streets so as to prevent danger to the public. As soon as it becomes apparent that a privilege of using the streets has been granted by it which works danger to the public, it becomes the duty of the city to so regulate or modify the privilege as to protect the public, especially if this can be done without destroying the essential substance of the privilege. Parties entering into contractual relations with a municipal corporation, in its municipal character, do so with notice that it cannot contract away its own governmental functions and duties, which are to be exercised from time to time for the benefit of the public, as occasion requires. This doctrine had been repeatedly enforced by the court of appeals of Maryland with regard to the city of Baltimore, and is the law of the state. *State v. Graves*, 19 Md. 351; *Rittenhouse v. Mayor, etc.*, 25 Md. 337; *Goszler v. Georgetown*, 6 Wheat. 593; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 13 Sup. Ct. 110. It is the general law that a grant by the legislature itself of a privilege or franchise does not restrict the power to enforce regulations for the public safety not inconsistent with the essential rights granted by the charter. New Or-

**léans Gaslight Co. v. Louisiana Light & Heat Producing & Manuf'g Co.**, 115 U. S. 650, 6 Sup. Ct. 252.

If in any case it is doubtful whether or not there has been an irrevocable grant of the use of a public highway, the rule applies that the construction favorable to the public, and not to the private grantee, should prevail. In considering the rightfulness of the exercise of the governmental power of the city to regulate the use of the streets by railways, it is to be noticed, in this case, that Ordinance No. 1, while it is a restriction, does not take away the right to maintain a railway on Lexington street, and is not destructive of the object of the ordinance which it, in small part, repeals. The portion of Lexington on which the railroad company is restricted to one track consists of three short blocks in the heart of the city, where the street is of a steep grade, and is less than the usual width, and where it passes some of the principal public buildings. There is shown by the proofs to have been diversity of opinion among the property owners on the street as to the danger, inconvenience, and obstruction resulting from double tracks; but enough appears to show that the position taken by the city officials and by the city council has strong support, and that it is a case in which it cannot be said that the action of the city council was wanton and in bad faith. With the strong presumption in favor of the reasonableness of the ordinance, I cannot see how, upon the testimony, it can be declared to be unreasonable and oppressive. Cases may be found in which the courts have held with regard to horse railroads in cities that it was not a justifiable withdrawal of a valid grant to reduce the railroad to one track, but the special circumstances must control. An electric railroad, in its speed, in the weight and momentum of its cars, in the danger to persons on foot and in vehicles (especially when the cars are run on frequented and narrow streets), approximates the danger of steam locomotives, rather than that of horse cars; and the duty of the city with regard to them is more stringent in proportion to the greater danger. If the city had ordained that the public safety required that but one car at a time should be allowed on Lexington street hill, so that there never should be both one ascending and one descending, it would be difficult to maintain that such an ordinance was not a proper exercise of the power to regulate the use of the street. The restriction to one track accomplishes the same result, with the advantage that the track is in the middle of the street. In my judgment, the restriction to the use of one track, under the circumstances, is an exercise of a governmental power, which the city never parted with, and subject to which the "North Avenue Ordinance" was accepted by the railroad company.

I have briefly stated my dissent without citation or discussion of authorities, for the reason that the authorities have been fully cited and discussed in the opinions delivered in the court of appeals of Maryland in the case of the Lake Roland El. Ry. Co. v. City of Baltimore, 77 Md. 352, 26 Atl. 510.

AMES v. UNION PAC. RY. CO. et al. SMITH et al. v. CHICAGO & N. W. R. CO. et al. HIGGONSON et al. v. CHICAGO, B. & Q. R. CO. et al.

(Circuit Court, D. Nebraska. November 12, 1894.)

Nos. 59 Q, 60 Q, 62 Q.

1. STATE STATUTES—ENACTMENT—PRESUMPTION.

Where an act of a state legislature is attested by the speaker and chief clerk of the house and president and secretary of the senate, is indorsed "Approved" by the governor, bears a certificate of the chief clerk of the house "that the within act originated in the house of representatives, and passed the legislature" on a specified day, and is duly filed in the office of the secretary of state, the federal courts will regard the act as duly enacted, in the absence of some special provision of the constitution or decision of the supreme court of such state requiring the courts to look beyond such evidences, and determine the question of due enactment by reference to other evidence. *Field v. Clark*, 12 Sup. Ct. 495, 143 U. S. 649, applied.

2. SAME—EVIDENCE.

Const. Neb. art. 3, §§ 8, 10, 11, provide that each house shall keep and publish a journal of its proceedings, and the yeas and nays shall be entered on it at the desire of two members; that the enacting clause shall be of a specified form; that no law shall be enacted except by bill, which shall be passed only by a majority of all the members of each house; that the question of final passage shall be taken immediately on its last reading, and the yeas and nays entered on the journal; that it shall be read on three different days in each house, and printed before the final vote is taken; and that the presiding officer of each house shall sign all bills in the presence of such house, and while it is in session. *Held*, that the most such constitution authorizes is that, in respect to certain matters, evidence may be sought in the journals of the two houses, which will prevail over that which appears on the enrolled bill as found in the secretary of state's office.

3. SAME.

Where the journals of the two houses of the legislature of Nebraska affirmatively show that with respect to Act Neb. April 12, 1893 (Laws 1893, c. 24, p. 164; Consol. St. Neb. p. 211), prescribing the maximum rates for transportation of freight by railroads within the state, everything was done on its passage which the constitution requires, and the act is attested by the proper officers, approved by the governor, and was duly filed in the office of the secretary of state, such act is a valid law so far as concerns the various steps essential to its enactment.

4. SAME—IMPEACHMENT BY PAROL EVIDENCE.

Parol testimony is not admissible to impeach the validity of an act which is shown by the record to have been duly and legally passed.

5. SAME—TRIVIAL ALTERATIONS.

Even if such act can be impeached by parol, its validity is not affected by parol evidence tending to show verbal alterations which are trivial, and do not affect in any substantial manner the scope and reach of the bill.

6. RAILROAD COMPANIES—CORPORATION CREATED BY CONGRESS—REGULATION BY STATE.

A state may prescribe the rates for transportation within the state by a railroad corporation created by act of congress, in the absence of anything in the statute indicating an intent by congress to remove such corporation from state control. *Reagan v. Trust Co.*, 14 Sup. Ct. 1060, 154 U. S. 413, followed.

7. SAME—UNION PACIFIC RAILROAD COMPANY.

Union Pacific Railroad Act (12 Stat. 497), § 18, provides that when the net earnings of the entire road and telegraph, after deducting expenditures,

shall exceed 10 per cent. on its cost, exclusive of the 5 per cent. to be paid the United States, congress may reduce the rates of fare thereon, if unreasonable, and fix and establish the same by law, and reserves to congress the right to "add to, alter, amend, or repeal this act." *Held*, that congress did not reserve to itself the sole and absolute control of all rates to be charged by such company.

8. CONSTITUTIONAL LAW—STATE STATUTE REGULATING LOCAL FREIGHT RATES—UNJUST DISCRIMINATION.

Act Neb. April 12, 1893 (Laws 1893, c. 24, p. 164; Consol. St. Neb. p. 211), prescribing the maximum rates for transportation of freight by railroads within the state, and providing that all railroads, or parts thereof, built since January 1, 1889, or which may be built before December 31, 1899, shall be exempt from the provisions of the act until the latter date, is not obnoxious to Const. U. S. Amend. 14, as a denial to railroads of the equal protection of the law, on the ground of unjust discrimination because all the roads in the state are not subject to its provisions.

9. SAME—INTERSTATE COMMERCE—CLASSIFICATION OF FREIGHT—REDUCTION OF RATES.

Such act is not an interference with interstate commerce because it establishes a classification of freights different from that which prevails west of Chicago, and which was established by the voluntary act of the railroad companies; nor on the ground that, by reducing local rates, it necessarily reduces rates on interstate business.

10. RAILROAD COMPANIES—REGULATION OF RATES.

Act Neb. April 12, 1893 (Laws 1893, p. 164, c. 24; Consol. St. Neb. p. 211), prescribing local freight rates on railroads, which reduces such rates 29½ per cent., is invalid, where the rates prescribed are such, as to companies operating roads within the state, and doing an interstate business, that there would be no net earnings from transportation of freight if such rates were applied to all their business.

11. SAME.

The fact that, if such statute is enforced, the earnings of such roads on all their business will be sufficient to pay reasonable compensation to the owners of the roads, does not render the act valid as to them; since other states and congress may fix like rates, and thus destroy their earning capacity.

12. SAME.

Nor does the fact that such rates are not as low as, or no lower than, those of other states, render such act valid as to such roads, where it appears that they would have no earnings on local freight if such rates are enforced.

13. FEDERAL COURTS — JURISDICTION — INJUNCTION AGAINST ENFORCEMENT OF STATUTE.

The circuit court of the United States has jurisdiction of actions by non-resident stockholders of railroad companies, doing business in Nebraska, against such companies and the board of transportation of such state and its officers to enjoin defendants from putting in force, as to such companies, a state statute fixing the maximum rates for transportation of freight within the state, where the only remedy provided by the act is that, by petition, a railroad company may obtain from the supreme court of such state an opinion that the rates are unreasonable, and an order directing such board, in its discretion, to permit the company to raise its rates.

Three bills—one by Ames against the Union Pacific Railroad Company and others; one by Smith and others against the Chicago & Northwestern Railroad Company and others; and the other by Higgonson and others against the Chicago, Burlington & Quincy Railroad Company and others—for injunctions. Decrees for complainants.

Before BREWER, Circuit Justice, and DUNDY, District Judge.



BREWER, Circuit Justice. In each of these three cases, respectively, the plaintiffs are stockholders in the corporation first named therein as party defendant. In the first the defendants are the Union Pacific Railway Company, a corporation created under the laws of congress, and owning and operating a railroad partly within the limits of the state of Nebraska; the St. Joseph & Grand Island Railroad Company, the Omaha & Republican Valley Railroad Company, and the Kansas City & Omaha Railroad Company, corporations organized under the laws of the states of Kansas and Nebraska, whose stock is substantially owned and whose lines are controlled and operated by the Union Pacific Railway Company; and certain officers of the state of Nebraska, constituting its board of transportation, together with the secretaries thereof. In the second the defendants are the Chicago & Northwestern Railroad Company, a corporation organized and existing under the laws of the states of Illinois, Wisconsin, and Iowa; the Fremont, Elkhorn & Missouri Valley Railroad Company, a corporation organized under the laws of the state of Nebraska; and the Chicago, St. Paul, Minneapolis & Omaha Railroad Company, a corporation organized under the laws of the states of Minnesota and Nebraska,—both of which companies are owned and their roads operated by the Chicago & Northwestern Railroad Company; and, in addition, the board of transportation of the state of Nebraska, and its secretaries. In the third case the defendants are the Chicago, Burlington & Quincy Railroad Company, a corporation organized and existing under the laws of the states of Illinois and Iowa, which owns, controls, and operates, in the name of the Burlington & Missouri River Railroad Company in Nebraska, certain lines within that state; and in addition the state board of transportation, and its secretaries.

On April 12, 1893, the legislature of the state of Nebraska passed an act (Laws 1893, c. 24, p. 164; Consol. St. Neb. p. 211) spoken of in the records in these cases sometimes as the "Newberry Bill," and sometimes as "House Roll 33," which act prescribed the maximum rates for the transportation of freight by railroads within the state. The act, in terms, applies only to freight whose transit begins and ends within the state, and in no manner attempts to affect interstate freight. The bills in these cases were filed to restrain the state officials from putting that act in force, as against the railroads named. Pleadings were perfected, a large volume of testimony has been taken, and the cases are now before us, upon pleadings and proof, for determination.

At the threshold the question arises whether this, which purports to be an act of the legislature, is a law; in other words, whether the various steps prescribed by the constitution as essential to the due passage of a bill through the two houses of the legislature were all regularly taken. The act is found duly filed in the office of the secretary of state; is attested by the signatures of the speaker of the house, and its chief clerk, also by the signatures of the president of the senate, and its secretary; is indorsed, "Approved, April 12, A. D. 1893. Lorenzo Crounse, Governor," and bears the following additional certificate, signed by the chief clerk of the house of representa-

tives: "I hereby certify that the within act originated in the house of representatives, and passed the legislature, April 5th, A. D. 1893." An act of congress thus authenticated would be conclusively presumed to have been duly and legally enacted. This precise question was before the supreme court of the United States, and fully considered, in *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495. Following that decision, the courts of the United States will regard an act of any state legislature, thus authenticated, as having been enacted in full compliance with all the prescribed forms, unless there be some special provision in the constitution of that state, or some decision of its supreme court, which requires a looking beyond these evidences of authenticity, and determination of the question of due enactment by reference to other kinds or matters of evidence, or, to state the proposition in another form, the rule prescribed in that case will control unless the state has prescribed some other or further rule.

In the constitution of Nebraska (article 3, §§ 8, 10, 11) are these provisions, which are all that are referred to by counsel, or that seem to have any bearing on this question:

Sec. 8. Each house shall keep a journal of its proceedings, and publish them (except such parts as may require secrecy) and the yeas and nays of the members on any question shall, at the desire of any two of them, be entered on the journal. All votes in either house shall be viva voce.

Sec. 10. The enacting clause of a law shall be, "Be it enacted by the legislature of the state of Nebraska," and no law shall be enacted except by bill. No bill shall be passed unless by assent of a majority of all the members elected to each house of the legislature. And the question upon the final passage shall be taken immediately upon its last reading, and the yeas and nays shall be entered upon the journal.

Sec. 11. Every bill and concurrent resolution shall be read at large on three different days in each house, and the bill and all amendments thereto shall be printed before the vote is taken upon its final passage. No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed. The presiding officer of each house shall sign, in the presence of the house over which he presides, while the same is in session and capable of transacting business all bills and concurrent resolutions passed by the legislature.

The utmost that can be inferred from these constitutional provisions is that, in respect to certain matters, evidence may be sought in the journals of the two houses, and evidence which will prevail over that which appears on the enrolled bill as found in the office of the secretary of state; and this is as far as any decision of the supreme court of Nebraska has gone.

In *Hull v. Miller*, 4 Neb. 503, that court held that the office of the journal is to record the proceedings of the house, and that it must appear on the face of the journal that a bill was passed by a constitutional majority, but also held that an omission therefrom of other matters which the constitution does not, in terms, require to be entered upon the journal, would not invalidate the law, and that it would be presumed, in favor of its validity, that the legislature had done that which it ought to have done. In *State v. Liedtke*, 9 Neb. 462, 4 N. W. 68, it was claimed that an appropriation bill, as it passed both houses, named a larger sum than was found in the en-

rolled bill signed by the governor, and a mandamus was asked to compel the state auditor to draw his warrant on the treasurer for such excess; but the court denied the writ, and declined to look into the journals of the two houses to see whether the fact was as claimed, on the ground that, even if such sum was in the bill when before the houses, it had never received the approval of the governor, and had therefore never been legally appropriated. In *State v. McLelland*, 18 Neb. 236, 25 N. W. 77, the matter was considered at some length, and it was held that the certificate of the presiding officers as to the passage of a bill through their respective houses is only prima facie evidence of that fact; that the journals may be examined, and, if they show that the bill did not pass, that evidence will be held conclusive, and the supposed law set aside. Similar is the case of *State v. Robinson*, 20 Neb. 96, 29 N. W. 246. The same proposition was again affirmed in *State v. Moore*, 37 Neb. 13, 55 N. W. 299, on the strength of the prior decisions; the court, however, saying that, were the question a new one, it would be inclined to follow the rule laid down by the supreme court of the United States in *Field v. Clark*, supra.

In the case at bar the journals of the two houses, fairly construed, affirmatively show that everything was done which the constitution requires shall be done and recorded in the due passage of a bill. It will be sufficient to quote the recitals of the house journal, those of the senate journal being equally explicit.

"January 14, 1893.

"Introduction of Bills.

"The following bills were read the first time, and ordered to a second reading: House Roll No. 33. A bill for an act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freights upon each of the railroads in the state of Nebraska."

"January 16, 1893.

"Bills on Second Reading.

"House Roll No. 33. A bill for an act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freights upon each of the railroads in the state of Nebraska."

"March 10, 1893.

"House Roll 33. A bill for an act to regulate railroads, to classify rates, to fix reasonable maximum rates to be charged for the transportations of freights upon each of the railroads in the state of Nebraska.

"Was read third time.

"This bill having been read at large on three different days, and the same with all its amendments having been printed.

"The question being,

"Shall the bill pass?"

"Affirmative votes, 63.

"Negative votes, 30.

"A constitutional majority having voted in favor of the passage of the bill, the bill passed and the title as amended was agreed to."

"Mr. Speaker: I move to amend the title by adding the following and to provide penalties for violations of this act. Rhodes.

"The motion prevailed."

"April 6, 1893.

"Mr. Speaker: Announced that he was about to sign house roll No. 33 while the house was in session and capable of doing business."

As for the parol testimony which was offered, tending to show some verbal alterations in the bill after it had passed the house of representatives, it is enough to say: First, that parol testimony is not admissible to impeach the validity of an act which, by the record, is shown to have been duly and legally passed, and, second, even if such testimony were competent, the supposed alterations were trifling, and not of a character to affect in any substantial manner the scope and reach of the bill. I am therefore clearly of the opinion that this act passed the legislature of the state, and received the approval of the governor, in due conformity to all substantial constitutional requirements in respect thereto.

From this preliminary matter I turn now to the consideration of various questions elaborately discussed by counsel, in respect both to the scope and validity of this law, and the jurisdiction of this court. Many of them I shall notice but briefly, for, while I have given a careful examination to all, to attempt anything like an elaborate discussion of each would unnecessarily prolong this opinion.

It is insisted that the Union Pacific Railway Company cannot be subjected to the provisions of this statute, because it is a corporation created by congress, and as such, in the discharge of any of its functions, is subject only to the control of that body. The general question of the power of a state in respect to rates for local freight over a corporation organized under the laws of congress was considered in *Reagan v. Trust Co.*, 154 U. S. 413, 14 Sup. Ct. 1060, and it was there held that the mere fact that the corporation was so organized did not exempt it from state control in that respect. It was conceded in the opinion in that case that congress could wholly remove such a corporation from state control; but it was held that, in the absence of something in the statutes indicating an intention on the part of congress to so remove it, the state had the power to prescribe the rates for all local business carried by it. Of course, that decision is controlling. It is true, there is one provision in the Union Pacific act which tends to show an intent on the part of congress to retain to itself full control over all rates, and that is found in the eighteenth section of the act (12 Stat. 497), as follows:

"And be it further enacted, that whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs, and the furnishing, running, and managing of said road, shall exceed ten per centum upon its cost, exclusive of the five per centum to be paid to the United States, congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law."

There is in these words, it will be seen, a special reservation of the power to fix rates; and when this is taken in connection with the general provision in the same section, reserving the right to "add to, alter, amend, or repeal this act," there is much force in the contention that congress intended to reserve to itself, as it had the power to do, the sole and absolute control of all the rates to be charged by the company. But I am not fully satisfied that this language warrants such a conclusion. Of course, if the Union

Pacific Railway Company is not exempt from the operation of this act, no other company is.

Again, it is insisted, that the act is obnoxious to the charge of denying to the railroads the equal protection of the laws, secured to them by the fourteenth amendment to the constitution of the United States, and this because all the roads in the state are not subject to its provisions. Section 4 is relied on to sustain this charge:

"All railroads, or parts thereof, which have been built in this state since the first day of January, 1889, or may be built before the thirty-first day of December, 1899, shall be exempt from the provisions of this act until the thirty-first day of December, 1899."

The right to classify is conceded, but it is said that this classification is arbitrary, and depends upon no fair and reasonable difference. Attention is called to the fact that since January 1, 1889, the Rock Island Company has built a road from Omaha to Lincoln, which is a part of its main line from Chicago to Denver; that in all of its business the Rock Island is in active competition with the several companies whose roads are subject to the provisions of this act; and that it is an unreasonable, unjust discrimination to exempt the Rock Island Company from like subjection. I cannot concur in these views. The principle of classification adopted by the legislature, whether wise or unwise, is within its power. To divide railroads into two classes, placing in the one all that have been constructed and in operation for a length of time, and whose business must therefore be presumed to have been thoroughly established, and in the other all only recently constructed, is clearly not a mere arbitrary distinction; and this notwithstanding it may be that one of the recently constructed roads is so fortunate as to have immediately secured a large business. The "protection of infant industries" is a term of frequent use in the political discussions and history of this country; and to rule that a classification based upon such principle is purely arbitrary, and therefore unconstitutional, would certainly be a judicial novelty.

Again, it is insisted that this act interferes with interstate commerce, in two ways: First, it establishes a classification of freights different from that which prevails west of Chicago; and, in the second place, by reducing local rates, it necessarily reduces the rates on interstate business. Neither of these objections seems to me to be well taken. In the first place, the classification of freights by the railroads is a purely voluntary act, not compelled by any statute, and not uniform throughout the country. There is one system which prevails east of Chicago, and one west. It might be more convenient if the classification established by this act harmonized with that adopted by the railroad companies doing business west of Chicago; but surely the voluntary act of the railroad companies, in establishing a uniform classification for certain territory, can work no limitation on the power of the state to establish a different classification. To say, for instance, that because the railroad companies have voluntarily placed flour in a certain class, on which a specified rate is to be charged, such voluntary act of mere classification destroys the

power of the state to establish a classification which puts flour in another class, and subject to another rate, is, to my mind, a most extravagant pretension. Neither can I understand how the reduction of local rates, as a matter of law, interferes with interstate rates. It is true the companies may, for their own convenience, to secure business, or for any other reason, rearrange their interstate rates, and make them conform to the local rates prescribed by the statute, but surely there is no legal compulsion. The statute of the state does not work a change in interstate rates, any more than an act of congress prescribing interstate rates would legally work a change in local rates. Railroad companies cannot plead their own convenience, or the effects of competition between themselves and other companies, in restraint of the otherwise undeniable power of the state.

It is further insisted by defendants that this court has no jurisdiction over these actions—First, because, in the act itself, an adequate legal remedy is provided, by petition to the supreme court of the state, and courts of equity may not interfere when adequate legal remedies are provided; secondly, because the rates are prescribed by a direct act of the legislature, and not fixed by any commission. I am unable to assent to either of these contentions. The remedy referred to is found in section 5, which authorizes any railroad company, believing the rates prescribed to be unreasonable and unjust, to bring an action in the supreme court of the state, and if that court is satisfied that the rates are, as claimed, unjust and unreasonable to such company, it may make an order directing the board of transportation to permit the railroad to raise its rates to any sum, in the discretion of the board, provided that the rates so raised shall not be higher than were those charged by such railroad on the 1st day of January, 1893. But this comes very far short of being an adequate legal remedy. Suppose, in such an action, the opinion of the supreme court is that the rates are unjust and unreasonable. There is no judgment of that court raising the rates, but only giving to the board of transportation a discretion. There is no final judgment relieving the company from the burden of the rates fixed by the act. It only opens the door to action by the board of transportation. Surely, a judgment or decree giving permission to do justice is not securing justice. It might as well be argued that giving to the executive power to pardon one convicted of crime is an adequate legal remedy for the correction of errors committed on the trial. An adequate legal remedy is one which secures, absolutely and of right, to the injured party, relief from the wrong done. But, even if it were a full and complete legal remedy, it is one which can be secured only in a single court, and that a court of the state. And, as was held in the case of *Reagan v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, it is not within the power of the state to tie up citizens of other states to the courts of that state for the redress of their rights, and for protection against wrong. The laws of congress, passed under authority of the constitution of the United States, open the doors of the federal courts to citizens of other states to suits and actions for the prevention or redress of wrong, and the state cannot close those doors. Whatever effect such legislation may have upon the courts of the state, the

courts of the United States are as open now as they were before to actions for the protection of citizens of other states in their property rights within the state of Nebraska; and the fact that the rates are absolutely prescribed by direct act of the legislature, instead of being created by a commission appointed by the state, is immaterial. The commission is but one agency of the state. The substantial question is whether the rates, as prescribed, work a wrong or injury to the property rights of the citizens of other states. I quote, in support of these propositions, these words from the case last cited:

"A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the federal courts. *Cowles v. Mercer Co.*, 7 Wall. 118; *Lincoln Co. v. Luning*, 133 U. S. 529, 10 Sup. Ct. 363; *Chicot Co. v. Sherwood*, 148 U. S. 529, 13 Sup. Ct. 695. \* \* \* The equal protection of the laws, which, by the fourteenth amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men; and it must never be forgotten that under such a government, with its constitutional limitations and guaranties, the forms of law and the machinery of government, with all their reach and power, must, in their actual workings, stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

There can be no doubt of the jurisdiction of this court in actions like these, and its duty to protect the property rights of the plaintiffs against any wrongful invasion thereof by the state through legislation in any form.

But the grave question still remains, are the rates prescribed in this act, as the maximum over which the railroad companies may not go, unreasonable, and so unreasonable as to justify the courts in staying its operation? No more difficult problem can be presented than this. There are so many matters which enter into it, and which must be taken into consideration, before a satisfactory answer can be reached. I think it may assist to a true understanding of the scope of this question, and the various considerations which must enter unto it, if we notice how, as a matter of history, the situation and the question have arisen. So far as the mere question of power is concerned, the transportation of persons and property is, equally with the carrying of letters and papers, a legitimate function of government. By reason of this, private corporations, acting as common carriers, are given the right to exercise the governmental power of eminent domain, and thus, against the will of the owner, to take his property for their public or quasi public uses. But in the history of this country the carrying of papers and letters was assumed by the government, and the transportation of persons and property left to private persons. In other words, the people chose to manage the carrying of the correspondence of the country, and to leave the matter of transportation to individuals. With the wisdom of this the courts have no concern. I simply notice the fact. But in consequence of this the carrying of letters and papers by strictly gov-

ernmental agencies became what may be fairly called a system, while the transportation of persons and property by private individuals and corporations became a business. In the one there was a simple classification and a uniform rate, and the system was extended wherever population went, and so far as possible to supply all the needs of all parts of the country in the way of transmission of news and letters. Whether, in the carrying out of this system, at the end of each year, there was a profit or not, was immaterial. It was something which the people of the whole country were doing for the joint and equal benefit of all, and if the expenses exceeded the revenues the common treasury paid the deficiency. Gain, profit, revenue, are in no sense the object of the post office. There is no effort to increase the number of letters or papers by special inducements, with a view of building up an increased business in one place or another, or in one direction or another. With uniform rates and equal facilities, all persons and places are served, and the system is improved, and the facilities for carrying and distribution are multiplied and bettered, as extensively and as rapidly as congress, in its judgment, deems for the best interests of the whole people. No citizen in any town or city can get special rates for the carrying of his correspondence. No one can be favored in the promptness with which his correspondence is carried, or the kind of service which is rendered. The thought and purpose of the post office is equal service to all, and uniform rates. On the other hand, as the government did not undertake the matter of transportation, it became a business carried on by individuals and corporations, and carried on, as other business, with a view to private gain, and according to the judgment of those engaged therein. No effort was made by the government, representing the public, to stay private investment in this business. On the contrary, the whole tenor of legislation was to encourage such investment, and thus to multiply the facilities and agencies of transportation, until now it is estimated that ten billions of dollars are invested in railroad transportation alone. It is unnecessary to stop here to inquire whether this investment was not largely in excess of the needs of the country, and unwisely made. It is enough to know that it has been made, with the acquiescence, if not with the active encouragement, of the public. Now, in the carrying on of any private enterprise, increase of business with increase of profits is a stimulating thought, and for this every variety of action is taken. Advertisement, solicitation, inducement, favors, are all freely resorted to, but with the single purpose of larger business and greater gain. It is not strange that in the carrying on of transportation all the characteristics of other kinds of business are found. Indeed, that is often given as one of the reasons for continuing the present methods in respect to transportation, and a matter in eulogy thereof. As evidence of this, I need do no more than quote this from the brief of counsel for the plaintiffs:

"Take the case of the beet-sugar factory at Grand Island. Nebraska sugar must be sold in the Chicago market, for instance, in competition with Cuba, Louisiana, and Sandwich Island sugar. If a higher price be asked for Nebraska sugar than for sugar from other regions, it will not find a buyer. But



the production costs about the same in Nebraska as in Cuba, Louisiana, and the Sandwich Islands. High railroad rates will shut it out of Chicago. Low rates must be given. Accordingly, the road is compelled, by the necessities of the situation, whether it will or not, to give them. Its own interests force it to do so. But that is not all. When the enterprise is in its infancy, cost of production is greater than elsewhere. Accordingly, the road must make rates so low as to cover this excess of the manufacture's cost; sometimes so low as to wipe out all the road's profit; sometimes below what the transportation costs the road. Of course, the road cannot always do this, nor can it do it on all its business. It justifies the irregularity in the exceptional case by the promise of paying business in the future. If helped at first, the new industry, by and by, will give the road a large business, and make up all concessions. The present loss is borne in hope of future gains. This is the way all commercial enterprises are carried on. He is most successful who acts on this principle with the best judgment. It is a general law of business."

The beet-sugar factory referred to in the above quotation furnishes a clear illustration of the difference between the post-office system and the transportation business. When the proprietor thought of locating that factory, the cost of correspondence was not considered, in determining the question of location, while that of transportation was the principal factor. Not only that; it was an uncertain factor. There was no schedule—no tariff—by which he could, at a glance, determine what the rates of transportation would be from one place or another to the market which he must reach. It became, therefore, a matter of negotiation—of contract—with the transportation companies; and, as stated by counsel, the negotiations resulted in rates at first cheaper than the cost of transportation, with the expectation of rates enlarged in the future, or that the loss on that transportation would be made up by extra charges on other transportation. Now, it may be for the interest of Nebraska that the beet-sugar industry be developed in that state, and that transportation elsewhere shall be temporarily burdened in order to accomplish this development; or, it may be better for the country at large, and thus for Nebraska, as a part of that country, that the cost of transportation everywhere be as fixed and certain as the cost of correspondence. But whether the one system or the other be the better is not for judicial consideration, for it is a mere matter of policy, involving, necessarily, no question of the rights of person nor property.

It is obvious that, in the matter of transportation, we are in an experimental or transitional stage. At first, transportation was a mere private business, and managed as such. Now, there is a growing conviction that the best interests of the people will be subserved by changing it from a business to a system. I say "experimental or transitional," for experience may satisfy that the change is not wise, and that it is better to continue transportation as a business; leaving to the interest of those engaged therein to determine how it shall be managed, and giving to them the power to build up, as counsel has suggested, industries and towns here and there. In such case the present would be only an experimental stage. Or it may be that experience will only make more imperative the present demand that transportation shall be a system, with absolute certainty and uniformity of rates, in which case the change will be

made, and this will be regarded as the transitional era. The transition may be accomplished by the government taking possession of transportation, and itself discharging that public duty. Certainly that would be the simplest, and—for the courts, at least—the easiest solution of the problem which now impends; for by purchase or condemnation, and in a single transaction, the state, paying simply the actual value of the property invested in transportation, would have the same control over that the national government has over the post-office system, and could prescribe such rates as it saw fit, making good by general taxation any loss. But, as ten billions of dollars are invested in the business of railroad transportation, the public may be reluctant to incur such indebtedness, and seek to accomplish the same result of uniformity of rates by means of legislation similar to that before us. In other words, leaving the property in the hands of the present owners, uniformity of rates is sought to be secured by compulsory legislation. Here comes in the embarrassment of present conditions. Property invested in railroads is as much protected from public appropriation as any other. If taken for public uses, its value must be paid for. Constitutional guaranties, to this extent, are explicit; and in such condemnation proceedings no inquiry is permitted as to how the owners have acquired the property, provided only it be legally held by them. If a farm belongs to an individual, and the public seeks to take it, it must pay its value, and is not permitted to diminish the price by proving the owner acquired the means of purchase by immoral or disreputable practices. He may have made his fortune dealing in slaves, as a lobbyist, or in any other way obnoxious to public condemnation; but, if he has acquired the legal title to the property, he is protected in its possession, and cannot be disturbed until the receipt of its actual cash value. The same rule controls if railroad property is sought to be appropriated. No inquiry is open as to whether the owner has received gifts from state or individuals, or whether he has, as owner, managed the property well or ill, or so as to acquire a large fortune therefrom. It is enough that he owns the property,—has the legal title; and, so owning, he must be paid the actual value of that property. If he has done any wrong in acquiring or using the property, that wrong must be redressed in a direct action therefor, and cannot be made a factor in condemnation proceedings. These propositions in respect to condemnation proceedings are so well settled that no one ever questions them. The same general ideas must enter into and control legislation of the kind before us. The value of the property cannot be destroyed by legislation depriving the owner of adequate compensation. The power which the legislature has is only to prescribe reasonable rates, not any rates. The language of the constitution of Nebraska in respect to the matter is (Const. 1875, art. 11, § 4), "And the legislature may, from time to time, pass laws establishing reasonable maximum, rates of charges for the transportation of passengers and freight on the different railroads in this state." But the foundation of the idea of reasonableness is justice. That which is unjust cannot be reasonable, and, when

the strong arm of the legislature is laid upon property invested in railroad transportation, it must be so laid as to do justice to such investors. There can be no justice in that which works to such investors a practical destruction of their property thus invested. It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. Railroads are not like stages or steamboats, which, if furnishing no profit at one place, and under one prescribed rate of transportation, can be taken elsewhere, and put to use at other places, and under other circumstances. The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed. The protection of property implies the protection of its value. The authorities on these general propositions are collected in the opinion in the recent case of *Reagan v. Trust Co.*, *supra*, and I need not do more than refer to that case.

What is the test by which the reasonableness of rates is determined? This is not yet fully settled. Indeed, it is doubtful whether any single rule can be laid down, applicable to all cases. If it be said that the rates must be such as to secure to the owners a reasonable per cent. on the money invested, it will be remembered that many things have happened to make the investment far in excess of the actual value of the property,—injurious contracts, poor engineering, unusually high cost of material, rascality on the part of those engaged in the construction or management of the property. These and many other things, as is well known, are factors which have largely entered into the investments with which many railroad properties stand charged. Now, if the public was seeking to take title to the railroad by condemnation, the present value of the property, and not the cost, is that which would have to pay. In like manner, it may be argued that, when the legislature assumes the right to reduce, the rates so reduced cannot be adjudged unreasonable if, under them, there is earned by the railroad company a fair interest on the actual value of the property. It is not easy to always determine the value of railroad property, and if there is no other testimony in respect thereto than the amount of stock and bonds outstanding, or the construction account, it may be fairly assumed that one or other of these represents it, and computation as to the compensatory quality of rates may be based upon such amounts. In the cases before us, however, there is abundant testimony that the cost of reproducing these roads is less than the amount of the stock and bond account, or the cost of construction, and that the present value of the property is not accurately represented by either the stocks and bonds, or the original construction account. Nevertheless, the amount of money that has gone into the railroad property—the actual investment, as expressed, theoretically, at least, by the amount of stock and bonds—is not to be ignored, even though such sum is far in excess of the present value. It was said in the case of *Reagan v. Trust Co.*, 154 U. S. 412, 14 Sup. Ct. 1059:

"It is unnecessary to decide, and we do not wish to be understood as laying down an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclu-

sive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible, without prejudice to the rights of others."

It is not always reasonable to cast the entire burden of the depreciation on those who have invested their money in railroads. Take the Union Pacific Railway, for illustration. At the time the government created the corporation, to induce the building of this trans-continental road through a largely unoccupied territory, it loaned to the company \$16,000 a mile; taking as security therefor a second lien on the property, and granting to the corporation the right to create a prior lien to an equal amount, which was done. There is testimony tending to show that the road in Nebraska could be built to-day for \$20,000 a mile. Would it be full justice to the government, would it satisfy the common sense of right and wrong, would it be reasonable, for the state of Nebraska to so reduce the rates that the earnings of the road would only pay ordinary interest on \$20,000 a mile, and so, the holders of the first lien being paid their interest, the government be forced to be content with only interest on one-fourth of its investment? Or, to put the case in a little stronger light, suppose the promoter of this enterprise had been some private citizen, who had advanced his \$16,000 a mile as a second lien, and that the road could be constructed to-day for only \$16,000 a mile. Would it be reasonable and just to so reduce rates as to simply pay to the holders of the first lien reasonable interest, and leave him without any recompense for his investment? Is there not an element of equity which puts the reduction of rates in a different attitude from the absolute taking of the property by virtue of eminent domain? In the latter case, while only the value is paid, yet that value is actually paid, and the owners may reinvest, and take the chances of gain elsewhere, whereas, if the property is not taken, the owners have no other recourse than to receive the sum which the property they must continue to own will earn under the reduced rates. Considerations such as these compel me to say that I think there is no hard and fast test which can be laid down to determine in all cases whether the rates prescribed by the legislature are just and reasonable, and that often many factors enter into the determination of the problem. Obviously, however, the effect of the reduction upon the earnings is the first and principal matter to be considered. This is a matter of computation. The power of regulating railroads is often said to be a legislative power vested in the lawmaking body, to be exercised for the general welfare. Within the term "regulation" are embraced two ideas: One is the mere control of the operation of the roads, prescribing the rules for the management thereof,—matters which affect the convenience of the public in their use. Regulation, in this sense, may be considered as purely public in its character, and in no manner trespassing upon the rights of the owners of railroads. But within the scope of the word "regulation," as commonly used, is embraced the idea of fixing the compensation which the owners of railroad property shall receive for the use thereof; and when regulation, in this sense, is attempted, it necessarily affects the property interests of the railroad owners; and it is "regulation,"

in this sense of the term, that we are to consider in the present cases.

There are certain matters which embarrass these cases, and render all computations more than ordinarily difficult. One is this: The various companies are doing an interstate as well as a local business. If these roads were wholly within the state, and only local business done by them, the computation would be much simplified, and the effect of the reduction in rates upon the property more easily disclosed. But all of these roads are interstate roads, and a large portion of their business is interstate business. Some of it is local business in other states than Nebraska. Now, it will not do to look simply at the gross earnings, and, because the reduction therein made by the enforcement of this statute still leaves enough to pay reasonable compensation to the owners of the property, uphold the act, because, if the legislature of Nebraska can put in force this tariff for local business, the legislatures of other states through which these roads run, and the congress of the United States, may make corresponding reductions in the rates on all other business, local and interstate, and the aggregate of such reductions might entirely destroy all earning capacity from the property.

Another matter to be noticed is this: There is in this act no interference with the passenger tariff, but only a maximum for freight rates. So we cannot place all the local expenses over against all the local receipts, and draw our conclusions therefrom. We have an attempt by the legislature to prescribe a maximum tariff for only the transportation of freight within the limits of Nebraska, and are called upon to determine whether the rates so fixed are unreasonable, and afford no fair compensation to those who have invested their means in these railroad properties. In order to determine this, we must ascertain what it costs to carry this local freight, what the receipts have been therefrom, and what reduction will be made in such receipts by the application of this act, and then we must take such proportion of the gross investment in the roads as the present earnings from local freights bear to the total earnings of the road. From these computations, we may see whether the reduction made by this act in the local freights, if applied to all the company's business, would leave any compensation to the owners, and, if so, how much. Obviously, the problem thus presented is one of exceeding difficulty. Fortunately, we have in Mr. Dilworth, the secretary of the state board of transportation, one of the defendants' witnesses, a gentleman whose competency and credibility are unchallenged. In the computations which I have made, I have relied mainly on his figures. From the labyrinth of tables, figures, and estimates presented in the testimony, and discussed by counsel in their briefs and arguments, let me take these two tables, presented by Mr. Dilworth, which seem to lay the basis for some fair calculations as to the effect of this act upon the business of the various companies:

## EXHIBIT 20.

Tons Carried, Tonnage per Mile, and Percentage of Expenses for Years ending June 30, 1891, 1892, and 1893. (Nebraska.)

1891.							
	No. of Tons Carried Locally.	No. Tons of Interstate Freight Carried.	No. Tons of Local Freight Carried 1 Mile.	No. of Tons of Interstate Freight Carried 1 Mile.	Total No. of Tons, Local and Interstate, Carried 1 Mile.	No. of Passengers, Local and Interstate, Carried 1 Mile.	Percentage of Expenses to Earnings.
Burlington & Missouri R. R. R. in Neb.	538,824	1,448,229	73,075,310	196,415,962	269,491,272	69,594,747	66.24
Chicago, St. Paul, Minn. & Omaha.....	64,496	228,671	10,267,118	36,397,629	46,664,747	7,403,263	70.78
Fremont, Elkhorn & Missouri Valley...	141,056	654,400	21,863,680	101,644,999	123,508,679	24,898,729	49.87
Union Pacific Railway.....	152,028	1,908,845	28,908,124	362,966,694	391,874,818	66,072,597	68.94
Omaha & Republican Valley.....	61,448	409,270	4,579,104	30,498,041	35,078,145	10,295,137	120.26
St. Joseph & Grand Island.....	25,078	178,169	1,497,658	10,640,979	12,138,637	2,308,918	96.44
Kansas City & Omaha.....	8,743	78,694	403,751	3,634,082	4,037,833	912,210	99.54
1892.							
Burlington & Missouri R. R. R. in Neb.	574,653	1,996,437	91,139,965	316,552,193	407,692,158	70,038,243	64.23
Chicago, St. Paul, Minn. & Omaha.....	65,762	264,403	11,028,287	44,321,384	55,349,671	8,833,405	65.93
Fremont, Elkhorn & Missouri Valley...	158,350	846,312	24,069,200	128,425,903	152,495,103	21,874,987	70.71
Union Pacific Railway.....	192,865	1,882,112	42,970,322	419,300,773	462,271,095	56,926,269	56.44
Omaha & Republican Valley.....	63,999	628,351	4,659,127	45,745,647	50,404,774	10,058,442	93.12
St. Joseph & Grand Island.....	39,657	303,550	2,005,851	15,355,015	17,360,866	2,472,538	74.23
Kansas City & Omaha.....	10,823	194,089	481,515	8,635,016	9,116,531	864,030	75.19
1893.							
Burlington & Missouri R. R. R. in Neb.	583,294	2,221,005	93,793,675	357,131,753	450,925,428	83,091,418	65.51
Chicago, St. Paul, Minn. & Omaha.....	78,753	279,218	12,848,551	45,554,417	58,402,968	9,074,093	64.58
Fremont, Elkhorn & Missouri Valley...	187,804	800,158	26,855,972	114,511,328	141,367,300	23,209,212	55.66
Union Pacific Railway.....	220,061	2,068,568	45,948,736	431,949,561	477,898,297	63,422,117	58.51
Omaha & Republican Valley.....	68,237	683,868	4,257,988	42,706,297	46,964,285	11,028,131	94.14
St. Joseph & Grand Island.....	60,452	337,647	2,774,860	18,576,845	21,351,705	2,834,169	62.05
Kansas City & Omaha.....	15,484	205,725	658,534	8,750,126	9,408,660	875,415	76.50

# DEFENDANTS' EXHIBIT 4.

Estimate of Local Business and the Effect of House Roll 33 on the Following Named Railroads.

	Number of Tons Hauled Locally.	Average Amount Re- ceived for Each Ton Hauled.	Total Amount Received for Tons Hauled Lo- cally.	Total Amount of Reduc- tion Caused by H. R. 33.	Amount Re- ceived from Passenger Business.	Amount Re- ceived for Freight Hauled in Nebraska, Including Through and Local.	Total Amount Realized on All Business Done in the State.	Per Cent. of Reduction on All Busi- ness Done in the State by H. R. 33.
Burlington & Missouri R. R. R. in Neb.....	574,653	\$2.15416	\$1,237,884	\$365,175	\$2,369,714	\$5,538,766	\$7,908,242	.044
Chicago, St. Paul, Minn. & Omaha.....	65,762	1.87089	123,033	36,294	263,458	472,051	763,509	.047
Fremont, Elkhorn & Missouri Valley.....	158,350	2.12633	336,714	99,310	598,219	1,495,468	2,093,687	.047
Union Pacific Railway. Omaha & Republican Valley .....	192,865	2.06498	398,262	117,487	977,264	4,284,793	5,262,057	.022
St. Joseph & Grand Island .....	63,999	1.38026	88,335	26,043	305,668	955,626	1,261,294	.022
	39,657	.63051	31,004	8,836	71,083	216,395	287,478	.030
Kansas City & Omaha.	10,823	.61261	6,630	1,889	41,123	125,530	166,653	.011

Exhibit 4 shows the amount actually received for business within the state during the year ending June 30, 1892, by the various roads whose interests are in controversy in these cases; also, the amount of reduction in those receipts which would have resulted if the rates prescribed by house roll 33 had been in force during that year. In Exhibit 20 is found the percentage of expenses to earnings upon the business of those companies. Obviously, the cost of transportation would be the same whether the companies received the prices which they did in fact receive, or the reduced rates prescribed by house roll 33. If the cost of hauling local freight was the same as that of the other business done by the roads, in order to ascertain what amount the companies earned from local freight, it would be necessary to multiply the gross receipts by the percentage of expenses to earnings. This would show the amount that it cost to carry that freight, and the difference between that cost and the receipts would be the amount of the net earnings. From such net earnings subtract the amount of reduction caused by house roll 33, and the result will show whether, under such rates, the companies would have earned anything from local freight, and, if so, how much. Making this computation, and placing the results in a table, and we have the following:



	Gross Receipts, or Total Amount Received for Tons Hauled Locally.	Percentage of Expenses to Earnings.	Cost of Hauling Local Freight.	Net Earnings from Local Freight.	Total Amount of Reduction caused by H. R. 33.	Net Earnings, if Rates Prescribed by H. R. 33 had been in Force.	Deficiency from Same Cause.
Burlington & Missouri R. R. R. in Neb.	\$1,237,884	64.23	\$759,092	\$442,792	\$365,175	\$77,617	—
Chicago, St. Paul, Minn. & Omaha.....	123,033	65.96	81,152	41,881	36,294	5,587	—
Fremont, Elkhorn & Missouri Valley...	336,714	70.71	238,090	98,624	99,310	—	\$686
Union Pacific Railway.....	398,262	56.44	224,779	173,483	117,487	55,596	—
Omaha & Republican Valley.....	88,335	93.12	82,257	6,078	26,043	—	\$19,965
St. Joseph & Grand Island.....	31,004	74.23	23,014	7,990	8,836	—	846
Kansas City & Omaha.....	6,630	75.19	4,985	1,645	1,889	—	244

From this table it will be seen that if, during that year, these companies had been limited in their charges to the rates prescribed by this house roll, four of them, to wit, the Fremont, Elkhorn & Missouri Valley, the Omaha & Republican Valley, the St. Joseph & Grand Island, and the Kansas City & Omaha, would not only have received nothing by way of earnings, but would actually have been carrying the freight at a loss. The three other roads would have made, respectively, net earnings of \$77,617, \$5,587, and \$55,996. This is upon the assumption that the cost of carrying local freight is the same as that of carrying through freight, and hence that, applying the general per cent. of expenses, enables us to determine accurately the earnings from local freight. But the testimony shows that the cost of carrying the local freight is largely in excess of the cost of other business. The exact per cent. of such excess is not disclosed. It may, perhaps, be difficult to determine it accurately. Mr. Fink, a witness for the plaintiffs,—a gentleman of large experience in railroad transportation, and of national reputation as an authority in such matters,—says that the cost of carrying local freight is four times that of carrying through freight; Mr. Utt, another witness for the plaintiffs, who is the commissioner employed by the Commercial Club, of Omaha, to look after railroad transportation matters affecting the business of the city, testifies that the one costs six times as much as the other; while Mr. Dilworth, the secretary of the defendant board, and their principal witness on matters of this kind, also says that it costs more to do local than through business; that the percentage of operating expenses on the local business would exceed the percentage on all business probably 10 per cent., and might run up to 20 per cent.,—possibly, might be higher than that. Of course, this testimony is not like that which we have heretofore been examining, where the figures and per cents. are accurate and certain, but is largely in the way of estimate. And yet it is clear from the testimony that the per cent. of expenses for carrying local freight is considerably above the total per cent. of operating expenses. Now, turning to the last table, it will be seen that, if the cost of carrying local freight was 7 per cent. more than the general per cent. of expenses, the Burlington & Missouri River Company would, under the reduction caused by house roll 33, have earned nothing from the transportation of local freight; if only 5 per cent., the Chicago, St. Paul, Minneapolis & Omaha road would likewise have earned nothing from that source; and, similarly, the Union Pacific Railway, if the per cent. was 14.1 per cent. It is difficult to resist the conviction that if the rates prescribed by house roll 33 had been in force during the year ending June 30, 1892, not a single one of these roads would have earned a dollar from the transportation of local freight. It is true that Exhibit 4 shows the effect of the reduction caused by house roll 33 only for the business of a single year,—that ending June 30, 1892; but a comparison of the business in 1891 and 1893 with that for 1892, as found in Exhibit 20, shows an average per cent. of expenses less in 1892 than in either of the other years. So that evidently the year 1892 was selected by the board of transportation for the making of its table, Exhibit 4, as the most favorable. But light upon this legislation is further thrown by another table prepared by defendant, as follows:

## DEFENDANTS' EXHIBIT 23.

Statement Showing Mileage, Capital Stock, and Funded Debt of the Following Named Railroads for the Year Ending June 30, 1892.

	Entire Mileage.	Capital Stock.	Funded Debt.	Total.	Capital Stock per Mile.	Funded Debt per Mile.	Total for Mile.
C. B. & Q.....	5,290	\$76,397,400	\$116,580,980	\$192,978,380	\$14,439	\$22,034	\$ 36,473
C., St. P., M. & O.....	1,356	34,050,126	23,742,800	57,792,926	25,103	17,504	42,608
F. E. & M. V.....	1,300	30,370,000	21,119,000	51,489,000	23,352	16,238	39,590
U. P. Ry.....	1,826	60,868,500	128,734,397	189,602,897	33,318	70,468	103,786
O & R. V.....	482	2,420,550	5,941,000	8,361,550	5,021	12,324	17,345
St. J. & G. I.....	251	4,600,000	8,721,405	13,321,405	18,322	34,768	53,060
K., C. & O.....	193	4,410,000	2,713,000	7,123,000	22,769	14,007	36,007

Take the Union Pacific Railway, whose net earnings for local freight seem greater than those of any other company, and by this last table it appears to be bonded for \$70,468 per mile. The total mileage of that road within the state is 487 miles; so that, if the bonded incumbrance were distributed according to mileage, the burden resting upon the part of the road within the state of Nebraska would be \$32,908,556. Six per cent. interest on this (the amount allowed by act of congress incorporating the company, and which is the rate on the original mortgages, at least) is \$1,974,513, or the amount to be paid out of the earnings of the road before the stockholders are entitled to any dividends. From Exhibit 4 it appears that the receipts for all business done in the state was \$5,262,057; for hauling local freight, \$398,262, or about  $7\frac{1}{2}$  per cent. of the gross receipts. Local freight, therefore, should earn  $7\frac{1}{2}$  per cent. of the amount necessary to pay the interest on the bonded indebtedness resting on the lines in the state. Seven and one-half per cent. on \$1,974,513 is \$148,088. But the net earnings for local freight that year were \$173,483, showing that there was only about \$25,000 earned from local freight, to be distributed among the stockholders; and this upon the assumption, in the face of the testimony to the contrary, that the cost of carrying local freight is exactly determined by the general per cent. of expenses to earnings. By the same table it appears that if the rates prescribed by house roll 33 had been in force the earnings from local freight, upon like assumption, would have been \$55,996, or but little more than one-third of the amount necessary to pay the portion of the interest on the bonds properly chargeable to local freight. If it be said that it is not a fair apportionment of the bonded indebtedness, to distribute it by the mileage, because the cost of construction in the mountainous part of the road, west of Nebraska, was much greater than such cost within the limits of the state, and if it be said that the cost of material and labor at the time of construction was far in excess of the present cost, and that there was extravagance, if not corruption, in carrying on the work of construction (all of which is undoubtedly true), it is also true that the act of congress under which the company was chartered and the road constructed provided for the issue by government to the company of bonds to the amount of \$16,000 a mile within the limits of the state of Nebraska, to be a second lien, and with power in the company to execute a prior mortgage for a like amount. Congress, therefore, in the inception of the work, made specific provision for an indebtedness of \$32,000 per mile on the road within the limits of the state. In order to meet its share of the interest on such indebtedness, the local freight should have earned \$67,248, or about \$12,000 more than would have been earned under house roll 33. Again, there is a volume of testimony as to what it would cost to reproduce these various roads; such amount being, as claimed, a fair test of the present value. I shall not—now, at least—attempt to make any comparison of this testimony, but, for present purposes, content myself with taking this concession from the brief of the defendants' counsel:

"There is sufficient testimony in this record to justify the conclusion that the average cost of reproduction or value of the roads in the state of Nebraska does not exceed \$20,000 per mile, including right of way, railway tracks, equipment, station houses, telegraph lines, and terminal properties."

The present value of the Union Pacific Railway property in the state, at the sum named in this concession, would be \$9,340,000. To pay 6 per cent. on this conceded value would require, as its contribution to the earnings from the local freight, \$42,030. Or, in other words, upon the conceded value, the local-freight earnings, as reduced by house roll 33, would have paid but their proportionate share of 8 per cent. interest. If a proportionate reduction in rates was made by other states and by congress (and, of course, such a reduction would be equally within their power), so that the total net earnings of the road would be but 8 per cent. on this conceded value, obviously only the holders of the first lien would receive full interest on their indebtedness, while the holders of subordinate liens would receive but a fraction thereof. All the stockholders would go without compensation, and soon their investment be swept away by foreclosure proceedings. Take the same process of computation, and apply it to the only other company which would have any amount of earnings under the reduction caused by house roll 33, to wit, the Burlington & Missouri River Railroad in Nebraska. Beyond the statement in Exhibit 23 of the capital stock and funded debt per mile of the Chicago Burlington & Quincy Company, which owns and operates the Burlington & Missouri River Railroad, we have, from the testimony of its auditor, the exact amount of mortgage indebtedness resting upon the road within the limits of the state, and the amount of interest charges due therefrom, to wit, an indebtedness of \$45,268,992.80, and interest charges for the year 1892, \$2,224,171.17. The amount received for local freight was about 16 per cent. of the total amount realized on all business done in the state, as appears from Exhibit 4. Sixteen per cent., therefore, of this interest, should have been earned by the local freight. Sixteen per cent. is \$355,867. But the table shows that the net earnings therefrom, under the rates prescribed by house roll 33, for that year, would have been only \$77,617,—not a fourth of the amount which it should contribute to the payment of such interest. But again, as Mr. Dilworth testified, the average reduction on local rates caused by house roll 33 is  $29\frac{1}{2}$  per cent. The tariff which was in force at the time of the passage of this act had been for some three or more years fixed by the voluntary action of the railroad companies, and the reduction of  $29\frac{1}{2}$  per cent. was from its rates. It must be remembered that these roads are competing roads; that competition tends to a reduction of rates, sometimes, as the history of the country has shown, below that which affords any remuneration to those who own the property. Can it be possible that any business so carried on can suffer a reduction of  $29\frac{1}{2}$  per cent. in its receipts without ruin? What would any business man, engaged in any business of a private character, think of a compulsory reduction of his receipts to the amount of  $29\frac{1}{2}$  per cent.? The effect of this testimony is not destroyed by the table offered of the percentage of reduction on the total amount of business done by these companies in the state, as follows:

B. & M. R.....	4.2%
C. St. P. M. & O.....	4.5%
F. D. & M. V.....	4.1%
U. P.....	2.0%
O. & R. V.....	1.9%
St. J. & G. I.....	2.7%
K. C. & O.....	1.5%

For such a table indicates, as is further shown by defendants' Exhibit 4, how small a proportion of the total amount of business done in the state comes from purely local freight. Nor is it weakened by any comparison between the amount of reduction and the total receipts from all business. It may be, as stated by counsel, that the annual earnings of the Chicago, Burlington & Quincy Company are \$27,918,128, and that the total amount of reduction caused by this house roll 33 is only \$365,175. It may be that the capital stock of the company is \$76,407,500, and that \$365,175 distributed among the stockholders may not be, for any of them, a great sum; but the entire earnings of the Chicago, Burlington & Quincy are more than 20 times the receipts from local freight in Nebraska, and to reduce such earnings by 20 times \$365,175 would make a startling difference in their amount. The fact that the state of Nebraska can reach only one-twentieth of the total earnings gives it no greater right to make a reduction in respect to that one-twentieth than it would have, had it the power over the total earnings, and attempted in them a like per cent. of reduction. If it would be unreasonable to reduce the total earnings of these roads 29½ per cent., it is *prima facie*, at least, equally unreasonable to so reduce any single fractional part of such earnings.

It is, however, urged by the defendants that, in the general tariffs of these companies, there is an inequality; that the rates in Nebraska are higher than those in adjoining states; and that the reduction by house roll 33 simply establishes an equality between Nebraska and the other states through which the roads run. The question is asked, are not the people of Nebraska entitled to as cheap rates as the people of Iowa? Of course, relatively, they are. That is, the roads may not discriminate against the people of any one state. But not necessarily absolutely as cheap, for the kind and amount of business, and the cost thereof, are factors which determine largely the question of rates, and these vary in the several states. The volume of business in one state may be greater per mile, while the cost of construction and of maintenance is less. Hence, to enforce the same rates in both states might result in one in great injustice, while in the other it would only be reasonable and fair. Comparisons, therefore, between the rates of two states, are of little value, unless all of the elements that enter into the problem are presented. It may be true, as testified by some of the witnesses, that the existing local rates in Nebraska are 40 per cent. higher than similar rates in the state of Iowa. But it is also true that the mileage earnings in Iowa are greater than in Nebraska. In Iowa there are 230 people to each mile of railroad, while in Nebraska there are but 190; and, as a general rule, the more people there are the more business there is. Hence, a mere difference between the rates in two states is of comparatively little significance.

Another matter must be noticed. As heretofore stated, the year 1892, upon which the estimates given by Mr. Dilworth are made, seems to have been the most favorable of the three years in respect to which figures are given. In addition to the inference drawn from these tables, the testimony of witnesses shows that that year was one of the most prosperous years for railroad business in quite a length of time. Now, it is one of the difficulties of this case that no provision is made for the varying conditions of business in different years and parts of years. Maximum rates are prescribed, above which the roads may not go, no matter what unforeseen events may affect the amount of business which they are doing. Indeed, since the argument of these cases, the railroad business in the West suffered a most serious prostration, growing out of the fearful strikes in the month of July. A statutory and fixed tariff, like the one before us, has no provisions for such contingencies as that. The loss is cast absolutely and wholly upon those who have invested their money in railroad business. In short, it deprives these property owners of all chances to make profit which result from private control of business, and compels them to pay out of their pockets all the losses which result from the enforcement of an absolute system.

I might prolong this opinion, and notice many other matters which have been referred to by counsel. I have done a great deal of work in computations,—work which is properly the duty of a special master, but which I have done in order to satisfy myself as to the effect of this reduction of rates on the business of these railroads. I have not attempted to introduce all of these computations into this opinion. It is long enough as it is. The computations and tables which I have placed indicate the lines of inquiry which have seemed to me most satisfactory. The conclusion to which I have come is that, having regard to the present condition of affairs in the state, the present volume of business done over these roads, and any probabilities of an early change in that volume, a reduction of 29½ per cent. in the rates for local freight is unjust and unreasonable to those who have invested their money in these railroad properties. I appreciate fully the embarrassments and difficulties attending an investigation of this kind. I am reluctant, as every judge should be, to interfere with the deliberate judgment of the legislature. I have taken much time to study this case in all its relations, and have come, though reluctantly, to the conclusion I have stated, and am therefore constrained to order decrees in behalf of the plaintiffs, staying the enforcement of this tariff upon the companies named in the bills. It may be said that, even if furnishing no reasonable remuneration to-day, the result might be different under an increase of business. That, of course, is possible; and it may be that, as the volume of business increases, the time will come when the rates fixed by this house roll 33 will be reasonable and just. So there should be entered, as a proviso to the decrees, that leave is reserved to the defendants, at any time that they are so advised, to move the court for a reinvestigation of the question of the reasonableness of these rates.

PARK v. NEW YORK, L. E. & W. R. CO. et al.

(Circuit Court, S. D. New York. October 31, 1894.)

**RAILROAD COMPANIES—RECEIVERS—PAYMENT OF INTEREST ON BONDS—PRIORITY.**

Upon a request for instructions by the receivers of defendant, an insolvent railroad corporation, as to payment of interest on bonds, it appeared (1) that one series of bonds was issued by defendant, and secured by a mortgage of stocks and bonds which had a market value largely in excess of the amount of bonds issued, and produced an income in excess of the interest on such bonds, and which secured to defendant control of properties forming integral and essential parts of its system, which would be lost if such stocks, etc., were sold under foreclosure; (2) that another series consisted of first mortgage bonds of a road constituting a link of vital importance in defendant's system, the loss of which by foreclosure would greatly depreciate the value of the rest; (3) that another series consisted of like bonds of another road, of great value to defendant's system; (4) that another series consisted of bonds secured by a deposit of four sets of past-due coupons of defendant's second consolidated mortgage bonds, which coupons, under the terms of that mortgage, were superior in lien to coupons of the same bonds subsequently maturing. *Held*, that the coupons of each of these series of bonds should be paid by the receiver, out of any available funds, before payment of coupons of the said second consolidated mortgage bonds maturing during the receivership, although such second consolidated mortgage was prior in date to all the aforesaid mortgages, and notwithstanding there was a question as to whether the lien of such second consolidated mortgage upon the stocks and bonds covered by the first-mentioned mortgage was not superior to the lien of that mortgage, which question could not be determined in this suit.

This was a proceeding by Trenor Luther Park against the New York, Lake Erie & Western Railroad Company for the appointment of receivers and for other relief. John King and John C. McCullough were duly appointed receivers, and in August, 1893, the Farmers' Loan & Trust Company petitioned the court for leave to intervene as a party defendant, and an order was made to that effect. The cause is now before the court on petition by the Farmers' Loan & Trust Company praying for an investigation by the court, and an order respecting the payment of certain demands against the railroad company by the receivers.

Frederic B. Jennings, for receivers.

Herbert B. Turner and Frederick Geller, for Farmers' L. & T. Co., for motion.

James C. Carter, for second consolidated bondholders.

Francis L. Stetson, for certain second consolidated bondholders.

LACOMBE, Circuit Judge. Receivers of the defendant railroad company were heretofore in this action appointed, and are now administering their trust. The defendant trust company is the mortgagee in trust under various mortgages covering property of the defendant railroad company. Among these mortgages is one known as the "New Second Consolidated Mortgage," dated October 5, 1878, under which bonds to the amount of \$36,097,400 are outstanding. The coupons falling due on this mortgage since receivers have been appointed have not been paid, the receivers not being in



receipt of sufficient net income to meet them; but proceedings to foreclose have not been instituted, as the mortgage provides therefor only in the event of default on each of six successive coupons. The trust company now presents a petition, accompanied by a letter received from the holders of a large number of these bonds, in which letter it is stated that there is reason to apprehend the payment by the receivers of interest installments soon to grow due upon certain bonds of the defendant company, and companies owned or controlled by it, which are subsequent and inferior in point of time or of lien, or of both, to the bonds secured by the said second consolidated mortgage. The petition prays that the court will make such investigations as may be proper, and will make such order as to the payment of the various installments of interest as the circumstances may demand. A supplemental petition presents another letter received from the holders of \$27,000,000 of the second consolidated mortgage bonds, urging the trust company to impress upon the court the importance of instructing the receivers to pay promptly at maturity such interest on bonds of four series therein named, and which are secured by mortgages subsequent in date to the said second consolidated. Counsel representing both sets of second consolidated bondholders have been heard on the argument. The receivers, in answer to the petition, set forth certain facts, and also submit the question to the court with a request for instructions. The bonds upon which it is alleged that installments of interest are about to be paid are these:

No. 1. Collateral trust bonds of defendant railroad, \$3,344,000, 6%. Mortgage dated November 1, 1882. Coupons due November 1st and May 1st.

No. 2. First mortgage bonds, Chicago & Erie Railroad Company, \$12,000,000, 5%. Mortgage dated August 21, 1890, and guaranteed by defendant railroad. Coupons due November 1st and May 1st.

No. 3. First mortgage bonds, New York, Lake Erie & Western Coal & Railroad Company. \$3,000,000, 6%. Mortgage dated May 15, 1882, and guaranteed by defendant railroad. Coupons due November 1st and May 1st.

No. 4. Income bonds of defendant railroad, \$508,008, 6%. Coupons due December 1st and June 1st.

No. 5. Funded coupons bonds of 1885, \$4,031,000, of defendant railroad, 5%. Mortgage dated November, 1885. Coupons due December 1st and June 1st.

As to No. 4,—the income bonds,—it appears that no interest upon them has been earned, and that none is to be paid. They are therefore withdrawn from further consideration. The coupons on Nos. 1, 2, and 3 fall due November 1st, and the court intimated upon the argument that it might not be possible, within the brief time remaining before that day, to examine and dispose of all the points raised with regard to them. Upon investigation, however, it appears that the questions now presented for determination are not at all as comprehensive as was then supposed, and there is no reason why the answers to them should be further delayed.

No. 1. The Collateral Trust Bonds. In 1882 the defendant railroad, being the owner of stocks and bonds of various corporations, pledged them to the United States Trust Company as security for a series of bonds issued by defendant. The various stocks and bonds thus pledged were specifically enumerated in the indenture of mort-

gage, and they were delivered to the United States Trust Company, the railroad reserving the power of voting on such stocks and bonds, so as not to lose its control of the subsidiary corporations. In case of six months' default in payment of interest on the collateral trust bonds, the United States Trust Company was authorized to sell the pledged securities at public auction upon three months' notice. The amount of collateral trust bonds outstanding is \$3,344,000. The par value of the stocks and bonds pledged for their payment is about \$8,000,000, and their actual value not less than three times the amount of collateral trust bonds outstanding. The pledged stocks and bonds are paying interest, annually, in excess of the interest due on the trust bonds by over \$50,000. It appears, moreover, that in some instances such pledged stocks secure to their owner the control of property which is, and has been for many years, an integral part of the Erie Railroad system. The anthracite coal lands and the bituminous coal lands, from which the road draws a large part of its supply of coal, are owned by corporations, the entire capital stock of which is included among the securities thus pledged. It is plain that if, upon default in the payment of the interest falling due on the collateral trust bonds, the trustee should, as the mortgage provides, declare the whole principal due, and sell the pledged securities in the open market to the highest bidder, the value of the property which was placed in the hands of these receivers to be conserved for the benefit of all the creditors would be most seriously impaired. Certainly, such a catastrophe should not be allowed to overtake the property while in the hands of the court if it is avoidable. It is urged, however, that no such disastrous consequence could result from a failure by the receivers to meet the interest coming due on collateral trust bonds. The second consolidated mortgage, which was made four years before these securities were pledged, enumerates not only the real estate, but also the estate, right, title, and interest of the Erie Company in various corporations expressly named, and, in general terms, "all manner of mixed and personal property, of whatever nature or description the same may be, at the date of these presents owned or possessed by said party of the first part, or that may at any time hereafter, during the continuance of this trust, be acquired by said party of the first part." By the terms of the mortgage, these securities, subsequently pledged to the United States Trust Company, were left in the possession of the railroad company, with a power of sale or exchange which is set forth in much detail in article 5 of the indenture. It is contended that the second consolidated mortgage subjected all the securities subsequently transferred to the United States Trust Company to a lien superior to any obtainable by the latter company as trustee under the collateral trust mortgage. Hence, it is argued that no title, save, perhaps, to an equity subordinate to the consolidated mortgage, could be conveyed by any attempted sale under foreclosure of the collateral trust mortgage. In other words, the question presented is, what are the respective rights of the holders of these two mortgages in the stocks and bonds enumerated in the collateral trust indenture? Manifestly, that is a question which this court should not now

answer. The holders of the collateral trust mortgage are not before us. The court is uninformed as to all the facts, and unenlightened by the arguments of all the parties in interest. All it is necessary or proper to determine now is whether the receivers should default and allow foreclosure of the collateral trust mortgage, on the chance that, when such foreclosure proceedings are instituted, the court before which the main question may come will hold that the holders of such mortgage acquired no right to sell out the securities enumerated therein, and with the certainty that, should such court reach an opposite conclusion, the property which was placed in the hands of these receivers to be preserved intact, as far as might be possible, for all the creditors, secured and unsecured, in the proper order of their priorities, would be most seriously impaired. The receivers should take no such risk. To do so upon speculations as to the future decision of some other court would be simple recklessness. The receivers should, if they have the money, pay the interest, and thus secure the pledged stocks and bonds beyond any peradventure, as assets valuable in themselves, and still more valuable because they preserve the control of subsidiary railroads, steamboats, coal fields, and other appurtenances essential to the system as a whole. The interests of the second mortgage bondholders themselves, quite as much as those of all other creditors, call for such action.

No. 2. First Mortgage Bonds Chicago & Erie Railroad. This road is part of the Erie system. It appears from the reports that it is not being operated at a profit. A statement submitted by the receivers seems to indicate that, were it not for the fact that this subsidiary road is charged with a disproportionate share of certain expenditures, that result would not appear. All such questions of bookkeeping, however, may be disregarded. The road in question is 269 miles in length, extending from Marion to Chicago. It is an integral part of the main line of the Erie Railway, and is the line by which it enters Chicago and secures the terminal facilities of that great railroad center. It must be assumed that, in the event of default upon these first mortgage bonds, foreclosure would ensue, and the Chicago & Erie Railroad be sold out to the highest bidder. To allow this to happen, if they have money in hand to prevent it, would be most reprehensible improvidence on the part of the receivers, unless it can be shown that the depreciation in the value of the whole property consequent upon discarding its present communication with Chicago may be made good in some other way. Upon the argument it was intimated that a reference might be ordered touching these bonds and those of the coal and railroad company, next to be considered, but upon further examination of the papers before the court it seems premature to make any such order. When any facts are presented tending to show that the loss of these 269 miles of road will not impair the value of the property, it will be time enough to send it to a master to take testimony, and report at a hearing where all parties creditor, whether secured or unsecured, may have an opportunity to discuss the question.

No. 3. New York, Lake Erie & Western Coal & Railroad Company  
v.64f.no.2—13

**Bonds.** The situation here is about the same. The road in question is the main line which connects the Erie system with its coal fields. Over this line, without payment of any freight, it hauls the coal which it uses to drive its engines on other parts of the system. The same remarks apply to these securities, and the same disposition should be made of them. Until further facts appear, the receivers should pay interest accruing on both these sets of bonds.

**No. 5. Funded Coupon Bonds of 1885.** In the years 1884 and 1885 the defendant railroad defaulted on the payment of four successive coupons of the second consolidated mortgage bonds. These coupons were deposited by their holders with the Farmers' Loan & Trust Company, as a trustee, to be held, "with all the rights, lien, remedies, and security incident thereto," in trust for the benefit of, and as collateral security for, a new issue of bonds, known as the "Funded Coupon Bonds of 1885," and taken by the holders of the coupons in exchange or substitution therefor. The funding coupon indenture, under which these funded coupon bonds were issued, expressly provides that all the rights, remedies, lien, and security incident to the coupon shall remain in full force for the purpose of obtaining or enforcing payment of said funded coupon bonds. The same indebtedness is represented both by coupons and bonds. By the terms of the second consolidated mortgage it is expressly provided that each due coupon must be paid in full before part payment of any coupon subsequently maturing. Upon winding up the affairs of the defendant railroad company, therefore, these coupons would have to be paid in full before any subsequent installment of interest or the principal of the second consolidated bonds. The debt, therefore, represented by these coupons and by the funded coupon bonds, is superior in point of lien to that represented by subsequent coupons of the second consolidated bonds, and there is no reason why the receivers should be instructed not to pay them, if there be net income available for that purpose.

**NOTE.** For prior hearing on motion of the New York, Pennsylvania & Ohio Railroad Company, as petitioner, to instruct the receivers of the defendant as to the making of certain payments to petitioner, see 57 Fed. 799.

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**PAGE et al. v. SUN INSURANCE OFFICE.**

(Circuit Court, D. Minnesota, Fourth Division. November 5, 1894.)

**INSURANCE—PRORATING LOSS.**

Where property is covered by both a specific and a compound policy, each containing a provision that the company shall not be liable for a greater proportion of any loss than the amount insured bears to the whole insurance, the full amount of the compound policy is available for its due proportion.

**Action by Edward S. Page and others against the Sun Insurance Office on a fire policy.**

In this case plaintiffs, lumber dealers at Anoka, Minn., held four policies of insurance for \$2,500 each, of which the defendant issued one, on the westerly block of their lumber yards. They also held policies, amounting

to \$40,000, covering the lumber on both the easterly and westerly blocks. A loss occurred, solely upon the westerly block, to the amount of \$30,982.02; and the only question to be determined is as to the contribution to be paid under the several policies. It is agreed that the values before the fire were \$42,368.46 on the westerly block, and \$16,727.06 on the easterly block which was not damaged. All the policies were of the Minnesota standard form, and contained the following clause: "This company shall not be liable under this policy for a greater proportion of any loss on the described property than the amount hereby insured shall bear to the whole insurance \* \* \* covering such property." Plaintiffs contend that the \$40,000 compound policies are available for the payment of the loss on the westerly block, only in the proportion that the valuation of the westerly block bears to the combined valuation of both blocks; or, in other words, that amount is to be obtained by adding together the valuations of each block, dividing the \$40,000 by that sum, and multiplying the dividend by \$42,368.46, which gives the amount of \$23,577.95; and it is stipulated that, if this view be correct, defendant is liable for \$2,002.56. On the other hand, defendant insists that the whole \$40,000 is available, and it is agreed that, if this rule is to be applied, the defendant is liable for only \$1,549.10, and for this sum it has offered judgment.

Kueffner, Fauntleroy & Searles, for plaintiffs.  
 Kitchel, Cohen & Shaw, for defendant.

NELSON, District Judge (after stating the facts). Under this clause in the Minnesota standard policy, which is the contract governing the case, the limitation of liability is for a proportionate part of the whole insurance covering the property; and the stipulation exempts the defendant from any greater liability than a part of the loss, to be measured by the whole amount insured. This rule, it seems to me, must be applied whether the other insurance is by specific or compound policies. There is no intimation in the clause that compound or floating policies covering the same and other property are not to be considered as part of the whole insurance covering such property. Let judgment be entered for plaintiffs in the sum of \$1,549.10.

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SCHERMERHORN v. DE CHAMBRUN.

(Circuit Court of Appeals, Second Circuit. October 16, 1894.)

No. 136.

1. FRAUD—PARTIES IN PARI DELICTO.

C., who was engaged as agent of certain heirs of one J., in efforts to recover property formerly belonging to J., under an agreement for compensation contingent upon success, made a contract, in 1876, with defendant, a lawyer, for services. C. made the agreed payments, and afterwards paid defendant other sums for further services. During the year 1876, C. made contracts with sundry lawyers and other persons for services and advances, agreeing to pay them out of his share of the J. property, after payment of expenses and counsel fees, making their claims liens upon such share. In August, 1880, C. contracted in writing with defendant to pay him \$30,000 in consideration of services rendered, the amount to be a lien upon C.'s share of the J. property. Defendant had rendered and continued to render important services throughout the litigation. After its close, resulting in a comparatively small recovery, C. brought this suit to establish a trust for his benefit in the \$30,000 which had been paid to defendant, alleging that the contract of August, 1880, was made upon a secret understanding between C. and defendant

that the \$30,000 should be held in trust for C., in order to withdraw that amount from the liens of the contracts made in 1876, by making it appear to be paid as counsel fees. Defendant denied the existence of such trust. Held that, assuming the alleged trust to be proved (as it did not appear to be), it would constitute a fraud upon C.'s creditors under the contracts of 1876, and a means of fraud upon others with whom he might contract, and equity would not aid C. to obtain the fruits of such fraud from his co-conspirator.

2. SAME—ATTORNEY AND CLIENT.

The fact that defendant was a lawyer would not bring the case within the exception as to transfers of property made by a client to his attorney to defeat creditors, since it did not appear that C. was induced to create the alleged trust by defendant's suggestion or advice, and the exception exists only where client and attorney are not in *pari delicto*, but the former acts under the advice of the latter.

This was a suit by Pierre De Chambrun, as administrator of Charles A. De Chambrun, against George J. Schermerhorn, to establish and enforce a trust, and is now heard on defendant's appeal from a decree of the circuit court in the Southern district of New York, sustaining the bill upon pleadings and proofs, and directing an accounting. 59 Fed. 504. The suit was originally brought by Charles A. De Chambrun, but after the complainant's proofs had been in part put in, he died, and his administrator was duly substituted. The words "complainant" or "De Chambrun," wherever used in this opinion, refer, of course, to the original complainant. Much of the record in this suit was before this court in *De Chambrun v. Campbell's Adm'rs*, 54 Fed. 231, and reference may be made to the voluminous statement of facts contained in the opinion in that case, much of which is necessarily reproduced here.

Arthur H. Masten and Louis Marshall, for appellant.

Everett P. Wheeler, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Charles, Marquis De Chambrun, was a citizen of France, for some time prior to the transactions hereinafter set forth a resident of this country, and attached to the French legation at Washington as its counsel and legal adviser. He was by profession a lawyer, though, of course, being an alien, not a practitioner in the courts of this state. Defendant is a lawyer, admitted to the bar in 1867. Until 1869 he was employed as a law clerk, the latter part of the time in the office of Edmonds & Field, where he acquired some knowledge as to the *Jumel* litigation, hereinafter referred to. Thereafter he entered upon the practice of his profession on his own account, continuing therein until the summer of 1876, when he met the complainant. For the period from 1870 to July, 1873, however, he was employed otherwise than at the bar. For many years there was pending in the United States courts what was known as the "*Jumel* litigation," which involved the title to valuable real estate in the upper part of the city of New York, in the possession of Nelson Chase and others, who derived their title from Madame Jumel, the widow of Stephen Jumel. This litigation found its way into the supreme court of the United States in the case of *Bowen v. Chase*, 94 U. S. 812, 98 U.

S. 254. During the progress of that suit it was discovered that the property involved had at one time belonged to Stephen Jumel, and it was claimed that the title thereto was still vested in his heirs. This claim came to the knowledge of De Chambrun some time in 1875, through one Joseph B. Stewart, a lawyer in New York, and on July 8, 1875, he entered into a contract with Nathaniel Wilson, a lawyer in Washington, whereby they mutually agreed to undertake the recovery of the property for the heirs, and to divide between them the net proceeds of such percentage as the heirs might agree to pay. Thereupon De Chambrun set out to find the heirs, who were residents of France,—a result which he accomplished with the assistance of one Stanislaus Le Bourgeois,—and on April 20, 1876, he entered into a written contract with them. By its terms he undertook and agreed to commence and carry on proceedings for the recovery of the estate, and to bear the expenses thereof. The heirs agreed to pay him as compensation for his services and outlay a sum equal to 47½ per cent. of any money or property recovered in such proceedings, and as security for such payment gave him a lien upon such recovery. They also executed a power of attorney, giving him full authority to act for them, retain counsel, prosecute suits, negotiate, and compromise, but at his own risk and expense. At a subsequent stage of the proceedings further documents authorizing compromises, etc., seem to have been executed by the heirs, but they are immaterial here, and need not be referred to. De Chambrun thus became the attorney in fact of the heirs in the prosecution of their claim, and from this time on during the long, arduous, and complicated proceedings in and out of court, with the narrative of which the voluminous record in this case is filled, he is the central and dominant figure. Briefly stated, the history of the litigation is as follows:

In September, 1876, an action was brought in the United States circuit court for the Southern district of New York, in which E. Delafield Smith appeared as solicitor and John A. Stoutenburgh as counsel. An amended bill was filed early in 1877, but after answers and replication the suit was discontinued, May 27, 1878. On the same day a second suit was begun in the same court, with Stoutenburgh as solicitor, and was prosecuted through its various stages until April, 1883. Its character and magnitude is described in a letter, put in evidence by complainant, from one of the counsel engaged in its prosecution, as follows:

"After [the death of E. Delafield Smith, in April, 1878] the whole burden of the work fell upon De Chambrun and his new associates. The enormous work performed by them can hardly be explained or understood without a personal examination of the papers. Personal searches were made through the records of a number of countries, running back for three-quarters of a century. Numberless old persons were hunted up and interrogated. All kinds of threads were followed up; in most cases with the result of discovering that they ran nowhere. Six years were consumed in this labor. Meantime the taking of testimony began, and continued over three years. Of that it is enough to say that the record makes four large printed volumes. That the work was thus carried on was due to the indomitable energy and pluck of De Chambrun. That anything has been realized is due to him and his associates, whom he inspired with his own spirit."

This description seems to be reasonably accurate. The stake for the winning of which all these exertions were put forth was originally believed by all parties to be worth millions, but depreciation in the value of real estate and other vicissitudes most materially reduced its amount. In June, 1880, William I. Chase, one of the defendants, compromised by conveying to the French heirs an undivided one-sixth in part of the property claimed by them, and thereafter began an action in partition to distribute the same. In July, 1881, Nelson Chase, another defendant, compromised by the conveyance of a further one-sixth in the same property, and on April 4, 1883, Mrs. Caryl, the remaining defendant, made a like compromise. The property, after partition, realized finally about \$350,000, and the 47½ per cent., when distributed, amounted (by reason of accretions during the proceedings to adjust all claims) to \$178,784.33. Defendant's employment in this litigation began in the summer of 1876. From that time till its close he was constantly engaged in the performance of the work that was allotted to him, and to that work he devoted practically his entire time. He examined records in public offices and elsewhere, sought diligently for testimony, was present at every argument and on every hearing, marshaled the witnesses, examined the law points as they arose in consultation with counsel, assisted in preparation of the pleadings to the extent at least of furnishing to counsel the data he had obtained, prepared digests of the proofs and memoranda for guidance of counsel in the examination of witnesses, kept track of all appointments and registers of all that was done, under authority of the solicitor signed the solicitor's name to such formal papers as the conduct of a suit requires, attended to the printing, and generally performed all the work which, when a suit is conducted by a well-equipped law office, is done by the clerks therein. With De Chambrun he was in constant communication. They consulted together daily when De Chambrun was in town, and Schermerhorn wrote him almost daily when he was absent, whereby complainant was kept fully advised of every step taken, and of all occurrences having any bearing on the business in hand. Defendant was competent, careful, untiring, accurate, painstaking, and it is manifest that the litigation was of such magnitude that the man who was willing to do all this—and to do it thoroughly and well—would find that he was practically making it the business of his life for the time being. Apparently he never examined a witness, nor participated in an argument, nor assumed to conduct the case, in the sense in which those words are used when describing the duties of solicitor and counsel. In the two suits together there were at one time or another employed as counsel Joseph B. Stewart, E. Delafield Smith, Levi S. Chatfield, Gideon J. Tucker, John A. Stoutenburgh, Matthew H. Carpenter, Douglass Campbell, and Roscoe Conkling. Some of these have left in the case no record but their names, and the burden of the litigation seems to have been borne first by Carpenter, afterwards by Campbell, and to some extent by Stoutenburgh. But with whomsoever might for the time being be the counsel in charge Schermerhorn constantly consulted. He also



took an active part in negotiations outside of the litigation for sales of the property partitioned.

Whatever may have been De Chambrun's financial resources, they were evidently wholly inadequate for initiating and carrying on any such litigation as this. From its very inception, therefore, he paid in promises, which, whether expressed upon their face to be contingent or not, were of no pecuniary value unless the litigation should prove successful, and the 47½ per cent, become available for their payment. Partly because it was supposed that the property was very valuable, and partly because counsel of ability are unwilling to hazard the loss of time and labor, which might be given elsewhere for a fair cash remuneration, without some additional prospect of reward to cover the risk, these contingent promises were out of all proportion to the value of the services to be rendered. And, possibly because De Chambrun was, as the circuit court expressed it, impulsive, generous, and optimistic, possibly also because he was shrewd enough to know that the surest way to "inspire his associates with his own spirit," and stimulate them to devote themselves despite difficulties and discouragement and delays to the end in view, was to awaken their avarice, the disproportion in this case was enormous. Twenty-five thousand, thirty thousand, forty-five thousand dollars—4 per cent., 7 per cent., one-tenth, one-sixth, in some instances one-fourth of a sum supposed to be within the millions suggested potentialities of speculation calculated to insure active and persistent exertions. The record in the case at bar, with its narrative of the transactions between complainant, defendant, and Campbell which followed the first compromise, when the end was in sight, and the spoils of a victory, less profitable than was hoped for, remained to be divided, is a pitiful exhibition of the baleful influence of such speculations upon the profession of the law. Suspicions, too often well-founded, of each other's intentions, efforts at combinations in which the individual combiners should "pool" their claims and unite to protect their interests against all other claimants,—efforts which proved abortive, because some one of the combiners was always sure to feel he was not getting his full share,—bitter recriminations, smooth words to patch up a hollow truce under cover of which new schemes to ward off other claimants might be arranged, broken promises, shifty devices, secret agreements, make up a history which we are fortunately spared the task of further reviewing.

As before stated, defendant was first employed some time in the summer of 1876. On October 25, 1876, De Chambrun signed and delivered to him a written agreement, in which, "for services performed and to be performed during the next ninety days in the suit of Jumel et al. vs. Chase [the first suit supra]," he agreed to compensate him (1) by paying him \$500 within 90 days, (2) by paying him, his heirs or assigns, the further sum of \$10,000, when the title of the heirs should be established, either by suit or compromise. And to secure such payment he pledged his share under the contract with the Jumels. Why De Chambrun should have thus agreed to pay defendant \$3,500 a month for three months of such service

as he could render we do not know, and this record does not tell us. It may be that he supposed the information as to the Jumel estate which Schermerhorn had acquired when in Edmonds & Field's office was valuable, and that it was better to buy it with him at a high price than to spend less money and more time in obtaining it through some one else. It may be that his two or three months' acquaintance with Schermerhorn had satisfied him that defendant was just the man he wanted, and that he wanted his whole time, and a devotion to the business in hand, which only some startling promise of reward would secure. It may be that he did not give the amount of compensation much thought; that he was merely improvident and reckless with his promises, where the ultimate recovery would be so large that \$10,000 would be a trifling item. Why he promised this sum we do not know, but we do know that it was promised for legal services; was promised absolutely if such services were rendered and success obtained; that the bill concedes this, although it avers that the period of 90 days was not the real limit of the services; and that no claim is made that this contract is impressed with any resulting trust in favor of complainant. The \$500 stipulated for was paid in due course; the \$10,000 was also paid at the foot of a judgment in *Chester v. Jumel*. That suit was brought in 1886, by the assignee of Stoutenburgh, to obtain the latter's agreed compensation out of the fund resulting from sale in partition. All persons having claims thereon, including Schermerhorn and De Chambrun, were made parties, and the decision therein settled priorities and awarded the respective amounts.

The 90 days named in the agreement of 1876 expired on January 25, 1877. Subsequent to that date, and prior to August 28, 1880, when a further agreement to pay Schermerhorn \$30,000 (hereafter to be considered) was signed, De Chambrun paid him from time to time, in various small amounts, \$3,175, and subsequent to August 28, 1880, he paid him in like manner \$2,100. These sums, aggregating \$5,275, the bill avers were to be considered as advances subject to final adjustment and were to be credited to complainant upon final accounting as part of the compensation stipulated for in the written contracts. There is conclusive evidence to the contrary of these averments. In the *Chester* suit the question as to these cash payments was presented and litigated vigorously between the parties to the suit at bar. Schermerhorn was cross-examined thereon at length, and the referee found that these payments were for services not covered by either written agreement, and were not intended to apply, nor were they applicable, on any indebtedness created by such contracts. These findings were incorporated in the judgment entered in *Chester v. Jumel*, and as between the parties here, who have thus once litigated the questions covered by them before a competent tribunal, are conclusive evidence of the facts they set forth. As was shown before, the *Jumel* litigation continued long subsequent to the 90 days mentioned in the contract of 1876,—long after the suit, which was pending when that promise was made, had been discontinued. The counsel who had been prominent at its inception gradually disappeared. Stewart "went South," Smith was

stricken with paralysis and died in 1878, Carpenter died, and in September, 1880, Campbell was employed, apparently to take his place. Through all these vicissitudes Schermerhorn remained active, diligent, seemingly the one man who thoroughly knew the history of the case from its inception in the first suit; knew where the evidence was to be found, which witnesses were living and which were dead; knew where to find each document or memorandum or reference to authority in the intricate mass of papers which such a litigation heaps up, wheat and chaff together, in the office of its solicitors; knew from frequent consultations with the earlier group of counsel just what were their opinions and plans, adopted or abandoned, as to the conduct of the case,—a most desirable associate, undoubtedly, for new counsel about to take up an unfamiliar litigation. Whatever may have been the value of Schermerhorn as a coadjutor when De Chambrun first met him in 1876, he was undoubtedly worth far more in 1880, when the W. I. Chase compromise gave promise of ultimate success, and time had become an important consideration to persons wearied by four years of delay.

On August 28, 1880,—two months after W. I. Chase's compromise,—De Chambrun and Schermerhorn executed the paper which is the subject of this action. It reads as follows:

"It is hereby stipulated and agreed by and between Charles Adolphe De Chambrun, as attorney in fact of the heirs at law and next of kin of Stephen Jumel, late of the city of New York, and George J. Schermerhorn, attorney at law, at the city of New York, that in consideration of the services rendered by said Schermerhorn at the request of said Chambrun, and in behalf of said heirs at law and next of kin of said Stephen Jumel, in litigations involving the title to premises in the city of New York at one time owned by said Stephen Jumel, said Chambrun agrees to pay said Schermerhorn the sum of thirty thousand dollars (\$30,000), and such sum of \$30,000 is hereby made a lien upon any moneys or property which said Chambrun may receive for said heirs at law and next of kin as aforesaid. It is further agreed that this agreement shall bind the heirs, executors, administrators, successors, and assigns of the respective parties hereto. In witness whereof the abovenamed parties have hereunto set their names and seals at the city of New York this 28th day of August, 1880.

"Charles Adolphe De Chambrun. [L. S.]

"George J. Schermerhorn. [L. S.]

"In the presence of Walter R. Beach."

The bill charges that:

"At the same time said contract was so executed it was understood and agreed between the said De Chambrun and defendant that the defendant should hold said contract, and should receive and hold any money or property which he might receive and hold under it, in trust for said De Chambrun; and that after his own services, mentioned in Exhibit A [the agreement of October, 1876], and hereinbefore alleged, should be paid for, he should transfer and pay over to said De Chambrun all such property and moneys."

The bill prays that it be adjudged defendant holds said assignment and contract and all moneys which he has received thereunder in trust for De Chambrun, and asks for an accounting and payment. Defendant received the full amount of this contract of August 28, 1880, under the judgment in *Chester v. Jumel*.

The reason why this alleged secret trust was created is set out in the bill as follows:

"That during the year 1876 said Charles A. De Chambrun, from time to time, made contracts with parties other than defendant, whereby other liens and charges upon his share of the estate aforesaid were created, and certain other liens and charges upon the same were claimed to have been created and to have become charged upon said De Chambrun's said share, whereas in truth and in fact such alleged liens and charges were such as could not in equity be held to be valid. And thereupon it became and was for the interest of De Chambrun that some portion of said share should, in so far as it properly could, be set aside and cleared from such alleged liens or charges, and so reserved that in any event, and whatever the amount of the recovery in said litigation, a certain sum, being part thereof, should belong to him, and, to secure this end, that the legal title thereto should be vested in some one other than him, the said De Chambrun. And it became and was also desirable for both him and defendant that any additional compensation which might become due to the defendant under the agreement set forth in the fifth paragraph of this bill should be secured to be paid out of said De Chambrun's said share of the estate, free and clear of other liens except such as had already attached thereto."

The answer specifically denies all allegations that the contract is impressed with any such trust, or is other than what it appears to be on its face,—an agreement to pay a specified sum for legal services rendered. The promise to pay is not contingent on success, but we do not think that fact material. The evidence shows pretty conclusively that De Chambrun's personal obligation for \$30,000 would have been of no particular value had the litigation proved barren, and the W. I. Chase compromise had made success reasonably certain. There is nothing on the face of this contract to indicate the existence of a trust, and the party who seeks thus to vary the written instrument assumes the burden of proving his claim by a fair preponderance of proof. As the trial goes on, the weight of evidence may shift from scale to scale, but the burden assumed at the beginning must be sustained at the end of the case. We find in the record no direct proof of an agreement that the contract should be held in trust, and it is suggestive that throughout the voluminous correspondence of the parties there is no allusion to its existence. Some of the subsequent actions of complainant himself seem wholly irreconcilable with any such theory as that now advanced on his behalf. His counsel suggests that there is a sufficient explanation of his attempt in the Chester suit to have all the contracts (including Schermerhorn's) thrown out, as not constituting liens on the fund, and all disallowed, because of champerty in the original contract; since, in that event, all being forced to accept a quantum meruit, De Chambrun would receive personally quite as much as he would under the alleged trust. But such explanation does not cover his attempt to secure the rejection of Schermerhorn's contract, for the reason, peculiar to itself, that "if he [Schermerhorn] had a lien, \* \* \* he waived such lien by having had under his control sufficient of said property to satisfy his lien, and having parted with the same without having asserted his lien thereto"; nor does it explain why he endeavored to have the cash payments of \$5,275 charged against Schermerhorn's contracts. If De Chambrun's objections to the contracts generally proved sound, this peculiar objection to Schermerhorn's would be superfluous. If, however, the general objections proved unsound, then by his

special objection complainant ran the risk of destroying the very ark of safety, which, as he now alleges, he himself constructed for the express purpose of securing \$30,000 for his own share, "reserved and cleared from all liens or charges." Upon the whole case, giving due weight to all the circumstances near to or remote from the date of the transaction, we do not find evidence adequate to prove the trust alleged. It would be proper to give the time necessary to discuss at length the circumstances relied on by complainant in support of his contention, were it not that there is inherent in his case an equitable bar to sustaining that contention, even if the proof of such a secret agreement as is alleged were clear and convincing.

The contracts made "during the year 1876" referred to in the complaint were these:

Contract No. 1: On March 3, 1876, with E. Delafield Smith, whereby, in consideration of \$16,250, advanced by the latter for the purpose of negotiating and perfecting the purchase from the French heirs, De Chambrun assigned to him one-fourth of his interest in any contracts he should have or thereafter make with the French heirs. This contract was superseded by a subsequent agreement of the parties to it on January 5, 1877, which agreement is treated in the case at bar as among the "agreements made in 1876."

Contract No. 2: On March 3, 1876, with E. Delafield Smith. It recited the purchase by Smith of a one-fourth interest in De Chambrun's contracts with the French heirs; and that Nelson Chase, a tenant upon and claimant of part of said Jumel estate, was indebted to Smith in the amount of about \$25,000. Thereupon the parties further agreed that "the said sum of \$25,000 or thereabouts shall also be paid to the said Smith out of the proceeds of said Jumel estate so acquired by the said heirs, or any further interest therein, after the payment of all proper disbursements, and is hereby made a charge on the same." The superseding agreement of January 5, 1877, above referred to, expressly mentioned this contract, and continues it in force.

Contract No. 3: On March 4, 1876, with Joseph B. Stewart, providing that in the contract already made with the French heirs, or in any agreement that may be made by De Chambrun with them, "the same, and every part thereof, after paying and discharging all expenses and charges, and the paying of all associate counsel fees, and for the use and advance of capital, shall be equally shared and divided by and between said De Chambrun and the said Stewart." Stewart, it will be remembered, was the one who, early in the summer of 1875, first called De Chambrun's attention to the fact that there was property formerly of Stephen Jumel to which his heirs in France were probably entitled, and who sought to interest him in the matter.

Contract No. 4: On July 10, 1876, with Stanislaus Le Bourgeois, transferring to him  $7\frac{1}{2}$  per cent. out of his  $47\frac{1}{2}$  per cent. in consideration of his services in discovering heirs of Stephen Jumel who were unknown to De Chambrun, and in settling with them the basis of the contract of April 20, 1876.

Contract No. 5: On August 8, 1876, with John A. Stoutenburgh, agreeing to pay him 4 per cent. on the entire proceeds of the property, covenanting that it should be a specific lien on the property recovered. Consideration, professional services.

Contract No. 6: On October 4, 1876, with Levi S. Chatfield, agreeing to pay him \$1,000 within a few days, and further to pay him, his heirs, or assigns, \$45,000 when the title to the property should be established, and, if less than the whole should be recovered, or the rights of the heirs compromised for less than the whole amount, then to pay a pro rata share of the amount recovered. To these payments De Chambrun pledged his share and interest under the French contract. The consideration expressed is "for services performed and to be performed, and information communicated in relation to the interests of the legal heirs," etc. Chatfield, like Stewart, was aware of the existence of the claim before De Chambrun heard of it. He seems to have been one of the counsel in the earlier Jumel litigations. In *Chester v. Jumel* it was held that he performed the services and communicated the information, and no one here questions such finding.

Contract No. 7: On October 5, 1876, with Gideon J. Tucker, in which, for services performed and to be performed, and information communicated, he agreed to pay \$10,000, and  $1\frac{1}{2}$  per cent. of all that might be recovered by suit or compromise.

Contract No. 8: On October 25, 1876, with Schermerhorn, already set forth supra.

Contract No. 9: On October 26, 1876, with Griswold and Chamberlain, assigning 5 per cent. of the  $47\frac{1}{2}$  per cent. for a cash advance of \$6,600.

Contract No. 10: On November 9, 1876, with Jesse C. Connor, assigning him  $3\frac{1}{2}$  per cent. of 40 per cent. of the entire recovery for services to be rendered in relation to the prosecution and preparation of the case of the French heirs against Nelson Chase and others.

Contract No. 11: On January 5, 1877, with Smith, superseding contract No. 1, and agreeing that he should receive out of the proceeds his advance of \$16,250, and one-tenth in value of the recovery in the Jumel proceedings.

These are the contracts as to which the bill alleges that it "was for the interest of De Chambrun that some portion of his share [the  $47\frac{1}{2}$  per cent.] should be set aside and cleared from their lien and charge," and "so reserved that in any event, and whatever the amount of the recovery in the Jumel litigation, a certain sum of money, being a part thereof, should belong to him," irrespective of the fact whether he had or had not already assigned or promised it to some one else. It was "for this purpose, and not otherwise," as the bill avers, that the written agreement with Schermerhorn was executed. Its avowed object, on complainant's own showing, was to create a bogus claim against the fund, ostensibly for legal services,—a claim which, as Schermerhorn had undoubtedly rendered legal services, would no doubt be paid as a legitimate, although extravagant, charge, and which, when thus paid, was to be secretly reserved for De Chambrun, out of the reach of any others who

might hold his promises to pay from his share of the proceeds of the litigation. Complainant cannot take the first step towards recovery under this bill without proving that the contract of August 28, 1880, was a sham, and when he has proved that (we are of opinion that he has not succeeded in doing so, but assuming that he has), then the undisputed facts in the case stamp it as a fraudulent sham. Such a sham agreement would be a fraud on Stewart. It was indeed held in the Chester suit that his contract gave him no specific lien upon the property or money in the hands of the trustee, Elliot, who held the proceeds of the compromise; but there is nothing before us to show that his contract with De Chambrun was not a valid and subsisting obligation. As he was the one who gave De Chambrun the information without which he would never have sought the heirs nor undertaken the prosecution of their claim, Stewart's contract was certainly based upon sufficient consideration. If, "after paying and discharging all expenses and charges, and paying all associate counsel fees," there should be \$30,000 left for De Chambrun, Stewart would have been entitled to one-half the residue. If the creation of a sham claim of \$30,000—for further counsel fees—exhausted the fund, there would apparently be nothing for De Chambrun, and therefore nothing for Stewart, while in reality De Chambrun, secure in his secret trust, would quietly pocket the whole \$30,000, and leave his original partner in the adventure in the lurch. If the agreement of August, 1880, were a sham, it was a fraud on Smith, or rather on his administratrix. His contract No. 2 was construed by this court in *De Chambrun v. Campbell's Adm'rs*, 54 Fed. 231. We there held that Smith was entitled to payment of \$25,000, the amount of the Chase notes, only "after payment of all proper disbursements" by De Chambrun. To create a bogus claim for legal services,—apparently a proper disbursement,—and thus deplete the fund from which the \$25,000 stipulated for by Smith was to come, was a deliberate fraud upon his administratrix, and none the less a fraud because subsequently, and before the money was distributed, this contract No. 2 had passed by assignment to Campbell for De Chambrun's benefit. The agreement of 1880 is to be judged in the light of the situation at the time it was made; its inherent vice is not purged away by subsequent accidents. The agreement of August, 1880, if sham, was ripe with the potentiality of future fraud. On August 31, 1881, De Chambrun, in consideration of \$10,000 cash, advanced to him by Mrs. Frances A. Gesner on his note for that amount, assigned to her as security all right, title, and interest in all fees and money due or to become due to him for services or compensation in *Jumel v. Chase*, or under any settlement thereof, with a covenant, which, in view of the facts above set forth, is, to say the least, remarkable, that he had "not heretofore made or executed any assignment of the interest in the fees or compensation or the money due to me in said action, or under any settlement with any of the defendants therein to any person whomsoever, nor any part or portion of the same." Manifestly what was to come to De Chambrun as due for his services and compensation was only what was left after the claims of others for proper legal services were

paid. If the August agreement was really for such fees, it would take precedence of Mrs. Gesner, and she would not be entitled to any portion of the money paid under it. If it were what the complainant contends,—an arrangement whereby De Chambrun was to pay to De Chambrun,—Mrs. Gesner's claim would be entitled to precedence, or to payment out of its proceeds. Now, Mrs. Gesner was a claimant in the Chester suit. Her contract came next after Schermerhorn's August agreement, and the various claims allowed were given priority in their chronological order. Schermerhorn's was presented as what it appeared to be, an agreement to pay for legal services rendered. De Chambrun was present in person and by counsel, but gave no hint that it was the sham he now claims it was. In consequence, the referee allowed it, and its \$30,000, added to earlier claims, so depleted the fund that for Mrs. Gesner there was left but \$601.36 for her genuine and righteous claim for \$10,000 and 10 years' interest.

The theory, then, of complainant's claim is that, having deliberately concocted with defendant a scheme whereby some of his creditors might be defrauded, the result of the scheme has been that his co-conspirator has obtained the money which complainant expected to secure, and now refuses to divide or pay over. The attitude of a court of equity towards litigants thus situated is too familiar to require citations from the reports. It is tersely and forcibly set forth by Mr. Justice Lamar, delivering the opinion of the court, in *Dent v. Ferguson*, 132 U. S. 50, 10 Sup. Ct. 13: "That court is not a divider of the inheritance of iniquity between \* \* \* two confederates in fraud." While conceding this rule, however, complainant's counsel contend, and the circuit court reached the conclusion, that the case at bar falls within the well-recognized exception that "as against an attorney and counselor the law will set aside an agreement made with his client by which property is placed in his hands to keep it out of the reach of the creditors of the client." The cases cited as sustaining and defining this exception are *Ford v. Harrington*, 16 N. Y. 285; *Fisher v. Bishop*, 108 N. Y. 25, 15 N. E. 331; *Place v. Hayward*, 117 N. Y. 487, 23 N. E. 25; *In re Howell*, 10 Law T. Rep. 367. When these cases are analyzed, however, it is apparent that they do not support the proposition that the wholesome rule which refuses the aid of a court of equity to one of two fraudulent parties as against the other is to be done away with when both stand in *pari delicto*, merely because the defendant is a lawyer, nor to make the path easy for lawyers to escape the application of the rule by choosing their law clerks as assignees. In each of the cases cited it will be found that "the parties, although in *delicto*, did not stand in *pari delicto*." "It would be a reproach to our judicial tribunals should they allow their officers \* \* \* thus to acquire property by a prostitution of the trust so confided to them, and then to interpose the fraud committed by their advice as such officers as a shield to protect them in such possession and enjoyment of that property." *Ford v. Harrington*, *supra*. In that case it appeared not only that the member of the bar was the assignor's attorney and counsel, but that it was in accordance with



and pursuant to his advice as such counsel that the contract was assigned by Conway, who "was a mere instrument in the hands of the defendant." And that fact is expressly stated to be the reason why the rule which refuses relief between partners in fraud was not applied. The facts in *Fisher v. Bishop*, 108 N. Y. 25, 15 N. E. 331, present so different a case from the one at bar that they need not be discussed at length. In *Place v. Hayward*, 117 N. Y. 487, 23 N. E. 25, the scheme to defraud creditors "was concocted and carried out under the advice of the defendant," who was the instigator of the fraud, the plaintiff relying implicitly on his advice; hence the court held the parties were not in *pari delicto*. In the case at bar, however, there is no pretense that De Chambrun was induced to make the transfer by the suggestion or advice of Schermerhorn. The very bill uses language which indicates pretty plainly what must have been the fact, if the contract be, as complainant insists, a sham one. "It became and was for the interest of De Chambrun that some portion," etc., "should be set aside," etc., "and, to secure this end, that the legal title should be vested in some one," etc.; that "for [these] purposes said De Chambrun and defendant entered into and executed a certain contract," etc. There is not a scintilla of evidence to show that Schermerhorn beguiled a confiding client into committing the fraud, or that it was in reliance upon his advice and in accordance with his suggestions that it was consummated. A review of all the evidence in the case satisfies us that in all these transactions De Chambrun's was the dominant mind. Of the threads of all his intricate contracts and combinations he kept the control, and to a large extent the secrets, too, for as late as 1886, in reply to Schermerhorn's expressed surprise at hearing then for the first time of the *Le Bourgeois* assignment, De Chambrun writes, "When you have accepted my terms, and joined me absolutely and unreservedly, then you shall know everything." In everything—certainly in everything outside of the actual suit in equity, where he may be regarded as a junior associate counsel—Schermerhorn was but a clerk, the mere hand of his employer, following his instructions and carrying out his wishes, until the time when, some years subsequent to August, 1880, he declined to join in an effort suggested by De Chambrun to set the old Wilson contract on its feet by the aid of a colorable assignment, and thus use it to defeat all subsequent contracts, including his own. We see no reason for extending the exception to the rule that one *particeps doli* shall not have the aid of a court of equity against the other to cover cases where the original designer of the fraud has chosen its own clerk as the instrument to carry it out, simply because that clerk is a member of the bar, where there is nothing to show that he suggested or advised the fraud. As complainant, therefore, could not obtain the relief prayed for even if the contract of 1880 to pay \$30,000 for legal services was in fact a bogus one, it is unnecessary to discuss at length the arguments which he advances to show that it is. It is enough to say that in our opinion he has not proved that it is.

The decree is reversed, and cause remitted to the circuit court, with instructions to dismiss the bill.

WEBER et al. v. SPOKANE NAT. BANK et al.

(Circuit Court of Appeals, Ninth Circuit. October 23, 1894.)

No. 156.

1. NATIONAL BANKS—AMOUNT OF INDEBTEDNESS—REV. ST. § 5202.

Under Rev. St. U. S. § 5202, providing that no national bank shall "be indebted or in any way liable to an amount exceeding the amount of its capital stock \* \* \* paid in \* \* \* except on" circulation, deposits, special funds, or declared dividends, a national bank is prohibited from contracting debts or liabilities, other than those within the four classes named, except to the extent of its paid-up, unimpaired capital stock; but, to that extent, there is an implied authority to become indebted upon any contract within the scope of its powers, no matter what may be the amount of its debt or liability upon demands within such four classes.

2. SAME—VALIDITY OF DEBT CONTRACTED IN VIOLATION OF STATUTE.

An indebtedness which a national bank incurs in the exercise of any of its authorized powers, and for which it has received and retains the consideration, is not void from the fact that the amount of the debt surpasses the limit prescribed by Rev. St. U. S. § 5202, or is even incurred in violation of the positive prohibition of the law in that regard.

In Error to the Circuit Court of the United States for the Eastern Division of the District of Washington.

Action at law by C. F. Weber and others against the Spokane National Bank and its receiver, upon promissory notes. Judgment for defendants. 50 Fed. 735. Plaintiffs bring error.

George M. Forster, for plaintiffs in error.

F. T. Post, for defendants in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The plaintiffs in error brought an action against the Spokane National Bank and its receiver, upon three promissory notes which had been given in payment for bank furniture and fixtures supplied by the plaintiffs for the bank building occupied by the defendant bank. The receiver pleaded as a special defense that at the time of the making of the notes, and the sale of the furniture in consideration for which they were given, the bank had already incurred indebtedness and had become liable for amounts aggregating a sum much greater than the amount of its paid-up capital stock; so that, by virtue of section 5202 of the Revised Statutes, it was prohibited from incurring the indebtedness sued upon. The case was tried by the court and a jury, and upon the conclusion of the evidence the court instructed the jury to return a verdict for the defendants, upon the ground that, under the facts disclosed in support of the special defense so pleaded, the plaintiffs could not recover. The evidence sustaining the special defense was that at the time the notes were given the total liabilities of the bank, of whatsoever description, were \$516,000, and the capital stock paid in was \$100,000. The plaintiffs' assignments of error bring under review the construction given by the circuit court to section 5202, above referred to. That section provides as follows:

"No association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on demands of the nature following: First, notes of circulation; second, moneys deposited with or collected by the association; third, bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto; fourth, liabilities to the stock holders of the association for dividends and reserved profits."

The bank was shown to be indebted to an amount five times its capital stock. There was no evidence of the nature of its liability, but assuming, as we properly may, that its whole indebtedness was in the direction of the exceptions mentioned in the statute, the question arises whether the statute, while declaring that a national bank shall not incur debt to an amount exceeding its paid-up, unimpaired capital stock, otherwise than in the line of the four exceptions named, by implication grants the permission to incur indebtedness or liability to the limit so named upon transactions other than those indicated in the exceptions referred to. In other words, when a bank has notes of circulation, deposits, special funds subject to draft, or funds for the payment of declared dividends to stockholders, which, either alone or in the aggregate, equal its paid-up capital stock, is it prohibited from incurring a debt such as that sued upon in this action? We are of the opinion that such is not the true meaning of the statute. A national bank is a body corporate, with power to make contracts, to sue and be sued, and to exercise all such incidental powers as shall be necessary to carry on the business of banking. But, while it has the power to enter into contracts and incur debts, a limitation is placed upon the extent of the indebtedness for which it may become liable. The purpose of this limitation may be conceded to be the protection of the depositors and others dealing with the bank. The inquiry is, how far does the protection extend? The question is one purely of interpretation of the language of the statute. What is the meaning of the words used? Taken in their ordinary sense and import, we take them to mean that a national banking association is prohibited from contracting debts or liabilities other than those within the four classes named, except to the extent of its paid-up, unimpaired capital stock, and that to that extent there is an implied authority to become indebted upon any contract or transaction which lies within the scope of its powers, no matter what may be the amount of its debt or liability upon its deposits, its notes of circulation, its special funds subject to draft, or its declared, but unpaid, dividends. We are not warranted in giving the words a meaning other than that of their plain import, from the consideration that if so construed the limitation may afford inferior protection to depositors. To hold as contended by defendants in error would be to deprive a national bank of all power to incur an indebtedness such as that sued upon, practically from the moment it had begun business. Take the case of the bank in question. Its capital stock paid up was \$100,000. It was authorized to maintain a circulation on notes to the amount of \$90,000. If it received that amount in notes, then, as soon as it should have received as much as \$10,000 in deposits, it would have been deprived of its power

to contract for the furnishing of its banking office, for the erection of its banking building, for the purchase of the real estate upon which the same is erected, for the payments of its employes' salaries, or for the furtherance of any of its ordinary business, save and except that portion of the banking business which is covered by the four exceptions referred to. If congress had intended the protection which is contended for on behalf of defendants in error, it would seem that its purpose so to do would have been made manifest, and the protection would have been made certain. As it is, even if we adopt the construction contended for, a national bank has it in its power to render the protection largely nugatory without in any way violating the prohibition. Thus, the bank in question was authorized to limit its notes in circulation to one-fourth of its paid-up capital stock. Upon receiving its notes of circulation to that amount, and before receiving deposits or doing any banking business, it could have incurred general indebtedness to the full amount of its capital stock, and thereafter could have received deposits in an unlimited amount. The depositors, in such case, would have the protection, not of the full amount of the paid-up capital stock, but simply such portion thereof as was protected by the deposit of bonds with the treasurer of the United States, upon which its notes of circulation were issued. This section of the statutes was incidentally construed in the circuit court of the district of Vermont, and the same conclusion was there reached concerning its interpretation. *Eastern Tp. Bank v. National Bank*, 22 Fed. 186.

A second question, and the one which was principally discussed upon the argument, concerns the effect of the statute upon the debt which is contracted in violation of its prohibition. The statute is directed to the banking association, and prohibits it from incurring the proscribed liability. It does not, in terms, declare void the debt or liability so incurred; and no penalty is denounced against the bank for violation of the prohibition, unless it be the general penalty provided for in section 5239, where it is declared that if any of the prohibitions of the law governing national banks are violated, with the knowledge of the directors, the charter of the bank shall be forfeited. Is the inhibited debt void, and may the banking association retain the property which it acquires under such circumstances, and deny its liability for the stipulated consideration? We find no reported decision of this question, but certain other sections of the statutes defining the powers of national banking associations, and prohibiting them from doing certain specified acts, have been the subject of adjudication. The tendency of all the decisions has been to refer to the general government the power to deal with all violations of the act, and to hold that acts done without the scope of the prescribed powers of the bank, or in violation of the express terms of the statute for their guidance, are not void, but are voidable only. Thus section 5136, by implication, prohibits a national bank from loaning money upon real estate security; yet it is held that a mortgage taken upon real estate to secure a contemporaneous loan or future advances is not void, but merely voidable, at the instance of the government. *Bank v. Matthews*, 98 U. S. 621; *Bank v. Whitney*,

103 U. S. 99. Section 5201 expressly prohibits a loan by a national bank upon the pledge of its own shares; but it has been held that, if the prohibition could be urged against the validity of a transaction by any one except the government, it could only be done before the contract was executed, and while the security remained pledged, and that the illegality of the transaction would not render the bank liable to the pledger for the payment to him of the money realized upon the sale of the security. *Bank v. Stewart*, 107 U. S. 676, 2 Sup. Ct. 778. Section 5200 provides that no bank shall loan to one person or firm an amount to exceed one-tenth of its actually-paid capital stock; but it is held that, if a greater sum is loaned than is allowed by this section, that fact may not be set up in defense to an action for recovery of the money so loaned (*Gold Min. Co. v. National Bank*, 96 U. S. 640), and that the statute was intended as a rule for the government of the bank, and did not render the loan void (*O'Hare v. Bank*, 77 Pa. St. 96; *Pangborn v. Westlake*, 36 Iowa, 546). We think the reasoning upon which these conclusions are reached is applicable to the case before the court. We hold, therefore, that an indebtedness which a national bank incurs in the exercise of any of its authorized powers, and for which it has received and retains the consideration, is not void from the fact that the amount of the debt surpasses the limit prescribed by the statute, or is even incurred in violation of the positive prohibition of the law in that regard.

The defendants in error rely upon decisions of the supreme court in which it has been held that municipal bonds issued beyond the limit prescribed by the legislature are void. *Crampton v. Zabriskie*, 101 U. S. 601; *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. 315; *Daviess Co. v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897; *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820. Those decisions rest upon principles entirely distinct from those involved in the case at bar. The amount of the authorized issue of municipal bonds is always ascertainable by a reference to public records equally accessible to all; and the officers of the municipal corporation are public servants, whose unauthorized acts do not bind the public. In the case of a national bank, no such public record is provided, and no method is pointed out by means of which the status of the bank's indebtedness can be ascertained. The judgment is reversed, at the cost of the defendants in error, and the cause is remanded for a new trial.

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NORTHERN PAC. R. CO. v. AUSTIN.

(Circuit Court of Appeals, Seventh Circuit. November 27, 1894.)

No. 150.

RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

Where deceased was killed at a crossing where his view of the approaching train was obstructed, and the engineer did not see him till he was 20 feet from the crossing, and the engine 60 feet from it, *held*, that the question of contributory negligence was for the jury.

**In Error to the Circuit Court of the United States for the Western District of Wisconsin.**

**Action by Margaret Austin against the Northern Pacific Railroad Company. Plaintiff obtained judgment. Defendant brings error.**

Thomas H. Gill, for plaintiff in error.

S. N. Dickinson, for defendant in error.

Before WOODS and JENKINS, Circuit Judges.

JENKINS, Circuit Judge. The defendant in error, as administratrix of the estate of her deceased husband, Willard Austin, brought her action under a statute of the state of Wisconsin to recover damages for the death of her husband, caused by the alleged negligence of the plaintiff in error. The accident by which the deceased came to his death occurred at a highway crossing called "Paint Creek Crossing," some three miles east of Chippewa Falls, on the Wisconsin Central Railroad, at the time operated by the plaintiff in error. At that point there was a single track running substantially east and west, crossing the highway at right angles. Westerly from the highway, and for a distance of about 275 feet, the railway runs on a sharp curve through a cut of from 10 to 15 feet, then for 225 feet over a fill, then entering and continuing in a cut westerly for something over 100 rods from the highway. One standing on the railroad track at the crossing is unable to see a locomotive approaching from the west for more than a distance of 600 feet. At a distance of 15 feet from the center of the track a locomotive approaching from the west can only be seen within a distance of 100 feet from the crossing. The highway between Chippewa Falls and Cadott, which crosses this railway at the place of the accident, on the southerly side of the railway curved around the intervening hill between the highway and the railway, an approaching train being hidden from the sight of a traveler on that part of the highway for a distance of 300 feet and over before reaching the crossing; and for a distance of about 80 feet from the crossing the intervening hill seriously interferes with the hearing by a traveler upon the highway of the signals of trains approaching the crossing from the west. The accident occurred at about 8 o'clock in the morning of the 12th of February, 1892,—a clear, cold, frosty morning. The deceased, who was familiar with the crossing, was driving a fairly spirited team hitched to a pair of bobs. According to the testimony of the engineer of the train, which came from the west, he first observed the deceased when the train was about 60 feet from the crossing, and the horses were about 20 feet from the track. The train had a speed of about 18 miles an hour, and the horses were traveling at about the rate of 6 miles an hour. The deceased was standing in the middle of the front bob with his overcoat on, its collar turned up around his face, and a scarf or some such article tied around the collar. The negligence charged was the failure of the engineer to sound the whistle or to ring the bell on the approach of the train to the crossing, and also a failure by the company to restore to its former state of usefulness the highway

in question, which had been changed when the railroad was constructed, so that the travel at and south of the crossing must turn to the southwesterly, around the base of the hill, which thus obstructed the view of trains approaching from the west, whereas previously the travel had gone directly over the hill.

The only question we are asked to review is that of the alleged contributory negligence of the deceased. It is asserted that the undisputed evidence establishes, as a matter of law, such contributory negligence. It is unquestionably true that it is the duty of a court to withdraw a case from the jury where the evidence of contributory negligence is so clear that reasonable minds can draw but one conclusion from the evidence. The question, however, is generally one of mixed fact and law, to be resolved by the jury under proper instructions from the court. *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569; *Elliott v. Railway Co.*, 150 U. S. 245, 14 Sup. Ct. 85; *Railroad Co. v. Meyers*, 18 U. S. App. —, 10 C. C. A. 485, 62 Fed. 367; *Railroad Co. v. Kelly*, 18 U. S. App. —, 63 Fed. 407. We cannot say, after a careful review of the testimony, that, as matter of law, the deceased was guilty of contributory negligence. We think that it was a proper case for submission to the jury, and that it was fairly and fully submitted by the court below. It was undoubtedly the duty of the deceased, in approaching this dangerous crossing, and which he knew to be dangerous, to exercise all due care and caution to avoid injury. It was his duty to listen and to look for approaching trains. Possibly, it was his duty, in view of the surroundings, to have stopped his team, and to have proceeded to the crossing to look for any approaching train; and yet it may well be observed, as was suggested by counsel, that had he done so, and, observing none, returned to his team, a train going at like speed with this one might have come upon the crossing while the deceased was returning to his team and was driving them over the crossing; so that it became a question for the jury to determine whether the deceased did in fact so stop and look and listen, and whether, under the circumstances, it was prudent to have so done. The witnesses testifying to being eyewitnesses of the accident were Phipps, the engineer of the train, and one Montana. It is asserted that the evidence of the latter witness establishes that the deceased did not stop, did not look or listen, but drove upon the crossing without using any precautionary measures to discover an approaching train. It may be open to question if his testimony goes so far. But, if it did, a fact is not always established because asserted by the contradicted testimony of a witness. There may be circumstances disclosed, impeaching his credibility, of such character as to carry a case to the jury upon the question whether the witness is worthy of belief. There were such circumstances in this case with respect to this witness. It would serve no good purpose to enter into detail, but we think it cannot be said that the jury were unwarranted in refusing credit, to his testimony. The evidence of the engineer, Phipps, giving full credence to it, does not so clearly disclose negligence on the part of the deceased, contributing to the injury, that the presumption that he was in the exercise of due care can be said

to have been fully rebutted, or to sanction the withdrawal of the case from the jury. When Phipps first saw the team he was within 60 feet of the crossing, his train having a speed of 18 miles an hour. The team was within 20 feet of the crossing, proceeding at the rate of 6 miles an hour. A collision would necessarily result within two seconds. This evidence does not tend to show that the deceased had not stopped, and had not proceeded to the track and looked and listened. It does not appear, with that clearness that would justify the taking of the case from the jury, that after the train came within his sight the accident could have been avoided by due care upon the part of the deceased, the burden of proof being upon the company. Undoubtedly, there were circumstances attending the actions of the deceased upon the occasion in question, as disclosed by the witnesses mentioned, that, if their evidence may be relied upon, go far to show a want of that care demanded by the dangerous character of this crossing. At the same time, bearing in mind that no one can speak to the transaction from the standpoint of the deceased, and that the credibility of one of the witnesses was seriously impugned, we cannot say that reasonable minds could draw but one conclusion from the testimony, and so authorize us to declare, as matter of law, that the conclusion to which the jury arrived upon the evidence was unwarranted, and counter to the fact and the law. We see no error in the submission of the cause, and no ground calling upon us to disturb the verdict. The judgment will be affirmed.

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#### THE HAYTIAN REPUBLIC.

#### UNITED STATES v. THE HAYTIAN REPUBLIC.

(District Court, D. Oregon. November 5, 1894.)

No. 3,403.

#### JUDICIAL SALE—CASH BID.

At a sale by a marshal under a decree directing him to sell for not less than \$15,000, with power to accept a bid of \$10,000 in cash, balance on credit, if there was no cash bid for the full amount, the property was knocked down to petitioner for a cash bid of \$16,050. It being past banking hours of a Saturday, and petitioner having only a certified check of \$10,000, he tendered it to the marshal as part payment, with the statement that he could keep it as forfeit if petitioner did not pay the balance Monday morning. The marshal, immediately after stating that this would be satisfactory, refused to accept it, rejected the bid, and made a private sale to the next lowest bidder. *Held* that, as a cash sale required payment on the same day, petitioner could not complain.

Libel by the United States against the steamship Haytian Republic for breach of the revenue laws. It was sold under a decree forfeiting it to the United States. E. W. Price and Lee Wheeler petition that title be given them under their bid.

Rufus Mallory and James Gleason, for petitioners, Price and Wheeler.

C. E. S. Wood and S. B. Linthicum, for respondents Sutton and Beebe.



BELLINGER, District Judge. E. W. Price and Lee Wheeler petition the court to set aside the sale heretofore made by the marshal of the steamer Haytian Republic, and to direct the marshal to correct his return so as to show that their bid of \$16,050 at such sale was the highest and best bid thereat; that the ship was sold to them,—and praying for an order declaring the bill of sale of such ship to Sutton and Beebe to be fraudulent and void, and directing the marshal to convey the title thereof to them, and to deliver possession of such vessel to them, upon the payment to him of said sum of \$16,050. The petition alleges in effect that the marshal was, by a decree of this court, directed to sell the Haytian Republic at public auction, and to receive no bid less than \$15,000; that, acting under this decree, the marshal advertised the ship for sale at public auction to the highest bidder, for cash, at 2 o'clock in the afternoon of Saturday, October 6th; that there were two bidders at the sale—Charles F. Beebe and the petitioners; that the former bid \$16,000 and the latter \$16,050, whereupon the vessel was knocked down to them; that thereupon the parties left the vessel where the sale had taken place, and went to the office of the marshal; that no demand was made by the marshal, of the petitioners, to pay the sum bid forthwith, and their bid was not rejected for failure to so pay such amount, and that no resale was had; that the petitioners, within a reasonable time after the sale, to wit, within an hour thereafter, delivered to the marshal, as an earnest of their good faith, certified checks for \$10,000, which were received by the marshal on account of their purchase; that they were prevented from procuring the remaining \$6,050 by reason of the fact that it was then past banking hours, but that they notified the marshal that he could retain the \$10,000 so paid, to be forfeit to the government should they fail to pay such balance immediately after banking hours on the following Monday, which payment at such time they promised to make; that the marshal informed the petitioners that what they proposed was satisfactory, and he directed the preparation of the receipt for the money paid; that thereupon Beebe interfered between the petitioners and the marshal, and persuaded the latter not to complete the transaction with the petitioners, and that Beebe and the marshal conspired and confederated together to prevent the petitioners from obtaining title to the vessel under their bid; that in pursuance of such conspiracy the marshal, at his office, pretended to reject petitioners' bid, refused to receipt to petitioners for the \$10,000, or to receive such sum, and then made a private sale of the vessel to Beebe for \$16,000, and gave the latter a bill of sale therefor; that within a reasonable time after such sale, being before the hour of 11 o'clock in the forenoon on Monday, October 8th, they tendered to the marshal \$16,050, in compliance with their bid, which sum they have been at all times since, and are now, willing to pay.

Exceptions are filed to this petition, which raise the question as to its sufficiency to entitle the petitioners to the relief prayed for. The cases relied upon by the petitioners are cases where complaints were made by the owners of the property sold, or by persons having liens thereon, whose rights of property were injuriously

affected by sales for much less than the value of the property sold. In this case the contest is one between bidders. The petitioners are concerned only with their own title. Unless they acquired rights in the property by their bid and offer of payment, it is a matter of no consequence to them whether there was a fraud in the after-sale of the property or not. Ex parte State and State Bank, 15 Ark. 264. It is claimed that the offer of payment made before 11 o'clock on Monday following the sale was within a reasonable time for a cash payment, for the reason that the time of the sale (Saturday, at 2 p. m.) was after banking hours. A cash sale is necessarily a sale for cash to be paid at the time of sale. The purchaser must be in readiness to pay at the place of sale, if required. The officer making the sale may give time for payment, if he chooses, but he does so at his own risk. Because he may do this, it does not follow that he must do it, and his conduct in this respect is not ground of complaint, unless it has been one-sided, and has given one party an unfair advantage over another. The fact that the sale was after banking hours is immaterial, unless the officer making the sale makes use of that fact to exact specie, when the bidders were justified in relying upon the belief that checks, certificates, or current bills would be taken. In one of the cases cited by the petitioners the officer refused to accept current bills, and then refused a delay to enable the bidder to get specie, with the result that the property was sold for less than one-third the amount offered by such bidder. There were other circumstances showing a conspiracy to get the property at a ruinous sacrifice. Technically, a certified check is not cash. Such checks or certificates of deposit are used to avoid the inconvenience of carrying specie to the place of payment. Such a check, upon a convenient bank of known solvency, when transferred to the payee of money, is in effect a cash payment, since it operates to transfer the title to that much cash, convenient to his use, to such payee. The petitioners in this case could have provided themselves with such checks during banking hours. It was argued in petitioners' behalf that such checks do not meet the requirements of a cash bid. My conclusion is otherwise, and, moreover, it is common knowledge that it is customary to make large payments in this mode. The conduct of the petitioners in providing themselves with such a check for \$10,000, to use as a payment at the sale, shows that they understood this, and that they acted upon the assumption that payment might be made in this way. It is an admitted fact, commented on at the hearing, that the court had ordered the marshal to accept a bid for \$15,000,—\$10,000 in cash, and the balance in credit, provided there was no cash bid to the amount of \$15,000. It was for this reason that the petitioners were provided with a certificate of deposit for \$10,000 and no more. It is said, however, that the petitioners only intended to back another bidder in such a bid, but that, upon being confronted with a cash bid of \$16,000, they decided to bid for themselves. But whether they bid for themselves, or stood sponsor for another, it did not alter the provision they had made for making a cash payment. It is evident that the petitioners prepared themselves for this sale in the expectation that a sale would be made to

them, or to the friend for whom they were acting, for \$10,000 in cash and the remainder in credit, and the controversy that has followed is solely due to the fact that they were disappointed in that expectation. But if the fact is as claimed the excuse cannot avail them. The authorities are clear that to constitute a cash sale the money must be paid within reasonable hours on the day of sale, and unless this is done no title or right passes, and if the officer makes a conveyance before payment the owner is not bound thereby. *Ex parte State and State Bank, supra.*

It is argued that the alleged agreement of the marshal to allow the petitioners until the following Monday in which to pay the remaining \$6,050 relieved them from the necessity of paying such sum on the day of sale, if that was otherwise necessary. If the petitioners were misled by such an understanding or promise, I should be disposed to give to it the effect contended for, although the marshal had no right to make such promise. The alleged promise was after the sale. Shortly afterwards, and while the parties were together, the marshal reconsidered his action, and rejected the petitioners' bid. I am of opinion he acted rightfully, in so far as what he did relates to the final rejection of petitioners' bid. As to whether he should have put the property up for resale is a question that does not concern these petitioners. If the government, to whom the steamer was wholly forfeited, and for whose sole benefit the sale was made, is satisfied with the sale, others, not having complied with the terms of sale so as to acquire rights in the premises, cannot complain. The character of the petitioners' bid is not changed by the fact that they offered to forfeit \$10,000 if they failed to pay the \$6,050 on the following Monday. A secured payment is not a cash payment. If the marshal had accepted this offer, and had kept the matter open until the following Monday, he could then have rejected it, and refused to accept the unpaid balance, and it would have been his duty to do so, had the owner so directed. He was not authorized to give credit upon a cash sale. *Chase v. Monroe, 10 Fost. (N. H.) 433.* It does not appear that the marshal subjected the petitioners to any inconvenience in the payment required, not necessarily incident to any sale, and that they could not provide against, and to which all other bidders were not equally subject. He does not appear to have acted unfairly towards them. The fact that he was at first willing to waive cash payment as to \$6,050 of the purchase, but subsequently, and while the situation of the petitioners remained the same, receded from that position, as he might properly do, shows the contrary. The exceptions are allowed.

## RHODES v. LINCOLN PRESS-DRILL CO.

(Circuit Court, S. D. Illinois. October 6, 1894.)

## 1. PATENTS FOR COMBINATIONS—NOVELTY AND INVENTION—INFRINGEMENT.

Where a patent is for a combination, and such combination is new, and produces useful results, it is immaterial that the separate elements are found in different prior machines.

## 2. SAME—ANTICIPATION—ESTOPPEL.

A combination claim cannot be invalidated by showing that certain original claims, containing all but one of the elements in the claim in controversy, were rejected on the citation of prior patents, and by then showing that there was no invention in adding the additional element.

## 3. SAME—GRAIN PRESS DRILLS.

The Rhodes patents, Nos. 355,716 and 400,947, for press drills for sowing wheat and similar grain, held valid, and infringed; the first patent as to both its claims, and the second as to its third and fourth claims.

This was a suit for the infringement of a patent.

Bond, Adams, Pickard & Jackson, for complainant.

Lysander Hill, E. D. Blinn, and J. W. Hill, for defendant.

ALLEN, District Judge. This suit is brought by John W. Rhodes against the Lincoln Press-Drill Company for the alleged infringement of letters patent No. 355,716, granted to John W. Rhodes, January 11, 1887, and letters patent No. 400,947, granted to John W. Rhodes, April 9, 1889. These patents relate to press drills for sowing wheat and similar grains, in which a front frame, mounted on runners, is followed by rear frames, pivoted to the front frame. The seed is dropped through the heel of the runner into the trench made by the runners, and the rear frames are provided with press wheels, which follow the runners, and press the dirt down upon the seed. In the old press drills in general use before the Rhodes patents, this rear frame was a single, rigid frame, all the wheels of which rose or fell together as the drill passed over irregularities in the ground. With this construction, the evidence shows that if a machine containing more than six runners and six press wheels in a rigid frame was made, the wheels rose and fell together, which limited the width of the machine, and in passing over irregularities of the ground the axle would bend and finally crystalize and break. Several attempts had been made prior to the Rhodes invention to obviate this difficulty, but, as the evidence shows, without practical success. The machine described in the first Rhodes patent may be briefly described as follows: To a front frame carrying the runners is hinged a plurality of rear press-wheel frames, consisting each of two side bars with an end bar connecting their rear ends. An equalizing bar is pivoted to these end bars. When more than two rear frames are used, three or more equalizing bars are employed, according to the number of rear frames. Each of these rear frames carries a separate axle, upon which are mounted a plurality of press wheels arranged to follow behind the runners, and press the dirt down over the seed. A seat beam, pivoted at its front end to the front frame, extends upwards and backwards,

and is connected with the equalizing bar by a support extending from the seat beam to the equalizing bar. A seat for the driver is carried upon the rear end of the seat beam, thus distributing the weight of the driver, by means of the equalizing bar, over the rear frames and upon the press wheels. By shifting the position of the seat, the driver's weight tends either to raise the runner frame from the ground in order that the machine may be turned in the field, or to properly press the wheels upon the seed. Without going into the description more in detail, the evidence shows that this machine proved a practical and successful machine, solving serious difficulties, and going at once upon the market.

The claims of this first patent are as follows:

"(1) In a grain drill, the combination, with the runner frame, of the frames, P, hinged to said runner frame; the shafts, S, held by said hinged frames; the press wheels, mounted on said shafts; the distributing bar, A, pivotally connected at its ends to said hinged frames; the seat, B, supported above the center of said bar; and the beam, C, joining said seat to the runner frame,—substantially as specified. (2) In a grain drill, the combination with the runner frame of the frames, P, hinged thereto; the shafts, S, held by said hinged frames; the press wheels, mounted on said shafts; the distributing bar, A, pivotally connected at its ends to said hinged frames; the beam, C, hinged at its front end to said runner frame, and supported at its rear end above the center of said distributing bar; the bar, C', rigidly secured to said bar, C, and projecting rearwardly therefrom; the seat, mounted on said bar, C', and a fastening for securing the same at different points on its bar,—as and for the purpose specified."

A number of patents are set up by the defense as anticipating this patent, those principally urged being the Smith patent, No. 266,325, the Wishart & Busick patent, No. 293,389, and the Bolton corn-planter patent, No. 326,388. These patents are not mentioned in the defendant's brief. The defense of anticipation seems to be practically abandoned. The only defenses there stated are that the claims are for mere aggregations and noninfringement.

The claims are not open to the charge of being for mere aggregations. It is enough to say that none of the prior patents contains the combination of the claims of the first Rhodes patent; and it is not seriously contended by the defendant's experts that any one of them does. In a combination patent, where the novelty of the invention consists in the combination, it is immaterial whether the elements are new or old, provided the combination is novel, and practically produces a new and useful result. Where the thing patented is an entirety, the respondents cannot escape the charge of infringement by alleging or proving that a part of the entire invention is found in one prior patent, printed publication, or machine, and another part in another prior exhibit, and a third part in another, and from the three or more draw the conclusion that the patentee is not the original and first inventor of the patented improvement. *Imhaeuser v. Buerk*, 101 U. S. 660; *Latta v. Shawk*, 1 Bond, 259, Fed. Cas. No. 8,116; *Machine Co. v. Pearce*, 10 Blatchf. 403, Fed. Cas. No. 4,312; *Bates v. Coe*, 98 U. S. 48; *Manufacturing Co. v. Steiger*, 17 Fed. 250; *National Cash Register Co. v. American Cash Register Co.*, 3 C. C. A. 559, 53 Fed. 367. The evidence clearly shows that the Smith and the Wishart & Busick machines were practi-

cally inoperative, and, when actual machines were built under the patents, these machines proved complete failures.

It is urged in defense that the claims of the first Rhodes patent are void for want of patentable novelty in view of the application file record, because they do not show "invention" over other claims, particularly the original fourth claim, abandoned upon references cited. The position taken is that the original fourth claim contained all the elements of the original fifth claim, which is the present first claim, except the seat beam. A machine is then supposed to be built up from the specification of the patent in question, and having all the parts of the Rhodes drill except the seat beam. An older patent for a rigid rear frame drill showing a seat beam is produced, and the assertion made that there would be no "invention" in putting the seat beam in. That this is not the proper way of looking at the matter appears from cases where a similar position was taken. In *Reiter v. Jones & Laughlin*, 35 Fed. 421, Mr. Justice Bradley, in deciding the case, overruled this position, and said (page 423):

"It is contended that the making of the grooves was no invention, and that, if it was, they had been made and used before for precisely the same purpose. The fair questions to put, however, are, was there no invention in the whole thing taken together, the detachable crown or lid with its grooves and cells? And has such crown or lid been used before?"

It must be remembered that this first claim stands as originally drawn, and unamended. The references cited by the office against the other claims were the Smith and the Wishart & Busick patents. Now, if a machine were built up having the elements of this original fourth claim, not in the light of the Rhodes invention, but from the Smith and the Wishart & Busick patents cited, the machine so built up would be like the Smith or the Wishart & Busick machine. The question of putting a seat beam into such a machine would be quite a different matter. Indeed, the evidence shows that Smith, Wishart & Busick, all tried to contrive a means to place a seat beam into such a machine, but failed, and their machines were thrown away, and abandoned as worthless. A number of decisions of the supreme court, beginning with *Leggett v. Avery*, 101 U. S. 256, coming down to *Knapp v. Morss*, 150 U. S. 224, 14 Sup. Ct. 81, are cited as supporting this position. The doctrine laid down by these cases, however, is simply this: that when a patentee, in response to references cited against a claim, has amended it, or has abandoned it, and accepted another claim, he cannot afterwards assert that the allowed claim covers the same ground or is coextensive with the abandoned claim; when a claim has been rejected on references, and the rejection acquiesced in, and another claim accepted by the patentee, the patentee is estopped from claiming the benefit of his rejected claim on such a construction as would be equivalent thereto. The case of *Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co.*, 10 C. C. A. 194, 61 Fed. 958, decided by the circuit court of appeals for the third circuit, analyzes the authorities, and shows that the courts will not extend this doctrine of estoppel beyond the doctrine above laid down.

Of the second claim of this patent, it is enough to say that it is for substantially the same elements as the first claim, with the added elements of "the bar, C', rigidly secured to said bar, C, and projecting rearwardly therefrom, the seat mounted on said bar, C', and a fastening for securing the same at different points on the bar," and that, if the first claim is valid, the second is also valid. The claims in suit of the second Rhodes patent are as follows:

"(3) In a grain drill, the combination, with the front frame and the rear frames hinged thereto, of the seat beam pivoted to the seed box on the pivot of the rear frames, substantially as shown and described. (4) In a grain drill, the combination, with the front frame and the rear frames hinged thereto, of the seat beam pivoted on the pivot of the rear frames, and the rigid seat support connected to the seat beam near its rear end and to the rear frames, substantially as described."

The object of the construction described in these claims is to avoid the racking of the machine and the oscillating of the driver's seat, caused by the rising and falling of the rear frames in passing over irregularities of the ground when the front end of the seat beam and the front ends of the rear frames are not pivoted on the same line. Of these claims it is enough to say that they are nowhere anticipated by the prior art as shown, and, while the invention may be a narrow one, I am not prepared to say that it does not involve patentable novelty. I therefore conclude that the patents are valid, and that the claims in suit in each of these patents are valid claims for the combinations therein described.

The question of infringement may be briefly disposed of. The machine of the defendant contains every element of the claims of the first Rhodes patent, combined together in the same way, and operating in the same manner. As to the second patent, defendant's machine has the front end of the seat beam, and the front ends of the rear frames pivoted on substantially the same pivotal line. A decree may therefore be entered in favor of the complainant upon both claims of patent No. 355,716 and upon the third and fourth claims of patent No. 400,947, with costs.

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#### LAWTHER v. HAMILTON et al.

(Circuit Court, E. D. Wisconsin. July 12, 1892.)

##### 1. PATENTS—DAMAGES FOR INFRINGEMENT.

An infringer cannot escape liability for actual profits made, on the ground that his superior skill and scientific methods in conducting the business enabled him to reap greater profits than others would have done by the infringement.

##### 2. SAME—TEST OF COMPARISON.

The essence of complainant's invention consisted in the thorough crushing of the seed without grinding, by mullers, before it was pressed, to obtain the oil. The defendants, after they were enjoined, continued to thoroughly crush the seed as before, but in addition put it under a small set of mullers, which had little, if any, appreciable effect; and in this way managed to produce the same high yield as the complainant's process. The master adopted this subsequent practice as a test of comparison. *Held*, that the adoption of this test was error.

This was an action by Alfred B. Lawther against Charles H. Hamilton, administrator of Charles S. Hamilton, deceased, and Timothy W. Goodrich, for infringement of a patent. Heard on exceptions to the master's report.

Munday, Evarts & Adcock, for complainant.

Banning, Banning & Payson, for defendants.

GRESHAM, Circuit Judge. This suit was brought for infringement of letters patent No. 168,164, dated September 28, 1875, for a new process in producing oil from oleaginous seeds. This court dismissed the bill for want of equity (21 Fed. 811), holding the patent invalid. On appeal the supreme court reversed the decree (124 U. S. 1, 8 Sup. Ct. 342), holding that the patent was valid, that the defendants had infringed, and that the complainant was entitled to an injunction. An interlocutory decree was accordingly entered by this court, and the cause was referred to Mr. Hugh Ryan, as master, to take the proofs, and report the profits, savings, and advantages which had accrued to the defendants from their unlawful use of the patented process. The complainant made no claim for damages.

It was admitted before the master that during the period of undisputed infringement the defendants treated 600,000 bushels of flaxseed, and received for the oil extracted therefrom 45 cents per gallon, or 6 cents per pound. The complainant claims that by the use of his process the defendants obtained an increased yield of at least 2 pounds of oil per bushel of seed treated, making a total gain of 1,200,000 pounds which, at 6 cents a pound, amounts to \$72,000. The old process consisted in crushing the seed between horizontal rollers (two or more pairs), passing the crushed seed under muller stones, where it was ground, moistened, and mixed, and then subjecting the mass to pressure. Lawther discovered that by dispensing with the muller stones he was able to obtain more oil and a better cake. His invention, as defined by the supreme court, consisted in discarding the muller stones, and passing the crushed seed directly into a mixing machine, to be stirred, moistened, and heated by jets of steam or water, and then transferring the mass to presses for the expression of the oil by hydraulic or other power. He employed no new machinery in his process, but simply dispensed with one step in the old and well-known treatment of the seed. The single claim of the patent reads:

"The process of crushing oleaginous seeds, and extracting the oil therefrom, consisting of the following successive steps, viz. the crushing of the seeds under pressure, the moistening of the seeds by direct subjection to steam, and finally the expression of the oil from the seed by suitable pressure, as and for the purpose set forth."

It appears from the testimony that while using the complainant's process the defendants obtained an increased yield of about 5 pounds of oil to the bushel more than they had extracted under the old process, and cake containing 2.87 pounds less of oil. Other mills obtained about 19 pounds of oil to the bushel while using the complainant's process,—an increase of about 2 pounds to the bushel of



seed treated,—and cake containing 2 pounds less of oil. The witnesses do not agree as to the increased yield due to the patented process, but, from all the testimony, I think it conservative to say that by its use the defendants obtained an increase of at least  $1\frac{1}{2}$  pounds of oil per bushel from the 600,000 bushels treated, making a total of 900,000 pounds, which, at 6 cents per pound, amounts to \$54,000. This amount, less \$11,000 deducted for the diminished value of the oil cake, leaves due to the complainant \$43,000.

The following are the master's conclusions:

"First. That it has not been proven upon this accounting that the use of the Lawther process in suit has been or is productive of any increased yield of oil or other profits, savings, or advantages over that derived from the use of the old or Callahan process. Second. That the evidence shows that the yield of oil produced from oleaginous seeds has been increased during the past ten or fifteen years somewhere from one to two and one-half pounds per bushel, and that such increase has been due in part to the improvement in the quality of seed during that period, in part to the greater attention paid to the details of the business, and the greater efforts made, owing to the diminished price of oil cake, to extract from the seed the greatest possible amount of oil, and in very large part to the adoption of improved machinery for the perfect crushing and gradual reduction of the seed, among which last-named improvements the chief is the complainant's 'five-high stack of rolls,' so called. Third. That the increased yield of oil obtained by defendants during the period of their infringement over that derived by them from the Callahan process, proper, was due to the causes set forth in the last paragraph, coupled with the unusually scientific and able management of the business by the late General Hamilton, one of the defendants. Fourth. That the complainant in this action has wholly failed to prove that the defendants have received or made, or that there have arisen or accrued to them, any profits, savings, or advantages from the infringement of said last patent, No. 168,164, dated September 28, 1875, to the complainant. Fifth. That the complainant is entitled to a decree for nominal profits only."

The master was largely influenced by the fact, as he found it, that the increased yield which the defendants obtained was chiefly due to the thorough crushing of the seed under pressure of the stack of five-high rolls. This crushing was one step in the complainant's process. It was a mistake to hold that, because the seed was thoroughly crushed between the stack of five-high rolls, the increased yield was due to the crushing instrumentality, and not to the patented process. The first step in the complainant's process is the crushing or disintegrating of the seed evenly and sufficiently between powerful rollers. The master seems to have lost sight of the construction given to the patent by the supreme court. In the master's opinion, the increased yield was due in part to the improved quality of the seed treated by the defendants, but the cake which they produced under the patented process contained 2.87 pounds of oil less per bushel than the cake produced by them under the old process. This fact seems to have escaped the master's notice. Another reason for finding that the increased yield was not due to the use of the patented process was that during the months of disputed infringement, just prior to the period of admitting infringement, the defendants obtained an increased yield of oil by using two sets of chilled steel rolls for crushing the seed, a steam-spraying device for moistening it, and muller stones, as they had been used

before. The complainant denies that the mullers were used during this period. It is plain that if they were used it was more to mix than to grind or crush the seed. The chilled rolls fully crushed the seed, and the increased yield was due to that, rather than the mullers. This was the first step in the patented process. The complainant demonstrated the importance of thoroughly crushing the seed by roller pressure, and the injurious effect of grinding the hulls under muller stones. His process was generally adopted. The master should have compared the result of the complainant's process with the results obtained prior to the invention. Before the complainant showed the importance of thorough crushing, the defendants obtained only about 15 pounds of oil to the bushel of seed treated.

The master erred in finding that after the service of the injunction the defendants crushed their seed by pressure under the stack of five-high rolls, then passed it under a set of muller stones, and obtained a yield of oil per bushel equal to the yield obtained by the use of the complainant's process. These mullers were only about three feet in diameter, and they traveled round about three times on the crushed seed. Gen. Hamilton himself testified that they did not grind the hulls. The essence of the complainant's invention consists in the thorough crushing of the seed, without grinding it, before it is pressed, and that is what the defendants did after the service of the injunction. They crushed the seed as they did during the period of undisputed infringement. The manner in which the small mullers, not the old ones, were used, had little, if any, appreciable effect. They certainly did not grind the seed into a mealy condition. It was error to adopt this test of comparison.

The master also ascribed the increased yield, in part, to Gen. Hamilton's superior skill and scientific management, rather than to the patented process. It does not appear from the evidence that he did not exercise the same skill and intelligence when manufacturing under the old process; and it is significant, in this connection, that other mills using the patented process showed substantially the same result as did the defendants'. An infringer cannot be heard to say that his superior skill and intelligence enabled him to realize profits by his infringement which a person of less skill might not have realized. He is liable for all profits he has made by the illegal appropriation of another's invention. The patentee cannot recover more than actual profits because the exercise of skill would have enabled the infringer to realize better results, nor can the latter avoid paying actual profits on the ground that they would have been less, had he not been skillful. Exceptions to the report sustained, and decree for the complainant for \$43,000.

## EDISON ELECTRIC LIGHT CO. et al. v. BUCKEYE ELECTRIC CO. et al.

(Circuit Court, N. D. Ohio, E. D.)

No. 5,142.

**1. PATENT SUITS—PRELIMINARY INJUNCTION—ESTOPPEL.**

A patentee, under a misapprehension of the law, secured from the patent office a correction limiting the life of his patent, and was afterwards held to be thereby estopped, as against certain alleged infringers, to deny the validity of the limitation. *Held*, on motion for a preliminary injunction, that certain other persons associated with him in the ownership of rights under the patent were also estopped, in the absence of an affirmative showing that they were ignorant of his acts in procuring the limitation.

**2. SAME.**

The fact that the patentee and his associates transferred their rights under the patent to a corporation of which they were the sole stockholders did not affect the operation of the estoppel.

**3. SAME—DISCRETION OF COURT—RIGHT OF APPEAL.**

When the court is clearly convinced that complainants are not entitled to an injunction, it will not, except by consent of the parties, allow the injunction to issue, merely upon the suggestion that defendants are entitled to an appeal from such an order, whereas complainants cannot appeal from an order denying an injunction.

This was a suit by the Edison Electric Light Company and the Edison General Electric Company against the Buckeye Electric Company and others to restrain the alleged infringement of letters patent No. 223,898, issued January 27, 1880, to Thomas A. Edison, for an incandescent electric lamp. A preliminary injunction was heretofore dissolved by the court (59 Fed. 691), but a motion for a preliminary injunction has again been made, supported by additional affidavits.

RICKS, District Judge. This case comes again before the court upon a motion for a preliminary injunction. Since the former motion for a dissolution of the injunction allowed in 1893 was passed upon, the plaintiffs have filed additional affidavits in support of the pending motion. Though this motion asks for the order without assigning any reasons, the affidavits disclose new facts which were not brought before the court on the previous application; and, though the plaintiffs did not desire to confine their application to the new facts thus presented, the court sees no reason why, upon this motion, the case should be again considered upon the matters so fully heard, considered, and decided in the opinion heretofore filed. I shall therefore consider only the question as to whether the new facts entitle the plaintiffs to a preliminary injunction. In granting the defendants' motion to dissolve the injunction then in force, the court found that there had been such acts on the part of the plaintiffs, in their application to the patent office to limit the duration of the Edison patent, and in the proceedings connected therewith, and sub-

sequent thereto, and in their negotiations with the defendants relating to the manufacture of lamps claimed to be covered by the patent, as to estop the plaintiffs from claiming, as against these defendants, that their patent did not terminate in November, 1893, or that, as against the defendants, they had a right to such an injunction.

The new facts disclosed by the affidavits are that at the time the owner of the patent and the assignee thereof made their application to the patent office, in October, 1883, asking for a limitation of the life of the patent, and at the time of the proceedings taken under said application, a contract was in force by which the owner of the patent had given the exclusive right to manufacture lamps under the patent to Edison, the patentee, and to certain persons whom the contract stipulated might be associated with him in that undertaking. The contract was made on the 8th day of March, 1881. On the 12th day of January, 1884, Edison and his association named in the contract of March, 1881, assigned and transferred to the Edison Lamp Company, a corporation organized under the laws of New Jersey, all their title and interest in the said contract, and also all their interest in a second contract between the Edison Electric Light Company and the Edison Lamp Company, made October 11, 1883. This right to exclusively manufacture lamps, thus vested in Edison and his associates, was in force when the owner of the patent and Edison joined in the patent office application of October, 1883. The associates of Edison in that exclusive right, it is claimed, were not advised of what Edison and the owner of the patent did with reference to the said proceedings in the patent office, were not bound thereby, and that, so far as their rights in that contract are concerned, they are not now estopped from claiming a preliminary injunction by any acts of the owner of the patent or the patentee. The case is practically, therefore, the application of the holders of this equitable interest in the contract of March, 1881, for a preliminary injunction against the defendants. It has already been decided that the assignee of the patent and the patentee are not entitled to such relief. Those who now ask for the injunction upon the new facts disclosed must show their right to this remedy and relief by the same rules and upon the same principles governing any other applicant for such an order.

What, then, are the facts disclosed as to the legal relations existing between the parties interested with Edison in this contract of March, 1881, and the owner of the patent and the patentee, and what was the information they had of the proceedings instituted in the patent office in October, 1883, by which their interest and rights in their existing contract were affected? The contract of March, 1881, between the assignee and owner of the patent and Edison, is an exceptional instrument. It confers upon Edison very valuable rights, coupled with very liberal conditions, and every provision contains terms showing it was not intended to be assignable. It was a contract showing in every line an intention to confer upon Edison, personally, the liberal and flexible conditions stated. The persons whom he was authorized to associate with him in the undertaking contemplated in the contract were his associates in his laboratory experiments, and closely interested with him in the success of his patents. It is important

to keep in mind these relations in considering how far they are justly bound by Edison's participation in the patent office proceedings of October, 1883. It is not now necessary to determine whether in their association under the contract of March, 1881, they were partners or not. We are not informed of the exact nature of their legal relations further than they are disclosed by the terms of that contract and by their affidavit. They were associated in that enterprise under such relations as makes it difficult to believe that they were for any great length of time ignorant of the patent office proceedings of October, 1883, and of Edison's participation therein. It is true that in their affidavits they each deny that Edison was authorized to act for them in joining in that application, and with varying explicitness each denies that he knew of such act of Edison's at the time. I accept these statements as true, but they are not inconsistent with the contention made by the defendants that, because of their intimate association in the enterprise, they must have learned of that proceeding soon after it took place, and that they have since ratified the act of their associate in different ways. And for the purposes of this preliminary hearing, when the granting of this application rests so largely in the discretion of the court, reasonable inferences and conclusions, based upon the facts as imperfectly disclosed in ex parte affidavits, are proper to be considered. Having already found that Edison is not entitled to this injunction, have his associates in that contract so clearly shown that they have been ignorant of the successive acts and of the conduct of their patentee, which have estopped him, as not to be precluded from claiming this relief as against the defendants? The burden is upon them to establish such want of knowledge and such conduct on their part as to entitle them to this extraordinary relief. If they considered their interest in the contract of 1881 as valuable from October, 1883, to March, 1893, as they now do, they were bound to protect it by such acts and conduct as not to mislead those dealing with this patent, and with its inventor and owner. With the certificate of correction attached to every copy of the Edison patent issued between October, 1883, and March, 1893, and with the concern that existed as to the effect of the patent office proceedings upon all interested in the patent, it seems highly improbable that during all that period these associates of Edison remained in ignorance of what had been done. If they were so innocent and ignorant during that time, it ought to so affirmatively appear, for it is the fact most important, in view of the decision of the court dissolving plaintiffs' injunction allowed upon the original hearing. Having failed to make this full and explicit denial, I am warranted, in view of all the facts, in concluding that these associates of Edison did acquire the knowledge of this patent office proceeding during the period named.

Edison and his associates transferred their title and interest in the contract of March, 1881, to the Edison Lamp Company in January, 1884. They were the sole stockholders, and the only parties interested in the new corporation. It was the same parties associated in the same enterprise under corporate name. They changed their legal relations, and took their new title to ownership charged with

all the knowledge, and burdened with the same duties as to third persons, that rested upon them as "associates" under the contract of March, 1881. Having knowledge of the part taken by their associate, Edison, in the patent office proceeding, they were charged with the knowledge of its legal effect on their rights under the contract of 1881, and they were charged with the duty of protecting them by their subsequent acts and conduct. While Edison estopped himself from claiming an injunction by his acts and conduct between October, 1883, and March, 1893, as found in the decision heretofore referred to, it does not follow that his associates were likewise estopped. But in this hearing it ought affirmatively to appear that these parties, who claim a prior equity to the defendants, were ignorant of, and did not participate in or authorize, the several acts and the line of conduct which it has been held estopped the other plaintiffs from claiming relief against these defendants. This should appear so satisfactory as to justify the court in granting this unusual relief. The burden is not on the defendants to show that this injunction should not issue, but it is on the plaintiffs, who claim a prior and superior equity, not affected by the estoppel heretofore found to preclude their associate plaintiffs, to show that it should issue; and this must be shown by the required degree of certainty. I do not think this has been done.

In 1892, the plaintiffs who now join in this suit instituted a suit upon this same patent against the Sawyer-Mann Electric Company. This was at a time when the certificate of correction was still supposed to be in force, and was a ratification of that correction, so far as the licensees were concerned. They then believed the proceedings for correction had been valid and effective, and accepted and adopted the beneficent results they supposed followed. But it has been suggested, inasmuch as the complainants cannot appeal from an order refusing an injunction, while the defendants can appeal from an order allowing one, that the court allow a preliminary injunction, but suspend its operation pending appellate proceedings. By such an order, it is urged, the plaintiffs may have partial relief, and no great hardship be imposed upon the defendants. I would be very glad indeed to have such an agreement made, so that this case might be speedily reviewed. I fully appreciate the disadvantages under which the plaintiffs stand because of the peculiar situation of these litigants, but I have no right to impose upon the defendants the burden and expense of prosecuting an appeal from an order allowing an injunction to which I have found the plaintiffs are not entitled. Such an order might properly be made where the parties assent, or there might be such a condition of proof, and such peculiar circumstances present themselves in a case, as would warrant the court in making such an order as plaintiffs suggest. The discretion exercised by courts in acting upon motions for injunctions is very great, and each case must be decided upon the facts and circumstances presented; and a proper one might arise for such a departure from the ordinary practice, but I do not find this to be such a case. The motion for a preliminary injunction is therefore refused.

EDISON ELECTRIC LIGHT CO. et al. v. UNIVERSAL ELECTRIC CO.  
et al.

(Circuit Court, N. D. Ohio, E. D. March 13, 1894.)

## PATENTS—INFRINGEMENT—PRELIMINARY INJUNCTION.

A corporation which was organized to manufacture an infringing article after the patent had been sustained by a circuit court cannot procure the dissolution of a preliminary injunction on the ground that an appeal had been taken, and that its officers believed the patent to be invalid; nor is its position bettered by the allegation that it afterwards made additional investments in the business, relying upon the validity of a correction limiting the life of the patent (which correction the patentee had procured under a misapprehension of the law), where it appears that such investments were made after the patentee had revoked the limitation. Edison Electric Light Co. v. Buckeye Electric Co., 59 Fed. 691, distinguished.

This was a suit by the Edison Electric Light Company and others against the Universal Electric Company and others to restrain the infringement of incandescent electric light patent. Defendants moved to dissolve a preliminary injunction.

RICKS, District Judge. On September 15, 1893, a restraining order was issued in this case, speedily followed by a preliminary injunction, restraining the defendant from manufacturing incandescent lamps described and covered by the Edison patent, No. 223,898, granted January 27, 1880. That order has ever since remained in force. On February 9, 1894, the defendant filed its motion asking for an order dissolving said injunction, because the complainants, by a certain proceeding in the patent office, instituted in December, 1883, and conducted by the patentee and his assignee, the time of his original patent was, upon their own application, limited so as to expire November 10, 1893, and that because of said proceedings, and of the action of the commissioner of patents thereon, said patent did expire on November 10, 1893. Said motion further recited certain facts connected with the organization and business operations of the defendant, and particularly with reference to increased expenditures made in the spring of 1893, which are relied on to show that the defendant was so misled by the conduct and acts of the complainants with reference to said proceedings in the patent office as to estop said complainants from now claiming that said patent did not expire in November, 1893, and that for the two reasons stated the injunction now in force should be dissolved. It is conceded by the defendant's counsel that this motion is as close a copy of the similar motion filed by the defendant in the case of the complainants against the Buckeye Electric Company, recently passed upon by the court (64 Fed. 225), as the facts of the defendant's case will permit, and that the reasons for asking for a dissolution of the in-

junction in this case are the reasons upon which the motion was allowed in the Buckeye Case, so far as the same are applicable to the facts set forth in defendant's motion and in the affidavits in support thereof. So that, in considering this motion, frequent reference will be made to that case, and it will be identified as the "Buckeye Case."

The facts relied upon in this case to entitle the defendant to a dissolution of the injunction are taken from affidavits, original and supplemental, of N. S. Possons, the president and general manager of the defendant. They are more specific than those set out in the motion. Mr. Possons, in substance, says that the defendant company was incorporated on the 29th day of August, 1892, for the purpose of manufacturing electrical appliances, with an authorized capital of \$25,000, and an actual investment of \$12,000, and that the persons who invested in said enterprise were induced to do so by the belief that the manufacture of incandescent lamps was lucrative, and not an infringement. Affiant says that owing to the decision of Mr. Justice Bradley, on the circuit, in the Sawyer & Man Case,<sup>1</sup> it was generally believed that the manufacture of incandescent lamps was open to the world. Affiant says that the similarity of the claims 1 and 2 of the Edison patent and claims 2 and 3 of the Sawyer-Man patent—the latter of which, Mr. Justice Bradley said, did not describe an incandescent electrical lamp, as then and now made—induced most people interested in that business to conclude that the Edison patent was invalid. Affiant further says that many other manufacturers were engaged in making the lamps, naming several of the firms having the largest output. Affiant says that when the defendants made their investment the decisions of the court were as above stated, and that they had every reason to believe they were not infringers, and that they acted in the utmost good faith. Affiant says that during the fall and winter of 1892 it began the manufacture of the lamps containing a silk filament; but during the spring of 1893 the company, believing that the Edison patent would expire on the 10th of November, 1893, at great expense caused investigation to be made to discover, if possible, a more satisfactory substance to use as a filament, and on or about April, 1893, did make such discovery. A short experience demonstrated the superiority of such filament, and thereafter, on or about May 1, 1893, the directors of the defendant held a meeting to consider the advisability of increasing the facilities of said company to manufacture incandescent lamps, so that they might be placed on the market in large quantities after the expiration of the complainants' patent in November, 1893, as limited by the application and correction of December, 1883. Affiant says that at the May meeting, after full discussion, it was decided to increase its producing capacity, and that thereafter some \$10,000 was expended "in perfecting said filament, in purchasing tools, machinery, appliances, etc., and that said expenditure was made relying upon the belief that said patent No. 223,898 would

<sup>1</sup> 40 Fed. 21.



expire and terminate on November 10, 1893, and that, but for that belief, said expenditure would not have been made." Possons' original affidavit, p. 7. Affiant says he advised his associate directors that eminent counsel, consulted by him, advised him that the Edison patent would expire, with the British patent, in November, 1893, and affiant says that upon the facts so ascertained, and opinion so given, "large additional investments were made by the stockholders to the capital stock of said company, to wit, upwards of the sum of \$9,000, which was subscribed and invested during the months of December, 1892, and January, 1893." Affiant says that he is informed and believes that, before the defendant organized as a corporation, the second claim of the Edison patent had been sustained by Judge Wallace;<sup>2</sup> that he and his associates had been advised that this decision had been at once appealed from; and the defendant company, having been organized, engaged in the manufacture of said lamps pending said appeal, and continued increasing its investments upon the faith of the invalidity of said patent, and its expiration in 1893. Upon learning of the affirmation of said decision of Judge Wallace,<sup>3</sup> it discontinued, and did not manufacture until Judge Hallet refused an injunction, application for which was made before him, against a defendant in his district, when it again manufactured until Judge Seaman's decision in the Oconto Case,<sup>4</sup> when it closed, and was so closed at the time the restraining order was issued in this case. Affiant avers good faith in the acts and conduct of the defendant; that all its tools purchased for the manufacture of said lamps, and all the appliances connected with its works, would be valueless unless it is allowed to proceed in the business for which it was organized.

These are, briefly stated, the facts upon which the defendant's motion for a dissolution of the injunction are based. In what respect do these facts differ from those which the court found in the Buckeye Case to be sufficient to estop the complainants from claiming that the Edison patent did not expire by their own limitation put upon it in November, 1893? In the Buckeye Case, the defendant company was organized in February, 1890, with an authorized capital of \$100,000, and with an investment at the time of \$25,000. Mr. Justice Bradley had then decided the Sawyer-Man patent invalid, and the belief was general, and had substantial foundation, that the Edison patent would be likewise held invalid. At the time of its organization, and in the early stages of its business, there has been no adjudication showing the Edison patent valid. About the time the said company began business, it had learned through counsel, from an examination of the patent office, that the patentee and assignee of the Edison patent, No. 223,898, had voluntarily gone into the patent office, surrendered the letters patent, and asked to have it so corrected that it should expire by limitation on the 10th of November, 1893. The company, having, at about the same time, discovered a new and superior filament, determined upon increasing the capacity of its works, and did so to the extent

<sup>2</sup>47 Fed. 454.<sup>3</sup>3 C. C. A. 33, 52 Fed. 300.<sup>4</sup>57 Fed. 616.

of many thousands of dollars; and this was done before there had been any adjudication sustaining the patent, and while the patentee and his assignee had so, as aforesaid, limited the patent so that it expired in November, 1893. Said defendant averred that, in good faith, it relied upon such acts and conduct of the parties owning and controlling said patent. The motion, and the proofs in support thereof, in that case, further showed that for some months negotiations were had between the complainants and the said defendant looking to a consolidation of the companies, or a sale, by the defendant to the complainants, of their manufacturing plant; and at the same time a substantial acquiescence by the complainants in the defendant's infringement was fairly inferable from its acts and conduct. The facts in that case further disclosed that the investments of said defendant had been largely increased upon the faith of the complainants' voluntary limitation of their patent to November, 1893, and before the revocation of such action in March, 1893, was attempted or undertaken. So that, in the *Buckeye Case*, if we keep in view the negotiations for the purchase and sale of the defendant's works that had been going on between the parties, together with the acquiescence by the complainants in its manufacture and sale of lamps, even after Judge Wallace's decision in July, 1891, it is manifest that said *Buckeye Company* was not at any time a willful infringer. It came into a court of equity asking equity, and averring with great explicitness that it had done equity. It was not only not a willful infringer, but it had made all its original and additional investments in good faith, before the decision of the circuit court of appeals, in October, 1892, affirming the prior decision of Judge Wallace, to which reference has already been made, and before any attempted revocation of the limitation of the Edison patent had been made.

In the case now under consideration, the *Universal Electric Company* was organized in August, 1892. Judge Wallace's decision affirming the validity of the Edison patent had been promulgated over a year prior to the date of its organization, and only a few months after its organization that decision was affirmed by the United States circuit court of appeals for the Second circuit. So that, although an appeal had been taken from Judge Wallace's decision at the time the defendant organized, it began the manufacture of an infringing lamp after the patent had been declared valid by a circuit judge of high authority. It was hardly more than in operation when that decision was affirmed by the court of last resort for such cases. Its increased investments set out in its motion and affidavits seem to have been a \$9,000 increase made in December, 1892, and January, 1893, and an additional increase of \$10,000 made after the meeting of the directors of the defendant company in May, 1893. The proof is not clear or satisfactory on this point, but giving to the defendant the benefit of the facts averred in its motion, and in the affidavit and supplemental affidavit of Mr. Possons, we give the conclusions as above stated. See Possons' original affidavit, p. 7. The last investment of \$10,000 was therefore made after the complainants' attempted revocation, in March, 1893,

of the proceedings of December, 1883. The court in the Buckeye Case found that the defendant acted in good faith, and relied on the acts and conduct of the complainants in limiting the Edison patent, and that its investments were increased in good faith, relying upon that act, and that all of them were made by it before the revocation of March, 1893, and that the defendant was therefore not affected by said revocation.

In the Buckeye Case, while the court declined to say just what rights the public acquired as against the owner and assignee of the Edison patent by virtue of the voluntary limitation put upon its life by the patent office proceedings of December, 1883, it did find that the Buckeye Company acquired rights by virtue of the complainants' conduct and acts in connection with such proceedings, and that, as to the Buckeye Company, the attempted revocation of March, 1893, was of no effect, because the Buckeye Company had made all its investments and business arrangements prior to such revocation, and thereby acquired vested rights which could not be disturbed. But, in the case now under consideration, the defendants, unfortunately for them, occupy no such favorable attitude. They began business as an infringer, and, of their two additional investments (if two were made), the last was certainly made after the revocation of March, 1893. They were bound to take notice of these proceedings in the patent office, and, as to parties who had not acted in good faith upon the limitation of the patent made by the proceedings of December, 1883, and had not acquired vested rights before the revocation thereof, said revocation was certainly effective.

In another important respect this case differs from the Buckeye Case. In the latter case the court concluded that if the facts set forth in the defendant's motion, and the affidavits in support thereof, had been an available defense to it upon the original application for an injunction, the court would not have allowed an injunction, as against the Buckeye Company, upon the showing which the complainants could then have made. But would such a conclusion be just in this case? Suppose the complainants were now here asking for an injunction upon the strength of this patent, adjudicated to be valid by the highest court having authority to pass upon those questions. What defense could the defendant interpose by way of opposition to such injunction? The defendant would come into court and say the injunction ought not to be allowed as against it because it organized and began its business after the decision of Judge Wallace, in 1891, and because it had made additional investments relying upon the complainants' limitation of their patent by the patent office proceedings of December, 1883. To this claim the reply on the part of the complainants would naturally be that the defendant was an infringer when it began business, and made its additional investments after the complainant had recalled or revoked its dedication or grant of 1883, and that said revocation was known to the defendant, or ought to have been known to it from the records of the patent office, before it had made its additional investments. Would such a defense be

effectual to prevent the allowing of an injunction? I think not. The defendant would not be showing any such conduct or acts on the part of the complainant as estopped it from claiming the benefit of its revocation of March, 1893, as the Buckeye Company could have done in its case. For these reasons, I do not think the defendant has made a case entitling it to dissolution of the injunction now in force.

Having decided the case upon the facts, and for the reasons, hereinbefore stated, it does not become necessary to notice the further contentions made on behalf of the complainants: (1) That the proceedings in the patent office of December, 1893, were entirely void for want of jurisdiction of that office, and that therefore the record made by the office in those proceedings was not a record of which the public were obliged to take notice, and could not be operative either upon the complainants or upon anyone claiming rights thereunder by reason of the complainants' conduct. (2) That the proceedings in the patent office of December, 1883, were not binding upon one of the complainants in this case, to wit, the Edison General Electric Company, because, at the time said proceedings were instituted, the said the Edison General Electric Company had a license from the patentee and his assignee to manufacture under said patent, which license ran to said company and certain other associates named, and that they could not be influenced or affected by such proceedings in the patent office, of which they had no notice, and that the interest of the Edison General Electric Company was acquired by it from the owners of the patent prior to any investments made by the defendant in this case.

Both of these propositions, pressed with great earnestness by the learned counsel, might be of very great importance in connection with the case if presented in a different phase; but, as before said, it is now not necessary to consider them in connection with the decision based upon the facts as hereinbefore stated. The motion to dissolve the injunction is therefore disallowed.

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H. W. JOHNS CO. v. ROBERTSON et al.

(Circuit Court, S. D. New York. October 4, 1894.)

PATENTS—INFRINGEMENT—ROOFING FABRICS.

The Johns patent, No. 418,519, for an improvement in roofing fabrics, construed, limited, and held not infringed.

This was a bill brought by the H. W. Johns Company against Henry M. Robertson and others for infringement of a patent.

Wetmore & Jenner, for complainant.

Gallagher, Richards & Dodd and John K. Hallock, for defendants.

TOWNSEND, District Judge. This is a bill in equity for an injunction and accounting by reason of an alleged infringement of

letters patent No. 418,519, granted December 31, 1889, to Henry W. Johns, for an improvement in roofing fabrics. The alleged invention relates to the class of roofing fabrics composed of layers of cloth, paper, and felt pressed together, and coated or saturated with waterproof material. The specification states that in the manufacture of such fabrics it has been found impossible to bring the edges of the sheets evenly together, owing to the frequent deviation of the canvas from a straight line, which necessitated the trimming of the edges of the compound sheet after manufacture. This operation not only involved waste and additional expense, but necessitated the cutting off of the selvage edge of the canvas, which it is particularly desirable to retain in order to strengthen the fabric. By the operation of the machine described by the patentee, the excess in width of the projecting canvas is turned or folded over, and the various sheets are made straight and equal in width, the outflow of the cementing material is obstructed, and the selvage edge of the canvas is retained. The patent in suit does not embrace the mechanism whereby these results are secured, but only the manufactured product. The claims of said patent are as follows:

"(1) A compound sheet comprising, essentially, a plurality of separate sheets of different materials and of average equal widths, one of them being canvas having a selvage edge, any excess in width and projecting edges of the canvas being made straight and equal in width to the other sheets by turning in the edges thereof, and cementing material between the several sheets, substantially as set forth.

"(2) A compound sheet comprising, essentially, a plurality of separate sheets having cementing material between them, one or both the edges of either of said sheets being folded over upon itself, thus thickening the edge of the sheet, and interposing a rib between it and the next sheet, whereby the outflowing of the cementing material is obstructed, substantially as set forth."

The defenses alleged are denial of infringement and invalidity of the patent for various reasons. The conclusions reached render it unnecessary to consider all the defenses in detail. The second claim specifically embraces a construction whereby the cementing material is confined within the fabric by the folding over of one or more of the layers upon itself. The only difference in this regard between the article described in former patents and that of the patent in suit is that in the former one sheet was turned over upon the other sheets, while in the latter such sheet is turned over upon itself. There is some evidence that, prior to the date of the patent in suit, it was customary to make the sheets of material wider than the rolls, and to turn the edges in, either upon themselves or upon the other sheets. The state of the prior art shows a clear anticipation of this claim, unless it is limited to a construction containing one sheet of canvas or burlap. No such limitation is to be found in the language of said claim; but if such limitation is adopted, and if the claim, as thus limited, shows sufficient patentable novelty to give it validity, it is not infringed by defendant's product.

So far as the subject-matter of this claim is concerned, defendant's roofing fabric is manufactured on a machine constructed in accordance with letters patent No. 302,938, granted to W. H. Rankin,

August 5, 1884, and is identical with such fabrics manufactured, long prior to the date of the patent in suit, on such a machine. Furthermore, the Rankin machine does not turn the edges of the material over upon themselves, in the manner described in the patent in suit. That this is so is shown by the letter of the solicitor of the patentee, when the application for the patent in suit was rejected upon the citation of the Rankin patent, as an anticipation. The complainant would seem, therefore, at best, to be forced to choose between the two horns of a dilemma, on one or the other of which it must be impaled. Either the Rankin machine does not make an infringing product, or, if it does, the second claim is anticipated. The first claim of the patent in suit specifically covers the controlling feature of the alleged invention,—canvas with the selvage edge left thereon. Considerable expert testimony is devoted to a discussion of the term "average equal widths," used in said claim, and to the patent-office history of the limitations imposed upon the patent by various rejections and amendments. It is clear therefrom, and from the language of the specification, that roofing fabrics composed of a plurality of separate sheets of different materials and cementing materials were old in the art. A plurality of separate sheets "of different widths" was rejected and abandoned, and "of substantially equal widths" was substituted therefor. This latter term is explained by the applicant as not having reference to sheets intentionally differing in width. If this language refers to the sheets before they are combined, defendant does not infringe, for in his product the canvas sheet is intentionally made narrower than the other sheets. But complainant contends that the language of the claim means that the sheets are to be of average equal widths, after formation into the compound sheet. While this construction is in harmony with some of the language of the specification, it is not easily reconcilable with the express provision in the claim: "Any excess in width and projecting edges of the canvas being made straight and equal in width to the other sheets by turning in the edges thereof." The specification states: "I run the canvas of such width that at no part will it be narrower than the width of the paper and felt." It would seem, therefore, that, after combination, the sheet must be of exactly equal widths, and that the term "average equal widths" refers to the accidentally varying widths of canvas before combining, referred to in the specification. Assuming the construction of the first claim contended for by complainant, the proofs fail to show infringement by defendant. In this connection the suggestions already made concerning the Rankin machine are relevant. But the only evidence of infringement is to be found in the testimony of defendant's witnesses on cross-examination. From this it appears that, in the manufacture of defendant's product on the Rankin machine, it sometimes happens, when the canvas accidentally runs crooked, that the portion of the canvas which bulges out is turned over by the housing on said machine, so as to straighten it, and make it conform to the line of the other sheets. Irrespective of the other considerations already suggested, it does not seem to me that such evidence

of accidental imperfect operation of the machine, upon which the defendant's product is manufactured, is sufficient to establish infringement. No other proof was introduced to show that defendant had ever thus operated said machine or produced such an article; nor did the exhibits introduced by complainant show any such infringement of said claim.

Let a decree be entered dismissing the bill.

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GOLDIE et al. v. DIAMOND STATE IRON CO. et al.

(Circuit Court, D. Delaware. February 23, 1894.)

No. 148.

1. PATENTS—NOVELTY AND INVENTION—RAILROAD SPIKES.

The Goldie patents for a railroad spike, for a spike-pointing machine, and for a method of pointing spikes (numbered 394,113, 413,341, and 413,342, respectively) show patentable novelty and meritorious invention.

2. SAME—INFRINGEMENT—COLORABLE CHANGES.

Infringement of a patent for a railroad spike is not avoided by forming it with two points, instead of one, by cutting out a crescent-shaped central part, when the two spikes are identical in all essential parts.

3. SAME—EVIDENCE OF INFRINGEMENT.

Positive evidence of an experienced witness, giving a specific description of the construction and operation of an alleged infringing machine, which shows it to be substantially the same as the machine of the patent, aided by strong inferences from marks left upon the product of the machine, must prevail over the unsupported assertions of defendant's expert and employés that such description is "erroneous" and "false and misleading"; that defendant's machines are "radically and totally different"; and like statements of opinion.

This was a suit by William Goldie and others against the Diamond State Iron Company and others for infringement of certain patents. Heard upon motion for a preliminary injunction.

R. D. Totten and James I. Kay, for complainants.

Bradford & Vandegrift, for defendants.

ACHESON, Circuit Judge. This suit is upon three letters patent granted to William Goldie, namely: No. 394,113, dated December 4, 1888, for improvements in spikes, and more especially spikes used in the construction of railroads; No. 413,341, dated October 22, 1889, for a spike-pointing machine; and No. 413,342, dated October 22, 1889, for a method of pointing spikes.

The distinguishing feature of the Goldie spike consists in its having a point provided with diagonal cutting edges located in the same perpendicular plane with its rear side, and a compressing surface on its front side, formed with oblique facets on the front sides of the cutting edges; the diagonal cutting edges, as the spike is driven into the wood, dividing the fiber with a clean, shearing cut, whereby is obtained a square-cut backing or solid supporting wall to hold the spike against the crowding strain of the rail, while the oblique facets turn and compress the ends of the severed fiber

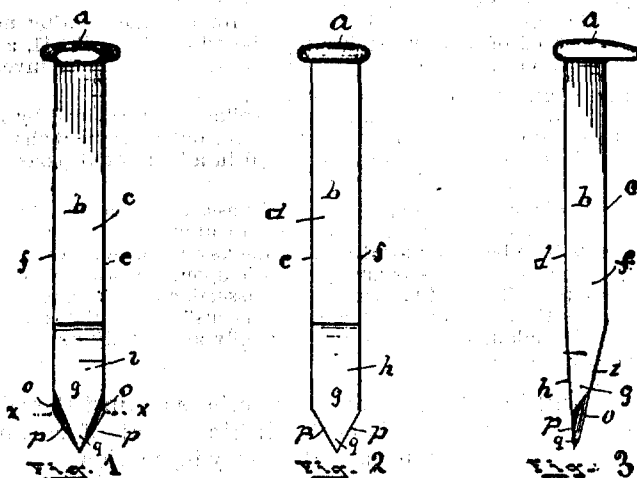
outwardly towards the side grain of the timber, so that they bear with great friction on the body of the spike, which is held firmly in the tie.

The claims of this patent are:

"(1) A spike having a point provided on each side with diagonal cutting edges located in the same perpendicular plane with its rear side, substantially as set forth."

"(2) A spike having a point provided with a sloping compressing surface on its front side, and with cutting edges, p, p, located in a plane with the rear side of the point, and diverging from the center diagonally upward to the lateral sides, and with the oblique facets, o, o, on the front sides of the said cutting edges, substantially as set forth."

[We herewith publish from the records of the United States patent office drawings of the Goldie spike, patented December 4, 1888, letters patent No. 394,113.]



Goldie's method of pointing spikes consists in swaging the point to form front and rear compressing surfaces, and then producing a sharp edge by shearing off the surplus metal obliquely across and in the direction of the length of the grain or fiber of the rolled iron. His spike-pointing machine consists of a vertically reciprocating plunger provided on its lower portion with one or more cutters of a shape to conform to the shape of the cutting edges required on the spike, and with a gage stop projecting below and in the rear of the cutters, and an anvil die having its upper face arranged to support the spike in a position oblique to the movement of the plunger, and having its front lower edge fitted to conform to the cutter or cutters on the plunger.

The Goldie spike, which was first put on the market in the year 1889, has met with unusual public favor. It has gone into very extensive use upon lines of railway all over the country. The uncontradicted proofs show that it is regarded by road masters and track officials generally as the best fastener for rails that has yet



been produced. It is also satisfactorily shown that the plaintiffs' competitors in business (save the defendant company) have respected their rights under the patents in suit.

I have very carefully examined the numerous prior patents set up by the defendants as anticipating Goldie's inventions, or as showing want of patentable novelty in what he has done. I am, however, quite clear that no such effect is to be given to them. The Goldie spike seems to be a valuable improvement, evincing meritorious invention. Nothing appears to create a doubt as to the validity of either of the patents sued on.

A specimen of the spikes manufactured by the defendants and here complained of is an exhibit in the case, and the question of the infringement of the spike patent (No. 394,113) is determinable by a mere inspection of this exhibit. The plaintiffs' spike and the defendants' spike differ in this: that, whereas the spike shown in the patent has a single point, the defendants' spike has two points, each, however, being substantially the same as the Goldie point in form, function, and result. The two points in the defendants' spike are produced by shearing away as well a central part of the metal as the sides, after the point is formed by swaging. The central shear, indeed, is crescent-shaped; but this is purely a formal difference. The substance of the invention remains. The principle of the two spikes is identical. The defendants' spike is provided with diagonal cutting edges located in the same perpendicular plane with the rear side of the point, and with oblique facets on the front sides of the cutting edges. To all intents and purposes the defendants' construction is a mere duplication of the Goldie point. The change which the defendants have made is a palpable evasion, and cannot here avail them. *Hoyt v. Horne*, 145 U. S. 302, 308, 12 Sup. Ct. 922. Infringement of this patent, I think, clearly appears.

With respect to the other two patents, the evidence of infringement is both direct and circumstantial. The defendants' spike itself bears very strong indications that it was cut by a reciprocating plunger acting upon the metal while supported upon an anvil die in a position oblique to the movement of the plunger. Plainly, its sharp cutting edges were produced by shearing the metal obliquely across and in the direction of the length of the fiber. The faces of the cut show straight and continuous lines, while the under side of the spike has visible marks which can be reasonably accounted for only upon the supposition that when cut it rested upon an anvil die. Then we have the positive statement of David Ford, an experienced witness, who examined and describes with particularity the defendants' spike-making machines. According to the specific description contained in his affidavit, those machines are the same, in construction and operation, as the machine of the Goldie patent, or substantially so. How do the defendants meet this case? In their answer the denial of infringement is couched in the most general terms. George W. Todd, the president of the defendant company, and its codefendant, in his additional opposing affidavit does not at all explain the defendants' machines or method.

Mr. Browne, the defendants' patent expert, Mr. Griffith, their employé, and Mr. George, their foreman, respectively deny the correctness of Ford's description of the spike-making machines the defendants are using, and assert that Ford's statements are "erroneous" and "wholly false and misleading"; that the defendants' machines and methods are "radically and totally different" from Ford's description, the machines operating in "an entirely distinct and different manner"; with other allegations to the like general effect. But no one of these affiants describes the machines the defendants are using, or their method of manufacture, or gives the court any specific information as to the actual construction of those machines, or their mode of operation. This reserve is significant. It is not satisfactorily explained. The plaintiffs' proofs under this head are exceedingly strong, demanding something more than bald denials and vague general statements. The defendants should have given the court facts, and not bare opinions. Moreover, the three last-named affiants state that the defendant company actually has one machine made "in substantial accordance with the Goldie machine patent," but intended and used, they say, "simply for the purpose of experiment." The proofs, then, as a whole, I think, fully warrant the interposition of the court to prevent infringement of the patents for the Goldie machine and method.

The evidence tends to the conclusion that the defendants do not conform to the Bower and Todd patents, but in material respects depart therefrom. Be that as it may, however, those patents are for inventions of a later date than Goldie's, and are subordinate to his patents.

The allegation that the plaintiffs have been guilty of such laches as should deprive them of summary relief is not well founded. In November, 1892, upon the first serious intimation of probable infringement, the plaintiffs addressed a warning letter to the defendants. Positive information of actual infringing sales did not reach the plaintiffs until May, 1893, and satisfactory proofs of infringement were not obtained until late in the year. Then the bill was promptly filed, and this motion made. There are no equitable considerations to induce the court to withhold preliminary relief. Interference with the defendants' general business is not proposed. Their manufacture of infringing spikes began recently, and has not yet attained large proportions. On the other hand, to permit the defendants to put on the market the infringing spikes at an under price, as the evidence shows they have been doing, would seriously embarrass the plaintiffs, and inflict upon them special injury which it would be very difficult, if not impossible, to compensate adequately.

A preliminary injunction in accordance with the prayer of the bill will be allowed.

## GRAVER v. FAUROT.

(Circuit Court, N. D. Illinois. November 8, 1894.)

## 1. FEDERAL COURTS—JURISDICTION—REVIEW OF DECISION OF STATE COURT.

A federal court cannot entertain jurisdiction of a bill of review seeking a rehearing of a cause in a state court.

## 2. COURTS—RULE OF DECISION.

Where two cases in the court of last resort appear to be in irreconcilable conflict as to the right of a complainant to maintain his bill, the later of such cases citing the earlier and conflicting case with approval, the circuit court will sustain a demurrer to the bill, in order to obtain a determination of such right, before putting parties to the expense of marshaling evidence.

## 3. FRAUD—IMPEACHING DECREE.

Can a final decree be impeached by an original bill seeking to attack such decree for fraud where the only fraud alleged is false swearing and perjury in the suit in which such decree was rendered, *quaere*.

This was a suit by William Graver against Benjamin C. Faurot to set aside, on the ground of fraud, a decree rendered in a court of the state of Illinois. Defendant demurred to the bill.

Monroe & McShane and R. Rae, for complainant.

Frank L. Wean and Frank O. Lowden, for defendant.

JENKINS, Circuit Judge. Preliminary to the consideration of the demurrer, an observation may be indulged with respect to this bill of complaint. It is understood to be a bill filed in the state court, either as a bill of review of a previous decree in equity in that court, or as an original bill attacking that decree for fraud. The transcript of record filed in this court upon removal of the cause from the state court exhibits what purports to be a copy of the bill so filed in the state court. That copy is either incorrect, or the bill itself is imperfect. I find therein no allegation that any bill was filed in the state court in the suit in which the decree was entered, and which is there attacked. The first six pages would seem to be a copy of that original bill in the state court, and this is followed by allegations that the defendant entered his appearance to the bill, and filed his sworn answer thereto. There are, however, no apt allegations showing the commencement of the original suit in the state court, although the decree therein is asserted and sought to be annulled. This is a matter which doubtless can be rectified, and I prefer to consider the bill as it should be perfected.

This bill is either a bill of review, seeking a rehearing of the original suit upon the ground of newly-discovered evidence, or is an original bill attacking the former decree for fraud. If it be a bill of review, this court cannot properly entertain jurisdiction. *Barrow v. Hunton*, 99 U. S. 80; *Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. 619; *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62. Otherwise, if it be an original bill attacking the former decree for fraud. I must therefore consider this bill as an original bill.

The decree sought to be impeached was rendered on the 8th of July, 1889, and is as follows:

"This cause coming on to be heard, came the parties hereto, by their solicitors, respectively, and the court, having heard the evidence, arguments of counsel, and being fully advised in the premises, finds that the equities to be with the defendant. Therefore, it is ordered that this case be, and the same is hereby, dismissed at the complainant's cost for want of equity, and the defendants have of the said plaintiff their costs in the premises."

It is asserted in the present bill that neither the complainant nor the solicitor were present at the hearing of the cause, if any were ever had; and it is charged that no evidence was heard in the cause at the final hearing thereof, or arguments made by counsel, so far as respects the complainant; and that the matter was disposed of *ex parte*, and without notice. There would seem to have been a motion to dissolve an injunction which had been granted in that suit, and the motion was allowed; that no replication to the answer was filed; and that some six months after such dissolution of the injunction this final decree was rendered. It is claimed that this decree is not, for the reasons stated, *res judicata*, and that this court should look into the circumstances, and so hold, treating that decree as a mere dismissal of the bill, and not to be a final and conclusive adjudication upon the merits of the action.

Ordinarily, a dismissal of a bill in chancery stands on the same footing as a judgment at law, and will be presumed to be a final and conclusive adjudication upon the merits, whether or not heard and determined, unless the contrary is apparent upon the face of the pleadings, or in the decree of the court. *Doe v. Oliver*, 2 Smith, Lead. Cas. 667; *Durant v. Essex*, 7 Wall. 107; *Tankersley v. Pettis*, 71 Ala. 179. The decree upon its face purports to be a final decree upon the merits, and in the absence of fraud this court is not at liberty to consider whether the statements of the decree be true or not.

This original decree is now attacked for fraud, consisting, as charged in the bill, in "false swearing and perjury of said Faurot and Bailey, and that this court was deceived and imposed on thereby, and that said decree was obtained by fraud." This false swearing and perjury were in the verification to the answer to the bill in that suit. The question is therefore sharply presented whether a judgment can be attacked for fraud, and the prevailing party deprived of the benefit thereof, when he has obtained that judgment or decree by a false answer, or by perjury in giving evidence therein. Assuming the facts to be as stated in this bill, I have been impressed with the conviction that the complainant has been grievously defrauded. It will not answer, however, to depart from well-settled principles upon which courts of equity proceed, to rectify an occasional injustice. Such a course usually results in the working of greater injustice. It should be the aim of the court to move along the lines of well-established principles, and not to permit hard cases to make bad precedents. I have struggled to find a way by which this complainant may be relieved from the gross fraud charged in his bill, and by which he may escape the conclusive effect of the prior decree. I am confronted with two decisions of the ultimate tribunal which I have not been able to reconcile. In *U. S. v. Throckmorton*, 98 U. S. 61, the court, by Mr. Justice Miller, in considering the question of what

frauds are sufficient to sanction a court to set aside a judgment or decree between the same parties, uses this language:

"If the court has been mistaken in the law, there is a remedy by writ of error. If the jury has been mistaken in the facts, the remedy is by motion for new trial. If there has been evidence discovered since the trial, a motion for a new trial will give appropriate relief. But all these are parts of the same proceeding. Relief is given in the same suit, and the party is not vexed by another suit for the same matter. So, in a suit in chancery, on proper showing a rehearing is granted. If the injury complained of is an erroneous decision, an appeal to a higher court gives opportunity to correct the error. If new evidence is discovered after the decree has become final, a bill of review on that ground may be filed within the rules prescribed by law on that subject. Here, again, these proceedings are all part of the same suit, and the rule framed for the repose of society is not violated. But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court; a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party, and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. See *Wells, Res Adj.* § 499; *Pearce v. Olney*, 20 Conn. 544; *Wierich v. De Zoya*, 7 Ill. 385; *Kent v. Ricards*, 3 Md. Ch. 392; *Smith v. Lowry*, 1 Johns. Ch. 320; *De Louis v. Meek*, 2 Iowa, 55. In all these cases, and many others which have been examined, relief has been granted, on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court.

"On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed. Mr. Wells, in his very useful work on *Res Adjudicata*, says (section 499): 'Fraud vitiates everything, and a judgment equally with a contract,—that is, a judgment obtained directly by fraud, and not merely a judgment founded on a fraudulent instrument; for, in general, the court will not go again into the merits of an action for the purpose of detecting and annulling the fraud. \* \* \* Likewise, there are few exceptions to the rule that equity will not go behind the judgment to interpose in the cause itself, but only when there was some hindrance, besides the negligence of the defendant, in presenting the defense in the legal action. There is an old case in South Carolina to the effect that fraud in obtaining a bill of sale would justify equitable interference as to the judgment obtained thereon. But I judge it stands almost or quite alone, and has no weight as a precedent.'"

The case he refers to is *Crawford v. Crawford*, 4 Desaus. Eq. 176. See, also, *Bigelow, Frauds*, 170–172. There the fraud consisted of a forged grant accompanied by depositions of perjured witnesses, whereby, as was claimed, the court was imposed upon to render the objectionable decree. But the supreme court affirmed a decree dismissing the bill, holding that the frauds for which a bill to set aside a judgment or decree between the same parties will be sustained are those which are extrinsic or collateral to the matter tried, and not a fraud which was in issue in the primary suit; and that the

cases where such relief has been granted are those in which, by fraud or deception upon the unsuccessful party, he has been prevented from exhibiting fully his case, by reason of which there has never been a real contest before the court of the subject-matter of the suit.

This case would seem to control action upon the present demurrer. It has never been reversed or limited, and is referred to approvingly in the subsequent case to which I now advert. In *Marshall v. Holmes*, 141 U. S. 598,<sup>1</sup> a bill was filed in the state court of Louisiana to annul and avoid a certain judgment obtained at law upon false and forged documents. It will be observed that the fraud asserted was of the same character as in the case of *U. S. v. Throckmorton*. The case was sought to be removed to the federal court, but removal was refused by the state court, resulting, upon final hearing in the state court, in the dismissal of the bill. The case was then appealed to the court of appeals for the Second circuit in the state of Louisiana, and the original judgment being affirmed, except that the general damages were reduced, a writ of error was prosecuted to the supreme court of the United States. The latter court held that the state authority was without authority to proceed further in the suit after the filing of the petition for removal, if it was a suit in which the circuit court of the United States could rightfully take jurisdiction. The case was held to be such an one, and the decree was reversed. The court reviews the averments of the petition, and declares the ground of fraud to be that the judgment complained of "would not have been rendered against Mrs. Marshall but for the use in evidence of the letter alleged to be forged"; and then observes:

"The case evidently to be presented by the petition is one where, without negligence, laches, or other fault upon the part of the petitioner, Mayer has fraudulently obtained judgments, which he seeks, against conscience, to enforce by execution. While, as a general rule, a defense cannot be set up in equity which has been fully and fairly tried at law, and although, in view of the large powers now exercised by courts of law over their judgments, a court of the United States, sitting in equity, will not assume to control such judgments for the purpose simply of giving a new trial, it is the settled doctrine that 'any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.' *Insurance Co. v. Hodgson*, 7 Cranch, 332, 336; *Hendrickson v. Hinckley*, 17 How. 443, 445; *Crim v. Handley*, 94 U. S. 652, 653; *Metcalf v. Williams*, 104 U. S. 93, 96; *Embry v. Palmer*, 107 U. S. 3, 11, 2 Sup. Ct. 25; *Knox Co. v. Harshman*, 133 U. S. 152, 154, 10 Sup. Ct. 257; 2 Story, Eq. Jur. §§ 887, 1574; *Floyd v. Jayne*, 6 Johns. Ch. 479, 482. See, also, *U. S. v. Throckmorton*, 98 U. S. 61, 65."

It will be observed that in the statement of general principles of law there is no conflict in the cases. The conflict, if any, is in the application of legal principles to the facts then in point. I have carefully examined the cases which the supreme court refer to in the latter opinion. Each of them was a case where the fraud was extrinsic or collateral to the matter tried, and undoubtedly fell within the doc-

trine of *U. S. v. Throckmorton*. As before stated, I am unable to distinguish those two cases upon the facts. The nature of the fraud was the same in both cases. In both the fraud was in the use of forged documents and false evidence offered by the successful party. In the one case the bill was dismissed, and in the other sustained. Both decisions were by a unanimous court. Three of the justices who were members of the court when the former case was decided were members of the court when the latter case was decided, including the justice who delivered the opinion of the court. I do not see how both can stand, and yet the former case is approvingly referred to in the latter. Possibly the fault is mine, that I am unable to distinguish them. In the doubtful frame of mind in which I am left by these two apparently conflicting decisions, I might have recourse to the maxim that the greater regard should be given to the latter decision, were it not for the fact that in the latter case the former decision is approvingly referred to, and apparently sought to be followed.

Under the circumstances, I think it would be a hardship upon the parties to put them to the expense of marshaling their evidence when the right to maintain the bill is thus placed in doubt. It would be the prudent course to first determine the right to maintain the bill on the facts stated, and in that view I have concluded pro forma to sustain the demurrer and dismiss the bill, and the complainant, by appeal to the court of appeals, may speedily have the question determined in advance of an issue upon the merits. That court may perhaps be able to reconcile the two cases referred to, or, if unable so to do, can certify the question to the supreme court for its solution. The demurrer will be sustained, and the bill dismissed.

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OAKLEY et al. v. TAYLOR et al.

(Circuit Court, E. D. Missouri, E. D. November 12, 1894.)

**FEDERAL JURISDICTION—CONTEST OF WILLS.**

Federal courts have no jurisdiction of a direct action to cancel a will.

**In Equity.** Bill by Mary C. Oakley and others against Mamie L. Taylor and others to cancel a will. Bill dismissed.

S. M. Chapman and Wm. C. & James C. Jones, for plaintiffs.

J. W. Emerson, C. P. & J. D. Johnson, Geo. D. Reynolds, and J. Perry Johnson, for defendants.

**PRIEST, District Judge.** The original jurisdiction of this court is invoked to set aside instruments admitted to probate by the probate court of Butler county, Mo., as the will of Mrs. L. J. Spear. The question, and the only one, of serious difficulty, is whether this court has jurisdiction to cancel and annul the will by a proceeding directed alone to that end. Congress has given to the circuit courts original jurisdiction of all suits of a civil nature, at common law or in equity, when the matter in dispute exceeds \$2,000, and the

controversy is waged between citizens of different states; and, under such conditions, the jurisdiction is concurrent with that of the state courts. It seems to have been, and was, the design of congress, where proper citizenship existed, to extend the common-law and equity jurisdiction of the federal circuit courts to as complete an extent as the same jurisdiction might exist in the several state courts; but there is manifest no intention to confer a special jurisdiction unknown to the common law, and not existing according to the usages of courts of chancery. There can be no doubt, however, of the capacity of federal courts to take cognizance of rights newly created, and enforce them, according to their own rules of procedure, when the subject-matter will permit. The right and the remedy are different things. The right will be recognized, but the remedy indicated may be disregarded. It has never been a part of the function of courts of law or equity, by a proceeding having that especial purpose in view, either to establish or reject wills. This jurisdiction was committed exclusively to the ecclesiastical courts in England, for which are substituted, with a jurisdiction extending to probate of wills affecting real estate, by the several states of the Union, courts of probate, variously styled probate, surrogate, or orphans' courts, not, however, exercising common-law or chancery cognizance; and these courts have always enjoyed this jurisdiction exclusive of either courts of common law or equity, tending a field of business from which other courts were excluded by the very nature of their organization and procedure.

Speaking with respect of the necessary simplicity and the summary character of the procedure of courts that usually have to do with wills and the administration of estates, Mr. Schouler (Ex'rs & Adm'rs, § 13) says:

"As befits an authority which thus pervades the sanctity of a household, crosses the threshold, and exposes to public view the chamber of mourning, probate jurisdiction in the United States is exercised with great simplicity of form, as well as decorum. Costs and fees are trifling. The mode of procedure is by a simple petition, which states the few facts essential to give the court jurisdiction. In various counties the needful blanks may be obtained from the register; and of so informal a nature is the hearing before the judge or surrogate that parties appear often without legal counsel, the usual aspect of a court room in the rural counties being that of an executive office, where business is summarily disposed of."

And directed in the same line of thought is the following expression of the court in the case of *In re Broderick's Will*, 21 Wall. 503, 509, wherein it is said:

"The public interest requires that the estates of deceased persons, being deprived of a master, and subject to all manner of claims, should at once devolve to a new and competent ownership, and, consequently, that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected with the least chance of injustice and fraud, and that the result obtained should be firm and perpetual. The courts invested with this jurisdiction should have ample powers, both of process and investigation, and sufficient opportunity should be given to check and revise proceedings tainted with mistake, fraud, or illegality."

From this it will be seen that it could not have been the purpose of congress to vest in federal courts a particular jurisdiction



which had never been exercised by courts of common law or equity, nor to give them a jurisdiction which could not be conveniently administered, and which, by virtue of the present policy manifested in the constitution of probate courts, could not be well assumed by federal authority. I must therefore conclude, from looking at the grant of jurisdiction to the circuit court alone, that it has no such jurisdiction as that contended for in this case.

But it is said that the statutes of the state of Missouri invests the state circuit courts with a jurisdiction to entertain contests of this character, and that a statute conferring such a right should be recognized in this court, and enforced according to its usages and procedure.

This principle, as broadly as is contended for in this case, is thus announced in *Reynolds v. Bank*, 112 U. S. 405, 410, 5 Sup. Ct. 213:

"It may be conceded that the legislature of a state cannot directly enlarge the equitable jurisdiction of the circuit courts of the United States. Nevertheless, an enlargement of equitable rights may be administered by the circuit courts, as well as by the courts of the states (*In re Broderick's Will*, 21 Wall. 503, 520); and, although a state law cannot give jurisdiction to any federal court, yet it may give a substantial right of such a character that, when there is no impediment arising from the residence of the parties, the right may be enforced in the proper tribunal, whether it be a court of equity, admiralty, or common law."

But, if we concede this principle,—and we have no disposition to oppose it,—it does not tend directly to sustain the plaintiffs' position.

Section 8888, Rev. St. Mo. 1889, provides:

"If any person interested in the probate of any will shall appear within five years after the probate or rejection thereof, and by petition to the circuit court of the county, contest the validity of the will or pray to have a will proved which has been rejected, an issue shall be made up whether the writing produced be the will of the testator or not, which shall be tried by a jury, or if neither party require a jury, by the court."

Sections 8880 and 8882 vest the jurisdiction to admit or reject a will in the first instance in the probate court, and provide a summary mode of contest. The action of the probate court, however, does not become final until after the expiration of five years, without action in the circuit court, under the provisions of section 8888. The question then arises, upon a proper construction of section 8888, *supra*, whether it vests a new right, or simply provides a remedy in the state courts by which the action of the probate court in admitting or rejecting a will may be revised. It appears, not only from an examination of the Missouri statute, but also from the interpretation of them by the supreme court of Missouri, that no new right is given either to the proponents or contestants of a will by section 8888, but simply a remedy by which the adjudication of the probate court may be appealed from or reviewed. The contest instituted in the circuit court is not the exercise of an original jurisdiction, but an appellate review or superintending authority. Without action first had in the probate court, the state circuit court would have no jurisdiction; for it does not exist at common law or in equity, and is not elsewhere conferred by statute.

In *Hughes v. Burriss*, 85 Mo. 660, after quoting the statutes referred to as we have set them forth, the court says:

"We understand these statutory provisions to mean that an ex parte order, such as the probate court is authorized to make in admitting a will to probate, shall not be conclusively binding on the parties interested until after the expiration of five years from the time such order is made, nor conclusively binding upon the parties interested if they are infants, married women, or persons of unsound mind, until after the expiration of a like period after their respective disabilities are removed. As to such parties, the legislature, in the sections above quoted, has characterized the force and effect to be given to the order of a probate court probating a will, and we are not authorized to give such order any greater force or effect. In the case of *Dickey v. Malechi*, 6 Mo. 177, decided in 1829, this court, speaking through Judge Napton, remarked in reference to a petition filed to establish a will which had been rejected by the county court: 'I do not see that the circuit court, in entertaining the petition of Malachi, did exercise any original jurisdiction. The legislature may undoubtedly provide other modes besides the ordinary form of appeal by which the controlling power of the circuit court may be exercised, and in the tenth section, respecting wills and testaments, they have made such a provision.'"

The tenth section referred to in the case of *Dickey v. Malechi*, supra, is the same as section 8888 of the present statute, supra.

The court, speaking again concerning the same subject, in *Benoist v. Murrin*, 48 Mo. 48, said:

"The effect of the contestant's petition, and the proceedings under it, was to transfer the subject-matter from the probate to the circuit court for adjudication in the latter court. There was no appeal in form, for the result of the process was the transference of the contest from an inferior to a superior court, and that may be done without a formal appeal, as was decided in this court in *Dickey v. Malechi*, 6 Mo. 182, and where it was held that the jurisdiction of the circuit court in cases like the present was not original. The jurisdiction not being original, it must be derivative, in effect, as on appeal."

Again, the same court, in *Lamb v. Helm*, 56 Mo. 420, said:

"When a contest is commenced under our statute either to establish a will which has been rejected or allowed and probated in the probate court, the effect is the same as if an appeal had been taken from the action of the probate to the circuit court, where the question could be tried anew, just as if no action had been taken in the probate court. The party who relies on or asserts the validity of the will must prove it up, and in the same manner and to the same extent as if no action had been taken in the probate court. In fact, the action of the probate court becomes wholly void by such contest, so far as the efficacy of the will is concerned. The effect of the contestant's petition and proceedings under it was to transfer the whole matter to the court [circuit court] where the proceedings are pending."

And, again, in *Tapley v. McPike*, 50 Mo. 589, it is said:

"The contesting of the will in the circuit court operates in the nature of an appeal from the probate in the county court."

It is very clear from the expressions of the supreme court of Missouri that the jurisdiction of the circuit court exercised under section 8888, supra, is not original, but is in the nature of an appellate derivative or superintending jurisdiction; and if this be true, under the decision of the supreme court in *Barrow v. Hunton*, 99 U. S. 80, 82, this court clearly has no jurisdiction. In the last case it is said:

"The question presented with regard to the jurisdiction of the circuit court is whether the proceeding to procure a nullity of the former judgment in such

a case as the present is or is not in its nature a separate suit, or whether it is a supplementary proceeding, so connected with the original suit as to form an incident to it, and substantially a continuation of it. If the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review, or an appeal, it would belong to the latter category, and the United States court could not properly entertain jurisdiction of the case; otherwise, the circuit courts of the United States would become invested with power to control the proceedings in the state courts, or would have appellate jurisdiction over them in all cases where the parties are citizens of different states. Such a result would be totally inadmissible."

Some cases are referred to in the brief of counsel which, upon a casual reading, would tend to excite a contrary view, but, when critically and analytically examined, are in harmony with the views here expressed. These cases are reviewed very satisfactorily and ably in the case of *Reed v. Reed*, 31 Fed. 49, by Judge Welker, and in which we express a very hearty concurrence.

The least that can be said of this question is that it is one of serious doubt, and this, of itself, ought to determine the judgment adversely to plaintiffs. Where there exists a substantial doubt as to the jurisdiction of the federal courts, the controversy should be declined; and especially is this true where its tendency would be to remove from domestic tribunals those matters of domestic administration with a view to which they are especially constructed and equipped. Were we to enter a judgment here annulling the probate of this will, and recognition be refused it by the probate court of Butler county, in order to enforce its judgment this court might be compelled to seize and administer the entire estate of the testator. The embarrassment that would attend such action does not need to be pictured that it may be appreciated. Moreover, were this court to entertain jurisdiction of this cause erroneously, the time might lapse within which the plaintiffs could pursue relief in the state tribunal, and they thus be debarred of relief against the action of the probate court of Butler county. The suit will be dismissed for want of jurisdiction.

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AMERICAN MORTG. CO. OF SCOTLAND, Limited, v. OWENS et al.

(Circuit Court, D. South Carolina. November 23, 1894.)

HUSBAND AND WIFE—SEPARATE ESTATE.

O. applied to D. for a loan, saying that he wanted the money, and wished to get a loan upon his wife's estate. D. having made out the application for the loan in her name, O. asked if he could sign it, and, upon D.'s telling him that he could, signed it with his wife's name. O. afterwards told his wife, who had known nothing of it, of his application for a loan, and induced her to agree to sign the papers when prepared, but did not tell her the contents of the application, or of any use proposed to be made of the money. O.'s wife, under D.'s direction, signed, without reading, a note and mortgage upon property belonging to her, and D. thereupon, in the wife's presence, but without any request from her, gave O. a check to his own order for the proceeds of the loan. Held, that the loan was made to O. for his own use, upon the security of

his wife's note and mortgage, and under the law of South Carolina as existing in 1886, where a married woman could only contract in reference to her separate estate, such note and mortgage were void.

This was a suit by the American Mortgage Company of Scotland, Limited, against Missouri A. Owens and Raymond Owens, her husband, for the foreclosure of a mortgage. The cause was heard on the pleadings and proofs.

John T. Sloan, Jr., and Allen J. Green, for complainant.

J. J. Brown, St. J. Grimke, and C. B. Northrop, for defendants.

SIMONTON, Circuit Judge. This is a bill to foreclose a mortgage given by a married woman of her separate property. The mortgage bears date 12th March, 1886. The first question which meets us in the case is, was this a valid mortgage, she being a married woman? In South Carolina, at the date of the mortgage, a married woman was under disability; perhaps it would be more exact to say "had but a limited power to contract." *Savings Inst. v. Luhn*, 34 S. C. 186, 13 S. E. 357. She could only contract with reference to her separate estate. Questions upon this subject have for many years vexed the supreme court of South Carolina. As a result of their discussion, the supreme court in *Mortgage Co. v. Deas*, 35 S. C. 50, 14 S. E. 486, reaffirm *Savings Inst. v. Luhn*, 34 S. C. 184, 13 S. E. 357, and say:

"It must be regarded as settled that when a married woman, either directly or through her agent, borrows money from another, the money so borrowed becomes at once a part of her separate estate, and her contract to repay the same is a contract with reference to her separate estate, which may be enforced against her, and that the lender, in the absence of proof to the contrary, has the right to assume that the money was borrowed for the use of the married woman, and she is estopped from denying that fact unless it is shown that the lender had notice to the contrary."

The *Luhn Case* adds that the husband may, if so authorized by the wife, act as her agent, and the disposition of the money after it is borrowed cannot affect the question. *Savings Inst. v. Luhn*, 34 S. C. 184, 13 S. E. 357.

The question in the case is, was this money borrowed by the married woman, and was the contract a contract as to her separate estate? The evidence as to the borrowing of the money is this: Mrs. Missouri A. Owens, the defendant, owned a farm in Barnwell county. Her husband, Raymond Owens, lived on the farm with her, and had no other property. He managed the farming, and the place supported itself. W. H. Duncan, a lawyer of Barnwell Court House, had advertised that he could furnish loans of money. Raymond Owens, without the knowledge of his wife, visited Duncan, and said that he wished to get a loan on his wife's estate, and asked Duncan if he could do it. Duncan replied that he could, and offered to make out the application for him. The application was made out in the name of the wife, and Owens asked Duncan if he could sign it. Duncan replying that he could, Owens signed his wife's

name, without more. The evidence at this point is important, and will be quoted literally (Owens is being examined):

"Q. Did you tell Col. Duncan how you came to borrow the money? A. No. I told him I wanted the money. Q. Did you say you wanted it for your own use and purpose? A. I told him I wanted the money. Q. You did not tell him your wife wanted the money? A. No."

Duncan sent on the application to New York. In this application it was stated that some of the money would be used in putting up a ginhouse on the farm. Some time after the application was made, and before the papers were prepared for signature, Owens told his wife, who up to that time knew nothing whatever of a proposed loan, that he had made an application for money, but he did not say for what purpose, and asked her to sign the papers when they should be prepared. After refusing more than once, she consented. When the papers were prepared, Duncan met Mrs. Owens, and, without saying anything about the papers, put them before her, and told her where and what to sign. She did so. Nothing passed between them. The husband was there at the time, and when all the papers were executed Duncan gave a check to the husband for the face of the bond, less 20 per cent. commissions and some smaller charges for papers and recording and insurance. The check was made payable to the order of the husband, although she was either present or within reach. Mrs. Owens says that she never saw it, and that no part of the money was spent on her property.

These are all the facts about the borrowing. As Mrs. Owens was a married woman, with a limited power to contract, a person dealing with her must take notice of her disability, and when he seeks to enforce this contract the burden is upon him to show that it is one a married woman is capable of making. He must show that she had the power to make the contract. To do this he must show that the money was borrowed for her use. If it were, she would be liable. If not, she would not be liable, even though she expressly declared her intention to bind her separate estate in the obligation given to secure the repayment of the money borrowed, for the simple reason that in the latter case she had no power to make such a contract, and her intention to do that which she had no power to do is wholly insufficient to bind her legally. *Savings Inst. v. Luhn*, supra. Who, then, borrowed this money? The husband acted. Did he act as his wife's agent? Did Duncan deal with him as such, believing or having reason to believe, that Mrs. Owens was the principal, that she was the borrower, that the money was borrowed for her use, and that her husband was only the agent? Owens told him that he wanted the money, and that he wanted the loan on his wife's estate. He did not say that his wife wanted it, nor did he say that it was for her use, nor that his wife authorized him to borrow it. When Duncan prepared the application, Owens asked him if he could sign it. He did not profess to have authority from his wife to sign it. Apparently, the question meant, being her husband, "Have I a right to sign for my wife?" Duncan seemed to think that he could. Now the husband is never qua husband the agent of his wife. Such agency is never pre-

sumed. It must be proved, and must be proved like every other fact. Merely signing his wife's name does not prove that he was the agent, especially when he signed it under the advice of Duncan.

This application was a contract,—the foundation of the loan. So far, there is nothing to show that it was Mrs. Owens' contract. Did she subsequently ratify it or affirm it, or, if not, is she estopped from denying that it is her contract? In order to prove that she ratified or confirmed the act of her husband, it must be shown that she had full knowledge of the facts concerning it. *Drakely v. Gregg*, 8 Wall. 267. And in order to estop her it must be shown that she held out her husband to the world as her agent, or that in this transaction she had put him in possession of all the indicia of authority to act for her as her agent.

The next step in the evidence is that the husband informed the wife that he had made an application for the loan. But she did not see the application, or know its contents, for her husband did not tell her its purpose. She knew nothing of the statement that any part of it was to be used in putting up a ginhouse, nor does it appear that she knew that it was signed in her name, or for her. When the bond and mortgage were signed, Duncan saw her for the first time. He knew that she had limited power to contract. He knew that her separate property was being incumbered, and that this could not be done unless she was the borrower, and that it (the money) was borrowed for her use; and yet he said not one word to her to ascertain if this was the case, or if she knew what was being done. Apparently, he preferred to rely on her estoppel. Having thus procured the signature of the papers, Duncan gave the check to the husband, to his order, not as agent, but as if its contents were his own. It is worthy of note that the money was paid *eo instanti* upon the execution of the papers by Duncan on his own check. If it was his own money, advanced by him for the lender, then when the lender repaid him the lender ratified and adopted his act, constituting him *quoad hoc* the lender's agent. If he had in hand the money of the lender, then that money was paid to him upon the strength of the application, and because of the application. In any event, if the bond and mortgage were void in *initio* because of want of power in the married woman to make them, and so went into Duncan's hands, no bona fides in any subsequent lender can give them validity.

Thus we see that in its first steps this money was borrowed by the husband on the security of his wife's property, he having no express or implied power or authority to do so, and Duncan having no reason to believe that he had such authority. On the contrary, having been put on the inquiry, on his guard, the husband asked him "Can I sign the application?" The question implied doubt of his authority. So, at the end of the transaction, the wife being at hand, immediately after the interview with her, upon her signature of the papers which now are set up to estop her, Duncan paid the money to the husband in a check to his own or-

der, the very act appropriating the money to the husband, and not to her use. It is impossible to escape the conclusion that this loan was made to Raymond Owens for his own use upon the security of his wife's note and mortgage, and that both Duncan and Owens so understood it,—that it was a contract which, as the law of South Carolina then stood, Mrs. Owens had not the power to make, and that it is utterly void. The bill must be dismissed.

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McMULLEN et al. v. RITCHIE et al.<sup>1</sup>

(Circuit Court, N. D. Ohio. October 24, 1894.)

No. 4,927.

1. CREDITORS' BILL—NEGLIGENCE IN SETTING UP DEFENSES TO JUDGMENT SUED ON.

Defendant contracted to buy certain bonds and coupons of a corporation of which he was president at the time of the contract and at the time the bonds were issued. Judgment was obtained against him for breach of the contract, and he was again sued on such judgment. In neither of the actions did he allege the invalidity of plaintiff's title, though making various pleas. *Held* that, as against a creditors' bill, he could not set up that the coupons were invalid because severed from the bonds before issued, and because plaintiff had surreptitiously taken them from the corporation's place of deposit, no reason being shown why he had not learned and set up these facts earlier, but that he would be remitted to his remedy at law on the implied warranty as to validity of title.

2. OFFICERS OF CORPORATION—COMPENSATION FOR SERVICES.

When a president and director of a corporation, for whom no salary is provided, of his own accord renders services to advance its interests, being a large owner of its stock and of the stock of other corporations which would be benefited by its prosperity, without expectation on his part of compensation, or knowledge on that of the corporation that he expected payment, he cannot recover therefor or for personal expenses connected therewith for which he had no purpose to charge.

3. CREDITOR'S BILL—MOTIVES OF CREDITORS.

That a creditor who seeks to reach the stock of his debtor in a corporation is induced to do so by other stockholders, with whom he has made plans for future management of the corporation, is no reason for denying him the remedy of a creditors' bill.

4. CORPORATIONS—MISMANAGEMENT BY DIRECTORS—ACTIONS.

Mismanagement by directors gives a right of action to the corporation or a stockholder for its benefit, but not to a stockholder for damages to him individually.

5. SAME.

The mere fact that directors in good faith refuse to enter into a contract for the corporation gives it no right of action.

6. CERTIFICATES OF STOCK—USE AS COLLATERAL—LIMITATION OF AUTHORITY.

When a wife indorses in blank her certificates of stock, and allows her husband to use them as collateral, the burden is on her to show a limitation on his authority to use them, and notice to the creditor of the limitation.

7. DEPOSITION—TRANSACTION WITH DECEDENT.

A deposition of a party as to transactions with another party, taken while the latter is alive, may, though the latter dies without giving his

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<sup>1</sup> The opinion in the above-entitled case, being a mere "memorandum for decree," was not intended for publication. It is now published, however, with the consent of Judge LURTON, in view of the importance of the questions decided.

deposition as he could have done, he used when the suit is revived in the name of his executors.

**8. WITNESS—COMPETENCY—DECLARATION OF DECEDENT.**

A joint maker of a note, though interested in having certain securities held to have been put up as collateral for the note by another maker, may, in a suit to which he is not a party, testify to declarations of the deceased payee relative thereto.

**9. SURETY—RIGHTS AS TO APPLICATION OF DEBTOR'S PROPERTY.**

A surety's right to have property of the debtor deposited with the creditor as security first applied on the indebtedness cannot be defeated by another creditor levying on it.

**10. WITNESS—COMPETENCY—DECLARATION OF DECEDENT.**

A party cannot testify to declarations of a decedent which would put a liability on his estate, represented in the suit by executors, decedent not having testified or made a deposition before dying.

**Creditors' bill by J. B. McMullen and others against Samuel J. Ritchie and others.**

The complainants obtained a judgment on the law side of this court November, 1890, against the defendant Samuel J. Ritchie, for \$265,370. Execution issued, and was returned nulla bona. Upon this footing they have filed this bill, to reach the interest of their debtor in certain securities held by the other defendants, Payne, Burke, and Cornell, as collateral security for the indebtedness of Ritchie to them severally. The relief sought is that the indebtedness of Ritchie to each of them be ascertained, and that the collaterals held by each be impounded and sold, and that any surplus after satisfying their several debts be applied in payment of their judgment. Two mining corporations are also made defendants, both organized under the law of Ohio, but having their respective plants in the dominion of Canada. Complainants allege that each of these corporations is largely indebted to Ritchie, and they seek to subject such indebtedness to the satisfaction of their judgment. The defendants Payne, Burke, and Cornell answered and filed cross bills, in which they separately set up the debts due them by Ritchie and the collaterals held as security. They ask that they may have decrees for their several debts, and that the collaterals held by each may be sold and applied in discharge of their debts, and consent to the application of any surplus to the satisfaction of the complainants' judgment. Ritchie also answered the several pleadings, and filed cross bills against each of his codefendants, and against the complainants. He attacks the judgment of complainants for fraud, and seeks to set off his liability to Payne, Burke, and Cornell, by their liability to him on account of alleged fraudulent conduct in the management of the two corporations issuing the stocks held by them as collateral security for the debts due by him to them, and charges that they have entered into a fraudulent conspiracy with the complainants with the view of squeezing him out of the two corporations in which he is heavily interested. He also sets up claims for services rendered by him to the said two corporations, aggregating more than \$500,000, and seeks a decree on that account. Under amended and supplemental bills, various other issues were from time to time presented, which need not now be specifically referred to.

**Williamson & Cushing, for plaintiffs.**

**Green, Grant & Sieber, Butterworth & Dowell, Shellabarger & Wilson, and W. S. Kerruish, for defendants Samuel J. and Sophronia J. Ritchie.**

**Burke & Ingersoll, for cross defendants Stevenson Burke, Henry B. Payne, Canadian Copper Co., Anglo-American Iron Co., and Thomas W. Cornell.**

**Baird & Voris and Squire, Sanders & Dempsey, for cross defendants William McFarlin, John B. Wright, and Charles Baird, executors of Cornell.**

**Before LURTON, Circuit Judge, and RICKS, District Judge.**



LURTON, Circuit Judge. Memorandum for decree: I shall not undertake to make any statement of the case. The record is one of the most voluminous ever submitted to this court. The pleadings are numerous and much complicated. Much bitterness of feeling exists between the parties, and counsel have suffered themselves to participate in some degree in the feeling and opinion of their clients. The record has been fully examined, and counsel heard both orally and by brief at unusual length. I do not deem it necessary to go into the facts any further than shall be found necessary in the statement of such conclusions as will enable counsel to draw a decree.

The questions to be decided will be stated in such order as shall be most convenient.

1. The attack on the judgment of the complainants, McMullens:

McMullens' judgment: At the October term, 1893, application was made for leave to file an amended and supplemental answer and cross bill by the defendant Ritchie, which, among other things, attacked the McMullens' judgment for fraud, in so far as it rested upon \$71,250 of Central Ontario coupons, clipped from the bonds of said company. In the said cross bill, Ritchie alleges that these coupons were not valid, because they had been severed from the bonds by the company before the bonds were issued, and that they had been surreptitiously taken from the company's place of deposit by the McMullens, and were not valid obligations of the said railroad company. In January, 1886, the defendant Ritchie contracted to buy from James B. McMullen and George W. McMullen, the plaintiffs in this case, 210 of the first mortgage bonds of the Central Ontario Railroad Company, with past-due coupons, which had matured the 1st of April, 1885, the 1st of October, 1885, and the 1st of April, 1886. Ritchie, by some contract, bought coupons amounting to \$71,250, which were described as having matured prior to January 14, 1885. These were detached coupons, and are those now complained of. Ritchie was to pay for these bonds and coupons described as above the sum of \$210,000, and also \$40,000 in stock of the Canadian Copper Company; payment to be made on or before the 1st of July, 1886. The delivery of the bonds and coupons, and the payment of the consideration, were to be simultaneous acts. Ritchie failed to make payment; was sued in the Canadian court for breach of contract on the 8th day of October, 1887. The declaration filed in that case set up this contract, averred ownership of the bonds and coupons, and readiness and willingness to deliver same in accordance with the terms of the contract. Ritchie entered his appearance by attorney, and put in pleas. Neglecting to further make defense to the suit, judgment was rendered against him, February, 1888, for the sum of \$238,000. Afterwards suit was brought on that judgment in this court, in September, 1888. Various pleas were entered by Ritchie, none of which challenged the validity of the coupons in question. The result of the second suit was that judgment was rendered at the November term, 1890, upon the Ca-

nadian judgment, for \$265,370. That case, upon a writ of error, was taken to the United States supreme court, where it is still pending. No supersedeas having been granted, execution issued from this court, which was returned nulla bona. Upon that judgment and nulla bona return, the present bill was filed, October 8, 1893.

The failure of Ritchie at an earlier date to set up the defense which he now, by amended cross bill, seeks to assert, is fatal to his application. The only reason suggested for failure to make this defense is that he had no knowledge at the time of the rendition of the judgment in Canada, and none at the rendition of the judgment in this court, of the fact that the said coupons were without validity, and that they had been surreptitiously obtained by the said McMullens as before stated. There is no averment of diligence whatever. No reason is shown why he did not earlier acquire the same information upon which he now seeks to attack the judgment. Mr. Ritchie was himself the president of the railroad company at the time the bonds were issued, and at the time the contract of 1886 was made, and has continued to be president of that company down to a very late date. In one of his depositions given in this case, where he touches upon this question and upon the McMullens' judgment and the alleged invalidity of these coupons, he says: "I am not now able to state to you when I became aware of the fact, but that I did become aware of it, and I promise to take pains to find out exactly." The McMullens had, jointly with Ritchie, been the owners of this railroad. The contract for the purchase of these coupons described them as coupons "maturing prior to January 14, 1885, and stipulated to be delivered to the McMullens by the contract made in January, 1885." Under these circumstances, it is very extraordinary that several years should have been suffered to elapse without his discovering any improper thing as to the validity of these coupons, or the title of the McMullens to them. Certainly, it is very essential to the jurisdiction of this court, when it is called upon to go behind a judgment rendered at law, that the facts and circumstances which prevented the complainant from making the defense, which was a legal defense, should be fully and thoroughly stated. It certainly was his right to have examined these bonds and coupons, to have inspected them, to have taken their dates and the number of the bonds from which they were clipped; and, looking to the fact that he was president of the railroad company issuing the bonds, it is impossible for him to escape the charge of very gross negligence in this matter, assuming that the defense which he now seeks to make has any merit in it. The inquiry which he did ultimately make of the McMullens as to the coupons covered by this contract does not seem to have been made until some time in the spring of 1893. The McMullens responded to his letter by stating that these coupons consisted of coupons maturing October 1, 1882, and subsequent dates between that time and 1885. At this stage of this case, he should be remitted to his remedy at law against the McMullens,

upon the implied warranty as to the validity of his title to the said coupons.

2. The debts of Ritchie to Burke, Payne, and Cornell:

First. There is no substantial question raised as to the amount due to Burke, and a decree will be drawn for the sums indicated by notes filed by Judge Burke, with interest.

Second. The only controversy as to the debt claimed to be due the Cornell estate is as to a note for \$8,000. This note is not produced, nor its loss accounted for. I am convinced that it was taken up, and that the note for \$8,640 was given for the old note and interest.

Third. The only controversy as to the indebtedness claimed by Senator Payne against Ritchie is as to a note for \$60,000, dated November 8, 1887, payable three months after date, and executed by the Central Ontario Railroad Company to Ritchie, and indorsed by Ritchie to Senator Payne, before maturity. Ritchie's claim is that this note was taken as a payment, and was to be credited by Payne upon Ritchie's obligations to him. This claim is not supported. The weight of evidence is against it. The railroad company was indebted to Ritchie at the time something in excess of \$60,000, and this note was executed as part payment of that indebtedness, and has been charged up by the railroad company to Ritchie as a credit upon his account. We think the real purpose of the execution of this note and its indorsement to Senator Payne was to prevent the McMullens, who were then suing Ritchie on account of his large indebtedness to them, from garnishing that money in the hands of the railroad company, and that this note was then turned over to Senator Payne as a mere collateral. The note was practically worthless at the time it was executed, as the railroad company had no means of payment, and there was no practical way of coercing payment. This fact was well known to Senator Payne, and tends to corroborate his evidence and that of Mr. McIntosh that there was no agreement that this note should be taken as an absolute payment upon the amount of Ritchie's indebtedness to him. Ritchie is entitled to have this note sold or collected, if it can be, and the proceeds applied to the payment of Senator Payne's debt; but he is not entitled to have a credit for amount of note thereon as if a payment. The other debts or claims of Senator Payne are allowed, without regard to this collateral.

3. Compensation claimed by Ritchie for services rendered the mining companies, and for expenses incurred by him in their service:

The aggregate amount of compensation claimed by Mr. Ritchie for services of one kind or another to one or other or both the mining companies exceeds \$1,000,000. These services may be summarized under the following heads: First, for buying mineral lands now owned by the copper company; second, for buying lands now owned by the iron company; third, for services rendered in getting

nickel ore placed on the free list of the McKinley bill; fourth, services in the matter of extending the uses of nickel as an alloy in armor steel; fifth, services in Europe, Canada, and America in advertisement of the value of the copper and nickel mines owned by the copper company, and endeavoring to bring about a sale of the product and of the property, or a consolidation with other nickel-producing mines; sixth, services in experiments tending to add to the value of the iron mines owned by the iron company; seventh, services in getting certain valuable contracts for the sale of nickel matte to the United States government and to Carnegie, Phipps & Co.; eighth, services in obtaining a proposition from Edison for the erection of a plant for the concentration and desulphurization of the iron ores of the iron company; ninth, services in getting certain propositions for subsidies from Canadian towns in aid of the erection of plants intended to work the ores of the iron mines; tenth, for services in getting switches put down to connect the copper mines with the Canadian Pacific Railway.

With regard to each and all of these claims, it may be said that, when Mr. Ritchie was engaged in the matters for which he now claims compensation, he was officially connected with the companies, either as an officer or director; and neither company had by any resolution or by-law provided for any salary or compensation to any president or director, and that the only salary paid for services rendered by any president or director was a small salary paid the secretary and treasurer, Mr. McIntosh; and that the services rendered by Mr. Ritchie were voluntarily rendered, and without expectation on his part that he would be paid for them, or on the part of either company that he expected payment. There was neither an express nor implied contract upon which he can now predicate a claim for services rendered. That he expected no salary or other compensation is overwhelmingly shown by circumstances, as well as by his direct declarations, established by several witnesses. Most of his claims for services have no equitable basis whatever. For the purchase of the original tract of land containing copper ore he claims \$50,000. That tract was bought by him for \$14,000. It was bought for himself and Senator Payne. Ritchie took a three-fourths interest, and Payne one-fourth, each paying the purchase money in that proportion. Subsequently, it was conveyed to the copper company, for the consideration of \$1,000,000 in the stock of that company. This stock Ritchie thinks was then and is now worth par. This stock was issued to Ritchie and Payne, and to such other persons as they directed. Just why the copper company should now pay him \$50,000 for selling to it at \$1,000,000 property which cost him \$14,000 does not appear. The great bulk of the mineral lands now owned by the iron company consists in a tract of 15,000 acres, in which the company owns an undivided three-fourths interest, the other one-fourth interest being owned by one Coe, who has persistently refused to sell his interest to the company. The interest the iron company owns was conveyed to it by Ritchie, Payne, and one McClaren, each of whom owned an undivided one-fourth interest; Coe, as before stated, own-

ing the other one-fourth. For their interests, Ritchie and his co-vendors had paid some \$14,000. They conveyed their undivided interests to the iron company, in consideration of \$1,500,000 paid-up stock of the company; \$500,000 being issued to each of them. Subsequently, other lands were bought by Ritchie; sometimes in his own name, and sometimes in association with one or the other of his codefendants. Such lands were subsequently conveyed to one or other of the companies, at large valuations, for stock of the company. The terms on which these conveyances were made were always satisfactory to Ritchie as a vendor, and equally satisfactory to the corporation vendee, it being practically represented and controlled by the vendors. Just why either of the companies should now pay for such services is past finding out on this record. The demand for payment of \$100,000, as the value of certain switches put in by the Canadian Pacific Railroad Company to connect the copper company's lands with their line of railway, is equally groundless. The grading seems to have been done by the copper company, the rail and ties being furnished and put down by the railroad company. His claim is that he should be paid for what the railroad company furnished and did. This he puts upon the ground that he had some special influence with the Canadian Pacific Railroad Company, and that what they did was in discharge of obligations to him. What the railroad company did was done for the copper company, and in the interest of the railway company, and for the purpose of developing business for itself. The transaction is one well known to be quite common, and the claim for the value of the track thus put down has no merit in it.

That Mr. Ritchie was extremely active and zealous in endeavoring to make a market for the nickel ores produced by the copper company, and in securing the admission of such ores into this country free of duty, and in efforts to give some value to the iron ores of the iron company by the discovery of some cheap process by which lean ores might be concentrated and deprived of the excess of sulphur which rendered them useless, is most clearly shown. That he spent his time, influence, and money under any employment by either company is not shown. On the contrary, it is shown that he gave his services with no expectation of compensation, other than as the stocks owned by him in the mining companies would be enhanced in value or made salable as a result of his efforts. Another motive moving him to do all in his power to bring about a large operation of these mining properties is found in the fact that he was the president of the railroad company extending from Lake Ontario to the iron company's lands, in the interior. That road was valueless unless it could get freight, and its chief expectation of freight was in the large operation of this iron property. Ritchie was also the owner of a majority of the bonds issued by the railroad company, and of a majority of its shares of stock. It was unable to pay interest upon its bonds. The operation of these iron mines on a large scale would, it was believed, enable it to pay interest on its bonds, and give value to its stocks. Still a stronger explanation of his willingness to aid in every way the

development of both the mining companies is found in the character of Ritchie. As this record shows him, he was a man of great ability, enormous energy, and a towering ambition for great enterprises. As a promoter or "boomer," he seems to be unrivaled; a man of large general information and robust constitution, extraordinarily sanguine, desperately pugnacious, generous as a prince, and possessing no degree of caution whatever. His ambition was to make millions. He believed with all his soul that these mines were of fabulous wealth. On their development he had staked all he had and all he could borrow. Difficulties did not deter him, nor danger affright him. In his mad pursuit of what he believed could be made out of these properties, he could not be restrained by his associates. His determination to dominate led him to give an amount of time to the affairs of these companies largely in excess of any duty by reason of official position. Their caution was, in his judgment, timidity and cowardice. He acted as if he owned the whole property, and, when his advice was rejected or his unauthorized contracts repudiated, he pronounced the conduct of his associates as treasonable, malicious. The court is not particularly impressed with the scrupulousness of his methods, or his reliability as to details of fact. He appears to have been an overbearing, imperious man. That such a man, owning a majority of the shares in each of these companies, should assume to represent them upon all matters of moment, and should endeavor to promote their interests in a thousand ways, is just what might be expected. That he should do so in his own interest, and by reason of his invincible desire for leadership, is precisely what we might look for. That he should wait for employment, or look for compensation when the stake was millions, we should not expect. That he should now turn round and demand pay for all this expenditure of energy, time, and influence is only explainable by the unfortunate result of all his grand schemes and heroic efforts. The conservatism of Payne, Cornell, and Burke was never a barrier to his exertions, or an obstacle to his plans. He never saw difficulties in the way of the development of these properties, and their consolidation with the other great nickel-mining companies of the world. To these ends he devoted himself with the zeal of a crusader. That such an unrestrainable man, of cyclonic energy, zeal, and ability, should now ask pay for each speech he made in favor of free nickel, or day spent in the laboratory of Edison, endeavoring to solve the problem of desulphurization, is wholly due to his final disappointment at results. I am quite clear that, on the whole evidence, there is no evidence which would justify a court in saying that there was an implied agreement for compensation.

#### 4. Expenses:

What has been said as to compensation for services applies equally to his claim for \$50,000, spent in the service of these companies. He admits that he kept no account of such expenses. He cannot apportion them between the several corporations, or say in what service he spent any particular sum. He had no purpose to

make a charge for his personal expenses when engaged in the matter for which he now asks compensation. Some of his expenses seem to have been paid. During 1890 he was paid \$1,600 on this account. His present demand is purely an afterthought, and has no just basis.

5. Amended cross bill:

First. The application to file amended answer and cross bill, made at October term, 1893, has been again considered in the light of the evidence in the record. The charge of a conspiracy between the complainants, the McMullens, and cross defendants Payne and Burke and Cornell's executors, entered into for the purpose of depreciating the securities held by them as collateral security, with a view of acquiring these securities at low prices, is not supported by the facts of this record. That there has been some concert of action as creditors having securities of the same class, and who are also owners in their own right of large interests in the same enterprises, is more than likely. But that this concert extended to an unlawful purpose, or was intended to maliciously injure Ritchie, is not supported. Whether McMullen was induced to file his creditors' bill by Burke and others, or that his motive in filing his bill was not altogether the offspring of his interest as a creditor, is in no sense a material matter. He has a legal demand, established by judgment. A return of *nulla bona* entitles him, as a legal creditor, to subject equitable interests of his debtor through a creditors' bill. It is no defense to a legal demand, instituted in the mode and according to the practice of this court, that the complainant is actuated by personal or improper motives. *Forrest v. Railroad Co.*, 4 De Gex, F. & J. 131; *Dering v. Earl of Winchelsea*, 1 Cox, 319. The motive of a suitor cannot be inquired into. *Ex parte Wilbran*, 5 Madd. 2; *Thornton v. Thornton*, 63 N. C. 212. Were it otherwise, nearly every suit would degenerate into a wrangle over motives and feelings. *Macey v. Childress*, 2 Coop. Ch. 442. Complainants had for years no interest in the several corporations in which Burke, Ritchie, and others were concerned. That they have, in concert with the defendants, who are also creditors of Ritchie, some plans looking to a rehabilitation of these companies, as a consequence of acquiring stocks and bonds now owned by Ritchie, as a means of saving their large demands, is no reason for repelling them from court.

Second. The several acts complained of in the proposed cross bill, and for which Ritchie seeks to hold his creditors Burke and Payne and Cornell liable to him, in so far as they are acts of alleged corporate mismanagement or maladministration, are corporate rights of action, and the remedy is a corporate remedy. Take the instance alleged of the refusal of the contract made by Ritchie of a large sale of nickel ores to the United States government, or the sale to Carnegie, Phipps & Co. of another lot of nickel ore, or the failure of the company to enter into a contract with Edison for the desulphurization of iron ores. All of these instances are contracts with one or other of the mining corporations. If any wrong was done by failing to ratify the arrangements made or proposed by

Ritchie, the wrong was done to the corporation. The injury done by the defendants, if any, was done to the corporation with whom it was proposed to make the contracts. The wrong, if actionable, was one to be remedied by an action by the corporation, or by a shareholder for the benefit of the corporation, upon the refusal of the corporation to sue. A stockholder cannot maintain a suit for the indirect injury done him as an indirect result of an injury to the corporation. This is too obvious to need elaboration. *Hawes v. Oakland*, 104 U. S. 450; *Porter v. Sabin*, 149 U. S. 478, 13 Sup. Ct. 1008; *Davenport v. Dows*, 18 Wall. 626; *U. S. v. Union Pac. R. Co.*, 98 U. S. 610. In the case last cited, the United States was a large creditor of the Union Pacific Railroad Company, by debt not matured; and it was held to have no such interests as would enable it to prosecute a suit against its officers and directors for acts of corporate malfeasance. The leading case on this subject is *Smith v. Hurd*, 12 Metc. (Mass.) 371. The court said: "An injury done to the stock and capital by negligence or defeasance is not an injury to such separate interest, but to the whole body of stockholders in common." *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Craig v. Gregg*, 83 Pa. St. 19; *Allen v. Curtis*, 26 Conn. 456. In the last case the court said: "A fatal defect in the plaintiff's petition, both original and amended, is that it seeks no recovery in behalf of the corporation, but seeks a direct recovery of damages for the plaintiff individually; the case stated not entitling him to such recovery." In *Howe v. Barney*, 45 Fed. 668, and *Hirsh v. Jones*, 56 Fed. 137, it was held distinctly that a stockholder in a corporation could not maintain an action at law against the officers and directors for malfeasance or maladministration; that the remedy for such a stockholder was a suit in equity for the benefit of such a corporation. This well-settled doctrine is not affected by the fact that these cross defendants held Ritchie's stocks as creditors, and would be liable to him for any willful act whereby the value of his securities were directly affected. The acts complained of may indirectly operate to depreciate these shares, but this indirect result was but a consequence of the supposed injury to the corporation whose shares Ritchie owned. A judgment in a case instituted by one shareholder for the benefit of all others, in a case where the corporation has improperly refused to sue, is one for the benefit of the corporation, and is for equal distribution, if there be no creditors, among all the shareholders, guilty as well as innocent. *Dewing v. Perdicaries*, 96 U. S. 198; *Wallace v. Bank*, 89 Tenn. 630, 15 S. W. 448; *Howe v. Barney*, 45 Fed. 668.

Another decided objection to any recovery against the cross defendants for alleged acts by which the corporation sustained loss lies in the fact that the acts complained of are for the most part disagreements between Mr. Ritchie and the several boards of directors as to the feasibility or wisdom of the several engagements, schemes, or enterprises into which he wished these companies to embark. They all concern the management or policy of the company's assets. They do not involve acts *ultra vires* done or threatened, or acts of gross negligence in protection of corporate prop-



erty, or acts involving a misappropriation of corporate assets. Mr. Ritchie's judgment was in conflict with the judgment of the board as to what was best to be done. They were questions of expediency as to measures of corporate interest. They present a case where it is sought to have the business judgment of the directory overruled, and the judgment of Mr. Ritchie enforced, through an appeal to the courts. I know of no rule of law which will justify an interference in regard to such matters by a court of justice. If the directors acted in good faith, they are not, as a rule, liable for mistakes of business judgment. The remedy of stockholders dissatisfied with the internal management of corporate affairs is to elect a new board. "The discretion of the directors or the majority of the stockholders as to acts *intra vires* cannot be questioned by single stockholders, unless fraud is involved." Cook, Stock, Stockh. & Corp. Law, § 684, and cases cited.

The refusal of the cross defendants to sell the corporate property, or to give options for a sale, is not a matter of legal wrong. I know of no rule by which the discretion of an owner jointly interested in property to join in a sale, or efforts to sell, can be complained of by those wishing such a sale. Mr. Ritchie's own evidence does not support the allegations in this regard made by the cross bill. No sale is shown to have been made by him, and no offer was bona fide made for a purchase. He had most exaggerated ideas as to the value of these properties. Some of the cross defendants at times entertained like ideas. That they should refuse to give Mr. Ritchie power to sell them out is not a ground for damages. We find in the record no evidence to support the vehement charges that in refusing to permit Mr. Ritchie to dominate the affairs of these corporations, or to sell them when he wished, or to consolidate with other companies, defendants were actuated by any malicious or improper motives towards Ritchie, or desire to ruin him or squeeze him out. They were his own chosen associates and friends. They advanced to one of the mining companies large sums of money, either as loans or stock subscriptions. They were largely interested in each of them. They loaned Mr. Ritchie enormous sums on the strength of the security of stocks and bonds of these corporations, which moneys he seems to have invested in railway bonds, issued to extend the road in which he was chiefly interested. Any injury done either corporation affected them as much as it did him. They carried him as long as they deemed safe and prudent. His own finances seem to have been locked up in an unprofitable railroad. He makes no case which, in my judgment, could have been aided by his proposed new pleading, and it was properly not allowed to be filed.

#### 6. Mrs. Ritchie's stocks:

McFarlin, executor of Cornell, shows that, of the copper stock shares held as collateral by Cornell, the following certificates appear to have been originally issued to Mr. Ritchie: No. 30, for 500 shares, indorsed by Mrs. Ritchie; No. 209, for 100 shares, in-

dorsed by Mrs. Ritchie; No. 210, for 50 shares, indorsed by Mrs. Ritchie; No. 285, for 51 shares, not indorsed by Mrs. Ritchie.

Certificate No. 36, for 200 shares, held by the executor of Cornell, was a certificate issued to Burke, and is indorsed by him in blank. McFarlin also shows that the executors held certificate No. 102 for 1,939 shares of the iron company stock issued to Mrs. Ritchie, and indorsed by her. The remainder of the iron shares certificates held by these executors do not appear to have been issued to Mrs. Ritchie.

Certificate No. 102, for 1,939 shares iron stock: Mrs. Ritchie, in her answer, claims that this certificate was authorized to be pledged only to secure a note for \$14,580.85, bearing date February 6, 1889, and for no other purpose whatever. A note of that description is produced by the executors of Cornell, who also produce a paper bearing date January 28, 1889, signed by S. J. Ritchie, in which he pledges a number of certificates for stock to Mr. Cornell, "as collateral security for any note or notes he has against me, or may acquire." On the 1st day of August, he added a memorandum to the paper above mentioned, in which he permitted the securities above referred to to stand as collateral security for a note for \$12,000, that day indorsed by Cornell for him. There is no competent evidence showing any limitation upon Ritchie's authority to use these certificates, indorsed in blank by his wife, as collateral security for any or all of his debts to Cornell. The burden was upon Mrs. Ritchie to show a limitation upon her husband's authority to use her indorsed certificates, and that Cornell had notice of that limitation. A number of papers are exhibited by Cornell's executors, signed by Ritchie, agreeing that the collaterals then in his hands should stand as security for any and all of his indebtedness. The conclusion I reach is that all of Mrs. Ritchie's indorsed certificates of shares in either of the companies are valid pledges in Cornell's hands for all of Ritchie's debt to him.

7. I next come to Mrs. Ritchie's claim to have the coupons and bonds levied on by execution applied in exoneration of her securities held by Cornell:

That the 901 shares of copper stock and 1,938 shares of iron stock held by Cornell as collateral security for Ritchie's debt to him belonged to Mrs. Ritchie is clearly made out. Ritchie also testifies that these shares were pledged to Mr. Cornell by her consent, and that he (Cornell) knew that these shares were the property of his wife. He says that on the 31st day of July, 1890, just before he went with Cornell to Europe, with the view of investigating the nickel industry, Cornell said to him that "a great deal of the collateral that I hold belongs to your wife, and I don't like the idea of relying on that." "Haven't you some other collateral which you can put up?" To which he says that he told him that he had a large lot of coupons clipped from bonds of the Central Ontario Railroad, for interest past due and unpaid, and that he then put up coupons amounting to the sum of \$180,000, and five bonds of the same rail-

way, of \$1,000 each, for the purpose of protecting his wife's securities against ultimate sale, and for the purpose of having in Cornell's hands securities of his own deemed sufficient to pay the debts which Cornell held against him. He produces from his letter book what he states is a copy of a memorandum made out and put in this second batch of collaterals. This memorandum which he produces is dated July 21, 1892, and reads as follows: "The following coupons of the C. & O. Railway, in separate lots, with the numbers on each lot, have this day been deposited in the First National Bank of Akron." Then follows a description of the 34 packages, amounting in the aggregate to \$108,870. The memorandum then proceeds: "In addition to the coupons, I have left with Thomas W. Cornell the following." Then follows a description of the five bonds, which, when added to the previous total, make an aggregate sum of \$184,880. The memorandum then proceeds: "These all put in one box in the First National Bank's vault, with my name upon the box." This box of coupons was levied upon by an alias execution issued from this court on the judgment of the McMullens against Ritchie, the levy being made some time in October, 1891. The deputy marshal who made the levy says that he got from Mr. Cornell the box which was in the vault of the First National Bank of Akron, Ohio, and that he there found a memorandum in pencil, which simply stated the contents of each package of coupons. This memorandum contains no contract or agreement of any sort or kind, and a copy is filed in the record. It corresponds to the memorandum produced by Mr. Ritchie as to the aggregate deposit and the number and contents of each package, except that it contains a memorandum of \$10,000 of coupons taken out by Cornell. He says there were no C. & O. Railway bonds in the packages. Thus, the contents of the box were some \$15,000 less than the original deposit seems to have been. The evidence of Mr. Ritchie leaves it fairly to be inferred that by his consent the \$10,000 coupons had been taken out, and the \$5,000 bonds applied for some other purpose. On the memorandum produced by Ritchie, in blue pencil, \$5,000 appears to be deducted from the aggregate amount shown to have been in the box, which he thinks means that they were taken out for some purpose he does not explain. This leaves a question of fact to be decided as to whether these bonds were deposited with Mr. Cornell as additional collateral for the security of his debts. The complainants insist that Mr. Cornell did not hold them as collateral security, and had no claim upon them except as a mere depositary, and that under their levy and the subsequent appointment of a receiver by this court, upon a bill filed here for that purpose, these coupons should be applied primarily to the discharge of their judgment. Mrs. Ritchie was made a defendant to the original bill in this case, January 11, 1892, and filed an answer same day, setting up the fact that she was a mere surety for her husband to the extent of the copper stock and iron stock heretofore mentioned, and insisting that her right as a surety was that the collaterals held by Mr. Cornell, the creditor, and which belonged to her husband, as principal debtor, should be first applied in payment of Cornell's debts, to the end that her own securities might thus be exonerated. Her in-

sistence is that, if Cornell has suffered collaterals belonging to the principal debtor to be taken from him by the McMullens, her own collaterals in his hands should be exonerated. If Mr. Ritchie's testimony is to be accepted as to the facts of the case, it is very clear that Mrs. Ritchie is entitled to have these coupons applied first to the discharge of Mr. Cornell's debts. It is also clear that the McMullens, by a mere levy of the execution upon these coupons at the time when they were in the hands of Mr. Cornell, the pledgee, could not defeat Mrs. Ritchie's rights as a surety to this relief. The supplemental and amended bill filed by the McMullens clearly submits to the court the question as to the right of the complainants to reach and apply these coupons upon their debt. Mrs. Ritchie, being a party to the original cause, by the consolidation of the original and supplemental bill, is in effect a party to the latter.

But it is insisted that the evidence of Mr. Ritchie as to the purpose and agreement under which this second batch of collaterals was deposited with Mr. Cornell is incompetent, and must be excluded. This objection appears first to have been made upon the taking of the evidence in this cause by the executors of Mr. Cornell, in October, 1893. Upon the taking of the last batch of depositions in this case, Mr. Ritchie, being again upon the witness stand, was asked concerning the circumstances under which these coupons were deposited with Mr. Cornell. Upon the argument of the case, a general objection was entered by the executors of Cornell to any evidence of Mr. Ritchie as to any transaction or conversation with Mr. Cornell. It seems to me that this objection is not well taken. Mr. Ritchie was first examined as a witness by the complainants on the 31st of May, 1892. In the deposition which he then gave, he substantially stated the same facts elicited more than two years afterwards, in another deposition. When he was first examined by the complainants, Mr. Cornell was alive, and a party to this litigation. Mr. Ritchie was therefore, when he then testified, a competent witness as to this transaction. In June, 1892, Mr. Cornell died, and the suit was revived in the name of his executors, who thereafter interposed the objection heretofore mentioned. I am of opinion that, inasmuch as Mr. Ritchie was a competent witness at the time that the complainants took his proof in regard to the very matter now under consideration, the deposition thus taken is competent testimony for all purposes. It was possible for Mr. Cornell to have given his own deposition in reply. He did not do so at once, and died within perhaps six weeks or two months thereafter, and before testifying in the case. My opinion is that Mr. Cornell's misfortune, whereby he was ultimately deprived of an opportunity of denying Mr. Ritchie's statements, ought not to, and does not, affect the competency of evidence that should be tested as of the time when the evidence was taken. "The intermediate incapacitation of a witness, therefore, does not exclude his deposition taken when he was competent." 1 Whart. Ev. § 477; Bingham v. Lavender, 2 Lea, 48; McDonald v. Allen, 8 Baxt. 446. I am therefore of opinion that upon the issue between Mr. Ritchie and his wife, the McMullens, and Mr. Cornell, as to whether Mrs. Ritchie is entitled to have these securities, levied on by

the McMullens, applied in her exoneration and protection, Mr. Ritchie was competent to testify at the time this first deposition was taken. Mr. Ritchie's testimony is largely supported by the deposition of I. P. Sperry, taken in November, 1892. He testifies that after this litigation was brought, and while it was pending, Mr. Cornell told him that he was very uneasy about the sufficiency of the collaterals which he had to pay his entire debt; that Ritchie had left with him a box of railroad coupons as additional security for the debt which he held against Sperry, Ritchie & Co., being a note for \$63,000, credited with certain payments, and now in the hands of Cornell's executors, and that these packages of coupons had been levied on without his consent and against his objections by the McMullens, and had been taken off by a deputy United States marshal; that he was afraid that Ritchie would undertake to divert them from the purpose to which he had devoted them, and was therefore uneasy. The competency of Mr. Sperry's evidence is objected to, upon the ground that he is one of the makers of the large note referred to. This objection is made by Cornell's executors. Sperry, although interested, is not a party to this cause, and is therefore not within the exception stated. *Potter v. Bank*, 102 U. S. 163; *Bank v. Jacobus*, 109 U. S. 275, 3 Sup. Ct. 219.

It is true that neither the memorandum found in the packages containing the collaterals, nor the paper produced by Mr. Ritchie, in terms say anything about the purpose for which these coupons had been left with Mr. Cornell. That these coupons were left with Mr. Cornell as a depository, and not in the hands of the First National Bank of Akron, is made clear by the testimony of Mr. McFarlin, one of the executors of Mr. Cornell, and an officer of that bank, who states distinctly and positively that the bank had nothing to do with the box; that it was left with Mr. Cornell, and not with the bank, and was placed by Mr. Cornell in the vault, which he had the right to do. Upon the issue as to whether these coupons were left with Mr. Cornell as additional collateral, I am of opinion that both the testimony of Ritchie and Sperry is competent; and that the testimony, taken in connection with the fact that coupons were in the possession of Mr. Cornell and in the box with Mr. Ritchie's name upon it, makes it reasonably satisfactory that Mr. Cornell did hold them as collateral security for the payment of his debts.

The attitude of Mrs. Ritchie as a mere surety is clearly made out by the testimony of Mr. Ritchie, and it must follow that the fact of the levy by the McMullens cannot operate to defeat her right to have these coupons sold in exoneration of her liability as a surety. A decree will therefore be drawn on this point of the case directing that the collaterals held by Mr. Cornell's executors, other than those belonging to Mrs. Ritchie, be first sold, and then a sufficiency of the coupons levied upon by the McMullens to pay any further sum be next sold; and, if any surplus remains after satisfying Cornell's debt, the McMullens will be entitled to such surplus. If, on the other hand, there be a deficiency, enough of Mrs.

Ritchie's securities will be sold to make good such deficiency. Her stocks not sold for this purpose will be delivered to her upon her receipt.

8. Is Cornell's estate liable to the McMullens in consequence of their loss of these coupons to Mrs. Ritchie?

I think that that question has perhaps been sufficiently answered by the ruling that Mrs. Ritchie had the right to pursue these coupons, and that her right had not been lost by reason of the levy. But, independently of that, the insistence of the counsel of the McMullens is that Mr. Cornell waived any right which he had to these securities as collateral in favor of the McMullens. If that were so, it would not necessarily follow that Mrs. Ritchie would be affected by anything which he did. It did not operate to put these securities in the hands of an innocent purchaser without notice. The McMullens occupy no such attitude. They are mere execution creditors, and must stand or fall upon the character of title which Ritchie had to these coupons. They have levied, not upon Cornell's title, but upon Ritchie's title, who was the owner of these coupons. When the levy was made, these coupons were held in pledge by Mr. Cornell, as a security for his debt, and, secondarily, for the protection of Mrs. Ritchie's securities. The McMullens cannot set up an estoppel because they have not been misled to their injury by anything that Cornell may have stated which induced them to believe that these coupons were Ritchie's absolutely, and therefore subject to levy. I am not at all satisfied from the evidence that Mr. Cornell made any distinct waiver of his rights as against these coupons. Mr. McMullen's testimony is perhaps relied upon to show that Cornell disclaimed having any interest in these coupons. I do not think that Mr. McMullen is a competent witness as to that conversation. If Mr. Cornell had testified before dying, and his deposition had been filed in this case, then McMullen would have been competent as an opposite party to have testified concerning any matter which his dead adversary had been examined about. But that is not this case. The McMullens had then taken Mr. Ritchie's testimony, and shown by him that these coupons were deposited as collateral with Mr. Cornell. Mr. Ritchie was not examined at all concerning any conversation between Cornell and McMullen. The effect of Mr. McMullen's testimony, if sufficient to establish the fact which he testifies to, would be, if contention of counsel is sound, to throw a large liability upon Mr. Cornell's estate. It is a case of a living party undertaking to maintain an issue against his dead adversary by detailing a conversation which occurred between them. I think it is incompetent, and I think the objection taken by the executors of Cornell is well taken, and all parts of Mr. McMullen's testimony relating to conversations with Cornell concerning his interest in these coupons must be excluded. But counsel say, if excluded, it is immaterial, because Mr. McIntosh testifies to the same thing. That is a mistake. Mr. McIntosh was present in the room when Cornell and McMullen were discussing

the question of these coupons before any levy had been made. McIntosh says he paid no attention to the conversation, and heard only the fact that they were talking about certain railroad coupons, and that Mr. Cornell said he had no claim upon them. Now, Mr. McIntosh does not testify as to the identity of the coupons that were the subject-matter of the conversation; and, if McMullen's testimony be wholly excluded, Mr. McIntosh's evidence would be almost unintelligible upon this point. The testimony of Mr. Wiman, the marshal, as to what occurred between him and Mr. Ritchie when he made the levy, is very vague and indefinite. I am constrained, upon the whole testimony, to hold, that upon the issue between the McMullens and Cornell's estate, the McMullens, neither upon the facts nor upon the law, have made out a case entitling them to any decree as against Mr. Cornell's estate.

9. The purchase of the Vermillion mine:

Without stating the facts of this matter, I am of opinion that Ritchie has no just demand against Cornell's estate for any part of the shares of the copper company issued to Cornell for the Vermillion property.

10. It is next insisted, by both Ritchie and his wife, that on the 24th day of January, 1890, Mr. Ritchie assigned and transferred to Cornell, by way of additional security, certain collaterals held by the savings and loan bank, to secure it in a loan theretofore made to Ritchie, for which it held Ritchie's note for \$171,500. The collaterals held by the bank were supposed to exceed in value the amount of the bank's debt. In support of this insistence, Mr. Ritchie produced a paper signed by himself alone, bearing date as of January 29, 1890, purporting to transfer all of his interest in the securities belonging to him and held by the said bank, as additional security for the payment of a note of Ritchie's held by Cornell at that time. This paper, thus produced by Ritchie, purports to be subject to an assignment made to Henry B. Payne. Ritchie was examined as to this matter by the counsel of Cornell's executors, and he testifies that on the 29th of January, 1890, he, in consideration of a certain indorsement renewed that day by Mr. Cornell, and in consideration of certain other obligations executed in his favor by Cornell, had drawn up and executed three copies of an assignment, one of which he filed in evidence. He testifies that the other two copies were delivered to Mr. Cornell. He also testifies that the subsequent transfer of these same collaterals to Senator Payne, made on the 10th of March, 1890, and conditioned that he would take up and pay off Ritchie's note for \$171,500, due to the said savings bank, was made with full knowledge of the previous assignment of January 24, 1890, to Cornell, and was made subject to it. In support of the alleged assignment to Cornell, it is shown that Cornell paid one installment of interest on the 29th of January, 1890, on Ritchie's note, held by the bank. Mr. McIntosh testifies that on the 6th of March, 1890, Mr. Cornell informed him that he had paid one installment of interest for Ritchie, under the belief that Ritchie had executed to him an assignment of the bank's collateral, but that he would pay no more

interest, for he had that day discovered that Ritchie had made no such assignment. Upon receiving this information, Mr. McIntosh, who was the private secretary of Senator Payne, wrote to his principal at Washington, under date of March 6, 1890, advising Senator Payne that, in view of the McMullen suit and the certainty that those assets would be levied upon in case there was a judgment in favor of the McMullens, it would be best for him to purchase outright the securities owned by Ritchie, and held by the savings and loan bank, and then pay off the Ritchie note. He told him of the conversation with Cornell, who had said to him that Ritchie had made no such assignment to him as he had supposed, and under which he had acted when he paid the one installment of interest. Long prior to either of these alleged assignments, and on the 10th day of September, 1887, Ritchie assigned to Senator Payne, as collateral security, all of his interest in the collaterals held by the savings and loan bank. The reference in his subsequent assignment of some collaterals to Cornell is to this early assignment.

The bank had power of attorney authorizing it to sell, upon default in payment of interest, these securities. A sale under this instrument would have thrown upon the market a very large amount of securities that Senator Payne was interested in upholding. On the 10th of March, Cornell saw Senator Payne, at Washington, and executed an absolute transfer of all his interest in these securities, in consideration that Payne would pay off his note of \$171,500, payable to the bank. This Payne did, and took up the securities, and now holds them. Ritchie insists that he informed Payne, at the time of this transfer of the securities to him, of the previous transfer to Cornell. This Senator Payne absolutely denies, and insists that the only information he (Payne) had upon this subject was the information imparted to him by McIntosh as to Cornell's admission. Payne did not owe the \$171,500 note. There were two notes, one for \$10,000, and one for \$25,000, held by this bank as security for the payment of this note, and this was his only interest in that transaction. According to Ritchie's own admission, these securities were held, not only for the benefit of the bank, but to secure Payne's indorsements upon the two small notes held as collateral to the large one. Payne's conduct was that of one who believed that, by paying off that note, he would obtain these securities unaffected by a liability for any other debts due from Ritchie. It is exceedingly improbable that Senator Payne would have paid this note off if he had understood that he was taking these collaterals subject also to a prior lien in favor of Cornell. The circumstances all tend to support Senator Payne's denial that he was ever informed by Ritchie of the actual existence of any such assignment to Cornell. It is clear that, as between Cornell and Payne, Cornell's estate would not be permitted to set up the assignment which had been repudiated to Mr. McIntosh, and which was communicated and acted upon by him to Senator Payne. Upon this point, therefore, my conclusion is that Senator Payne is entitled to prior payment out of these assets, and to have satisfaction of his claims out of these collaterals, as well as those he already had.

It is well to observe right here, as to the actual truth of any such



transfer, that it does appear that Ritchie and Cornell, together, went to the office of Mr. Allen, a lawyer, and had him draw up a transfer of these securities. The paper exhibited by Mr. Ritchie is a copy of the transfer then drawn up. Mr. Allen says that neither of these copies, of which he says there were two, on typewriter paper, was signed by Ritchie, and there was no delivery of either one of them to Mr. Cornell; that, when he had printed two typewritten copies on the typewriter, he handed them both to Mr. Ritchie, who took them; and that he and Cornell then went off together. No such paper was found among Cornell's papers, after his death, by his executors. It is likely that Cornell expected that Ritchie would deliver to him one of these transfers, and that, upon the faith of that, he paid the installment of interest of some thousands of dollars; but before the second installment fell due, Ritchie having never concluded the transfer, he refused to make any other payment, and announced to Mr. McIntosh that he had been deceived by Mr. Ritchie in the transfer, and that it had never been completed. Under all the circumstances, the evidence is not sufficient to my mind to establish the fact that this transfer was ever executed by a delivery of a signed copy to Mr. Cornell, or by giving notice to the bank. Cornell stated to several persons that these collaterals had not been assigned to him, and his whole conduct, with the single exception of the payment of the installment of interest, is that of a man who had no claim upon these assets. My solution of it is that Ritchie intended to transfer these collaterals to him, but, in the thousand matters that were then troubling him, it escaped his attention. I cannot conceive that he had it in mind when he made the subsequent assignment, on March 10th, to Senator Payne.

11. The McMullens will deliver the coupons and bonds sold to Ritchie, and for which they have obtained judgment, to Irvin Belford, clerk of this court, who is hereby appointed special commissioner, and take his receipt. The securities thus turned over will, after due advertisement (the terms of which to be hereafter stated), sell them separately from any and all other coupons; and after deducting a reasonable compensation for his services as commissioner in making the sale, and a fair proportion of the cost of advertising, he will pay over the entire proceeds of sale to the complainants, crediting same upon their judgment. Each of the defendants holding collaterals will likewise turn over their said collaterals to said Belford, as commissioner, taking his receipt. Said commissioner will, after advertisement, sell at public sale each lot of collaterals, keeping proceeds separate. In regard to the collaterals held by Cornell's estate, he will first sell the securities belonging to Samuel J. Ritchie, including the coupons and bonds levied on by complainants, and now in the possession of ———, as receiver, who, for this purpose, will place same in the hands of said Commissioner Belford. If the sale of Ritchie's collaterals is insufficient to pay the debt of Cornell, and a just proportion of all costs of the cause, and his own compensation, he

will then sell a sufficiency of the collaterals owned by Mrs. Ritchie to pay any deficiency. If, however, there be enough of the proceeds arising from the sale of Ritchie's collaterals to pay Cornell's debt, and a surplus, he will pay such surplus on the McMullens' judgment. He will sell the Payne and Burke collaterals separately. After applying a just proportion of the proceeds of each in discharge of the costs of the cause, and his own expense and commissions, he will pay remainder from sale of Payne's collaterals to Payne, and remainder from sale of Burke's collaterals to Burke, on their respective debts. If, in either case, there be a surplus, then he will pay such surplus on the complainants' debt as far as necessary; balance to Ritchie. He will in each case sell the said collaterals in such lots as, in his judgment, will tend to bring the largest price. The sales will in each case be for cash; creditors paying in such proportion of money as the commissioner shall require for expenses and costs, up to the amount of their respective claims. If the counsel for all parties shall agree upon a mode of sale, and upon terms of sale, differing from those here fixed, they may do so, and so enter the decree. The commissioner will make no sale until 90 days after decree is entered, within which time, if the defendant Ritchie shall pay off the several amounts due to complainants and to Burke and Payne and Cornell, and all the costs of the cause, the commissioner will turn over to said Ritchie the collaterals so ordered sold; but, if he fails to pay off the said indebtedness and costs, he will then advertise his sale in one or more papers published in London, England, Toronto and Sudbury, Canada, Cleveland, Ohio, and New York, N. Y., using his discretion as to the number of papers in each city, and the number of insertions in each paper, except as to Cleveland, where he will advertise his sale for 60 days, in each of the two leading daily papers. The commissioner will also prepare a circular letter, describing the shares and bonds to be sold, and cause same to be mailed to such persons and firms and corporations as he shall have reason to believe may be interested in such securities. His sale will be made at the door of the Federal building at Cleveland, between 11 o'clock a. m. and 3 o'clock p. m. of the day of sale, and may be adjourned to such other day or days as he shall find advisable. He will make full report of his proceedings under this order to the following term of the court.

The costs of the cause, including receiver's costs and commissioner's costs and all expenses of sale, will be paid out of the proceeds of sale, being proportioned between each separate fund.

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SMITH v. ATCHISON, T. & S. F. R. CO. et al.

(Circuit Court, D. Kansas, First Division. November 5, 1894.)

No. 7,154.

1. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—AMENDMENT OF CHARTER—TERRITORIAL AND STATE GOVERNMENTS.

The charter of the defendant railroad corporation, granted in 1859, by a special act of the legislature of the territory of Kansas, provided

that, in elections of directors, each shareholder should have one vote for each share of stock held by him. The constitution of the state of Kansas, assented to by congress on the admission of that state, provides that all laws in force in the territory at the time of the acceptance of the constitution, not inconsistent with it, shall continue in force. It also provides (article 12, § 1) that the legislature shall pass no special act conferring corporate powers; that corporations may be created under general laws, but such laws may be amended or repealed; but it declares that all rights arising under the territorial government shall continue. The legislature of the state of Kansas, by an act passed in 1876, and amended in 1881, provided that, in all elections of directors of any incorporated company, each stockholder might cast for any one candidate as many votes as he held shares of stock, multiplied by the number of directors to be elected. *Held*, that no power was acquired by the legislature of the state, through the provisions of the constitution and its acceptance by congress, to amend the charter of defendant without its consent, and that the last-mentioned statute, accordingly, did not apply to its elections.

**2. SAME—METHOD OF VOTING ON STOCK.**

*Held*, further, that the right to amend the defendant's charter in this respect was not reserved to the territory by an act passed before the charter, and providing that any charter thereafter granted might be amended, provided such amendment should not conflict with any right vested by the charter; since the right of each shareholder to cast one vote for each share is a vested right.

**3. SAME—ASSENT OF CORPORATION.**

*Held*, further, that the corporation had not assented to or accepted the provisions of the act for cumulative voting by accepting and acting under sundry statutes providing that any railroad corporation should have certain rights, etc., but imposing no terms or conditions indicating an intention to abrogate rights or privileges already existing.

Bill by William Palmer Smith against the Atchison, Topeka & Santa Fé Railroad Company, and Edward Wilder and others, stockholders in that corporation. On motion for preliminary injunction.

B. F. Tracy, A. L. Williams, Henry Wollman, and M. Summerfield, for complainant.

A. A. Hurd, Robert Dunlap, and Gleed, Ware & Gleed, for defendants.

FOSTER, District Judge. The complainant brings his bill to this court, praying that the defendants be enjoined from preventing or interfering with the exercise by the complainant of certain alleged rights as a stockholder of the Atchison, Topeka & Santa Fé Railroad Company. He charges in his bill that the defendants are stockholders in said company, and, having control of the annual meeting of the stockholders for the election of directors, have combined together to prevent him from casting, and the meeting from allowing and counting, his votes as such stockholder, under the provisions of the statutes of Kansas of 1876, amended in 1881, known as the "Cumulative System." The statute reads as follows:

"In all elections for directors or trustees of any incorporated company, each shareholder shall have the right to cast as many votes in the aggregate as shall equal the number of shares so held by him or her in said company, multiplied by the number of directors or trustees to be elected at such election, and each shareholder may cast the whole number of votes either in person or by proxy for one candidate, and such directors or managers shall not be elected in any other manner." Laws 1881, p. 131.

Since the nonresident defendants have been dismissed from this case, and the proof submitted, there is some doubt whether we should proceed further, in view of the facts touching the purpose and power of these defendants to do the acts complained of; but inasmuch as it is apparent that defendants hold a different view of the law as to plaintiff's rights in this matter, and, as far as they may have the power to do so at said meeting, will ignore his claim to proceed under said act of the legislature in electing directors, and as a full and able discussion of the law of the case has been had, it is proper that we should consider and determine the legal issues involved. The importance to the defendant corporation, to the stockholders, and, incidentally, to the people of the state, of the final outcome of this issue, must be apparent; for, although its property is now in the charge of this court by its receivers, and the power of its officers and directors is at present unimportant, it must sooner or later be turned over to its owners, whoever they may be, to be managed and operated under the provisions of its charter. From its humble origin as a corporation chartered to construct a railroad from Atchison to Topeka, with a capital stock of \$1,500,000, it has grown to be probably the greatest aggregation of railway management, under one system, in the world, extending across the continent, from the northern lakes to the Gulf of Mexico on the south, and to the Pacific Ocean on the west, and embracing over 9,000 miles of railway, with a corporate capital stock of over \$100,000,000. Neither party to this controversy questions the validity of the original charter granted to the defendant company by the legislature of the territory of Kansas in February, 1859; but the complainant says that the original charter, granting special powers and privileges, has been so modified by subsequent legislation and action of the company itself that it is now governed by the general laws of the state of Kansas touching railroad corporations. This the defendants deny. Complainant contends that the congress of the United States has absolute sovereignty over the legislature of a territory; that it is the creature of congress, and subject to its arbitrary will in all matters of legislation; that it may modify, change, or reject in toto any or all the legislation of such territory. *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. U. S.*, 136 U. S. 1-44, 10 Sup. Ct. 792.

Counsel further contend that this power of congress was exercised when it admitted Kansas into the Union as a state, and that it assented to the constitution of the new state by admitting it into the Union under that constitution.

Section 4 of the schedule of the constitution reads as follows:

"Sec. 4. All laws and parts of laws in force in the territory at the time of the acceptance of this constitution by congress not inconsistent with this constitution, shall continue and remain in full force until they expire or shall be repealed."

It is therefore urged that every law of the territory in existence at the time of the admission of the state of Kansas, inconsistent with the provisions of the constitution of the state, was repealed by

the act of admission, and that every provision of every law inconsistent with such constitution, modified so far as was necessary to place the provision of the law in harmony with the constitution, and, as modified, such laws must continue and remain in full force until they expire or shall be repealed.

Section 1 of article 12 of the constitution reads as follows:

"The legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws, but all such laws may be amended or repealed."

It is insisted that if, at the time of the admission of Kansas, there was any law upon its statute book creating corporations, which provided that the legislature should have no power to amend or repeal that act, such provision would be inconsistent with the constitution, and the act would, from the time of the admission of the state, be subject to the power of the legislature to modify or repeal such charter. It seems to me this is not the proper interpretation of the intent and meaning of the constitution.

Section 1 of the schedule provides as follows:

"That no inconvenience may arise from the change from a territorial government to a permanent state government, it is declared by this constitution that all suits, rights, actions, prosecutions, recognizances, contracts, judgments and claims, both as respects individuals, and bodies corporate, shall continue as if no change had taken place."

This section saves to bodies corporate all rights and contracts granted by the territorial government, and it is apparent that section 1 of article 12 of the constitution was intended to limit and define the powers of the state legislature, and is altogether prospective in its operation. That the powers and privileges given by corporate charters become vested rights and contract obligations has been decided so often that it is no longer a debatable question. Commencing with the Dartmouth College Case, in 4 Wheat. 518, there is a uniform line of decisions on that subject down to the present day. *Farrington v. Tennessee*, 95 U. S. 685; *Edwards v. Kearney*, 96 U. S. 595; *Hays v. Com.*, 82 Pa. St. 522; *State v. Greer*, 78 Mo. 188; *Pierce v. Com.*, 104 Pa. St. 150; *Wright v. Water Co.*, 67 Cal. 532, 8 Pac. 70; *Baker's Appeal*, 109 Pa. St. 461; *Railroad Co. v. Duncan*, 111 Pa. St. 361, 5 Atl. 742; *Com. v. Philadelphia & E. R. Co.* (Pa. Sup.) 30 Atl. 145.

Referring to the charter, we find the following provisions:

"Sec. 5. The capital stock of this corporation shall be one million, five hundred thousand dollars, which may be increased from time to time to any sum not exceeding the amount expended on account of said road, divided into shares of one hundred dollars each, which shall be deemed personal property, issued and transferred as may be ordered by the directors or by laws of said company.

"Sec. 6. All the corporate powers of said company shall be vested in and exercised by a board of directors and such officers and agents as they may appoint. The board of directors shall consist of thirteen persons, stockholders, three of whom, at least, shall be residents of Kansas, who shall be chosen annually, by the stockholders, each share having one vote by person or proxy, and continue in office until their successors are elected and qualified; vacancies in the board may be filled by a vote of two-thirds of the remaining directors."

It will be observed that each share of stock shall have one vote in the election of directors. It was decided in *Hayes v. Com.*, supra, that such a provision meant one vote for each director to be chosen, and was noncumulative, and that it was a vested property right. To the same effect is *State v. Greer*, supra; *State v. Stockley*, 45 Ohio St. 304, 13 N. E. 279; *Pierce v. Com.*, 104 Pa. St. 150.

We may admit that there is a recognition and consent by congress, in section 4 of the schedule, that the state legislature may repeal any and all territorial laws it may choose, and that this power includes the lesser power to modify or change, but that consent could have no force or effect against any act that neither the territorial legislature nor congress itself could modify or repeal; and there is no power reserved in this charter to any legislative body to modify or repeal any provision of the act. Such power, therefore, could not pass to the state, unless it may be found in some other law of the territory, for the state took the territorial statutes as it found them. In the territorial laws of 1855 (chapter 28) we find the following:

"Sec. 7. The charter of every corporation that shall hereafter be granted by law, shall be subject to alteration, suspension or repeal by any succeeding legislature; provided, such alteration, suspension or repeal shall, in nowise conflict with any right vested in such corporation by its charter."

Whether or not this act was in force at the time the defendant's charter was granted it is not necessary to decide, as the proviso in this section has extracted the meat, and left only the shell. It seems to me it would puzzle the most astute legal mind, in the light of the adjudicated cases touching vested charter rights, to find anything of substance herein reserved for legislative action. Certain it is that the right to vote capital stock on the noncumulative plan has been repeatedly decided to be a vested property right, and that is sufficient for this case, and brings it under the proviso of the act. It must therefore be conceded that this corporation may stand on its chartered rights, unless it has lost or given them away by some act of its own. And it is further alleged by the complainant that the company has lost these special rights by voluntarily accepting legislation of the state, and thereby brought itself under the provisions of the general laws governing railroad corporations. The following acts are specially cited by complainant's counsel: The name was changed to the Atchison, Topeka & Santa Fé Railroad Company under section 3 of the act of 1862 (chapter 170). That law gave the right to the stockholders of any railroad company organized, or which might thereafter organize, under the laws of the state or territory of Kansas, to change its corporate name, etc. Section 2 of the same act gave to any such railroad company the right to construct and operate along its route a line of telegraph, etc., with all the rights given to any telegraph company under the laws of the state or territory of Kansas. The act of 1864 (chapter 79) granted congressional lands to said company as it should construct its road. The law of 1868 (section 25) gives the right to any corporation heretofore organized, and now in existence, under any general or special law of the territory or state of Kansas, to accept any of the provisions of the act,

and especially reserved to such corporation all privileges and franchises of its act of incorporation not abandoned in such acceptance. Of this act the defendant corporation accepted the fourteenth section, which provided for the increase of its capital stock, especially reserving all the rights, privileges, and powers of its original charter. The act of 1870 (chapter 92) authorized any railroad company in this state existing under general or special laws to lease its road to any other railroad company, etc. The act of 1878 (chapter 134) amends the act of 1870, above, and enlarges the right to lease, etc., other lines, or to buy said roads, or to buy the stock and bonds thereof when such road shall form a continuous line, etc. This act was specially accepted by the defendant company at a meeting of its stockholders. The act of 1887 (chapter 181) provides that:

"Any railroad company existing under any of the laws of the state or territory of Kansas, may extend its line into other states or territories, or may purchase or lease roads in other states or territories when it forms a continuous line," etc.

Section 3 of the act reads as follows:

"Any railroad company making extensions or purchases under this act may, conformably to the laws of this state, issue stock or bonds or mortgage its property or any part thereof to such extent as may be necessary to meet the cost of such purchase or extension."

The defendant corporation accepted the provisions of this act, and issued an increase of stock thereunder, and it is strenuously insisted by complainant that the acceptance by the defendant corporation of this act of 1887, giving authority to issue stock conformably to the laws of this state, etc., and increasing its stock, invested such stock with the attributes of other corporate stocks, and subjected it to the requirements of the laws of the state, including the cumulative system of voting at meetings of the stockholders. This is undoubtedly the strongest point in support of the plaintiff's contention in this case, and still it rests upon implication alone, and the court is asked to divest the corporation of an admitted vested right on the strength of an implication. This is not favored by the law. The supreme court of the United States, in the case of *Chew Heong v. U. S.*, 112 U. S. 550, 5 Sup. Ct. 255, lays down the rule of law as follows:

"If, by any reasonable construction, the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part or wholly, as the case may be."

*Grand Rapids v. Grand Rapids Hydraulic Co.*, 66 Mich. 606, 33 N. W. 749; *Zabriskie v. Railroad Co.*, 18 N. J. Eq. 178; *State v. Stoll*, 17 Wall. 425.

In *President, etc., of Rushville v. Town of Rushville*, 32 Ill. App. 320, the court uses this language:

"The rules in reference to the repeal by implication are: A statute will never be held to be repealed by implication if it can be avoided on any reasonable hypothesis. A statute will not be repealed by implication unless the subsequent act is so inconsistent and repugnant in its provisions that the two cannot stand together. A general law will not by implication operate as a repeal of a special law on the same subject, though inconsistent with it."

See, also, *Butz v. Kerr*, 123 Ill. 659, 14 N. E. 671.

In *Com. v. Philadelphia & E. R. Co.* (decided very recently by the supreme court of Pennsylvania) 30 Atl. 145, we find the rule stated as follows:

"But that a mere general law, without negative words, cannot repeal a previous special statute, although the provisions of the two acts are different, has been so frequently decided that it must be regarded as settled law. In *Brown v. Commissioners*, 21 Pa. St. 37, we said: 'A general statute, without negative words, cannot repeal a previous statute that is particular, even though the provisions of the one be different from the other.'"

See, also, *State v. Archibald* (Minn.) 45 N. W. 606.

Plaintiff's counsel contend that the defendant company, by accepting the benefits of this general legislation, ipso facto made a new contract with the state, and cite *Monongahela Nav. Co. v. Coon*, 6 Pa. St. 379, and *Railroad Co. v. Duncan*, 111 Pa. St. 361, 5 Atl. 742. These cases do not support the principle as broadly as claimed by the counsel. The navigation company accepted further powers and privileges under a law especially reserving the power to the legislature to alter, amend, or annul the charter, and the court said:

"It is evident that, by accepting additional privileges and powers on the terms prescribed in the grant of them, the company surrendered the inviolability of its contract to the discretion of the legislature."

The case in 111 Pa. St. and 5 Atl. was predicated on the acceptance by the railroad company of an act of the legislature of 1857, authorizing it to build a branch road not included in its original charter of 1846; and, when the corporation accepted the act of 1857, the statutes of Pennsylvania contained a reservation to the legislature to amend, alter, or revoke charters granted to railroad companies; and the court, speaking of the legal effect of such acceptance, uses this language:

"This gave to the Pennsylvania company a new charter, containing all the privileges of that of 1846; and it was under the rights thus conferred that it built, and now operates, the branch in question."

Again, referring to the act of the legislature of 1887, we find the following:

"Sec. 2. This act shall not be construed as repealing any previous act, or as impairing any rights or privileges given or granted thereby."

So far from indicating any intent to repeal or impair any vested rights by this legislation, such purpose is expressly denied. It appears to have been the intention of the act to permit railroad corporations to issue capital stock under any rights then existing under their original charters, and this may be said of other instances of the increase of the stock of this defendant corporation. It would be a waste of time to discuss each enactment above referred to under which the defendant corporation had some right or privilege; but we find all of these enactments commencing with these or equivalent terms:

"Any railroad corporation heretofore organized, or which may hereafter organize, under the laws of the territory or state of Kansas, shall have the right," etc.



There are no terms or conditions imposed in these acts which indicate any intention on the part of the legislature to abrogate any rights, powers, or privileges already enjoyed by these corporations by their acceptance of these acts. It was competent for the legislature, if it saw fit to do so, to make a gift to any existing corporation of lands, rights, powers, or privileges either with or without limitations or conditions. It is written of our first parents that they were tempted and fell, but with the temptation they had the admonition that "in the day that thou eatest thereof thou shalt surely die." No such warning was given with the temptations and benefits offered by these enactments. They appear to be gifts to be had as free as Divine salvation. Charters of corporations are usually *ex gratia*, but they have their compensations. These new states were desirous of enlisting capital in the building of railroads, and thus developing their resources, and increasing their taxable wealth. It is not necessary to decide how far the additional powers given the corporation by these acts may be subject to the control of the legislature by general legislation, under article 12 of the constitution; sufficient for that when the legislature shall undertake to exercise that authority. It was considered and held by the supreme court of Kansas in *State v. Missouri Pac. Ry. Co.*, 33 Kan. 189, 5 Pac. 772, that such additional rights are subject to modification, amendment, or repeal. It must not be supposed that this corporation is in no manner answerable to the laws of the state. Such as affect the remedy only, and those that come under the police power of the state, are as applicable to this corporation as to any other. *Stone v. Mississippi*, 101 U. S. 816.

For the reasons above given, there is no justification in law for the order of injunction asked for, and it must be denied. It is so ordered, to which order the complainant at the time duly excepted.

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FOWLER et al. v. JARVIS-CONKLIN MORTG. TRUST CO.  
(MORGAN, Intervener).

(Circuit Court, S. D. New York. September 22, 1894.)

**EQUITY PRACTICE—INTERVENTIONS—RECEIVERSHIP SUITS—CORPORATIONS.**

In a suit in which a receiver has been appointed for a corporation, the court will not permit separate interventions by individual stockholders, with the consequent multiplication of papers and requests for separate allowances of costs and attorney's fees; but, where there are dissensions among the stockholders, each separate group will be secured a separate hearing.

Petition of intervention filed by Henry P. Morgan in the suit of Benjamin M. Fowler, J. G. Zachry, and Elizabeth Garnet against the Jarvis-Conklin Mortgage Trust Company.

Jas. G. Janeway, for the motion.

W. S. Pearce, opposed.

LACOMBE, Circuit Judge. This action was brought by complainants in behalf of themselves and all other stockholders and creditors

who might choose to become parties to the suit and contribute to the expense thereof. Complainants are creditors as well as stockholders. The petitioner Morgan is a stockholder, but not a creditor, and asks to be made a cocomplainant in the original bill, and to have separate notice of all motions, proceedings, orders, etc. Apparently, he wishes to appear by separate solicitor and counsel. As he is the first petitioner whose rights as a stockholder are not complicated with his rights as a creditor, he may take an order allowing him to intervene, and directing all parties to give him such notice, whenever any of the proceedings may affect his rights. It must, however, be understood that the court cannot tolerate a separate intervention by each separate stockholder, with an interminable multiplication of papers, and requests for separate allowances of costs and counsel fees at the close of the receivership. The interests of all stockholders are alike, and should be presented and attended to without marshaling a host of different lawyers, all advocating the same relief, although, if it becomes apparent that there is dissension among the stockholders as to the conduct of the proceedings, each separate group of them will be secured a separate hearing. The granting of this motion, therefore, will not by itself entitle petitioner to any individual allowance for costs or counsel fee at the close of the case.

Petitioner has also filed an affidavit of Elijah Coffin, dated September 15, 1894, containing charges against Jarvis and Conklin, now receivers of the corporation, founded upon transactions occurring before their appointment, with a "request" that, upon such affidavit, the motion heretofore made by Elizabeth Garnet to remove the receivers may be granted. As this affidavit was never served upon the receivers, nor any notice of petitioner's "request" given to them, it must be dismissed. Nor can the affidavit of Coffin be considered on Garnet's motion, as it was not prepared till after argument, and does not comply with the instructions of the court that all additional affidavits of petitioner Garnet must be confined to new matter set out in the answering affidavits of receivers.

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CORLISS et al. v. E. W. WALKER CO. et al.

(Circuit Court, D. Massachusetts. November 19, 1894.)

No. 3,152.

1. PUBLICATION OF PORTRAIT—PHOTOGRAPHER'S CONTRACT.

It is a breach of contract and violation of confidence for a photographer to make unauthorized copies of a customer's photograph.

2. SAME—PRIVATE AND PUBLIC CHARACTERS.

A private individual may enjoin the publication of his portrait, but a public character cannot, in the absence of breach of contract or violation of confidence in securing the photograph from which the publication is made.

3. SAME—"PUBLIC CHARACTERS"—INVENTORS.

One who is among the foremost inventors of his time is a "public character," within the above rule.

This was a suit by Emily A. Corliss and others to enjoin the E. W. Walker Company and others from inserting a portrait of George H. Corliss in a biographical sketch about to be published by them. An injunction was heretofore granted (57 Fed. 434), and defendants have moved to dissolve the same.

Henry Marsh, Jr., and James M. Ripley, for complainants.

M. L. Sanborn and Henry E. Fales, for defendants.

COLT, Circuit Judge. The defendants move to dissolve the injunction heretofore granted in this case. As the case was first presented, it appeared that the print of George H. Corliss to be inserted in a biographical sketch about to be published by the defendants was taken from a photograph obtained from Mrs. Corliss by the defendants upon certain conditions, which they had failed to comply with, and the court granted an injunction upon the ground that the proposed use by the defendants would be a breach of contract and a violation of confidence. 57 Fed. 434. Upon a full presentation of the facts at the present hearing, it now appears that the defendants obtained two photographs of Mr. Corliss, and that the one received from Mrs. Corliss was returned to her, while the other, from which the print was actually taken, was purchased for the defendants at a store in Providence several months before any contract was entered into between the parties, or any correspondence had in relation to the subject. It must be confessed that the case now assumes a different aspect. If we eliminate the element of contract or trust, the question resolves itself into the broad proposition of how far an individual, in his lifetime, or his heirs at law after his death, have the right to control the reproduction of his picture or photograph. The photograph obtained by the defendants was a copy of an original taken by Mr. Heald, of Providence, for Mr. Corliss, in September, 1885. Mr. Corliss engaged Mr. Heald, in the ordinary way, to take his photograph, and paid for the pictures which he ordered. The contention of the plaintiffs is that Mr. Heald had no right to make prints from the original negative, other than those which Mr. Corliss ordered, and that neither Mr. Heald nor any one else had the right to reproduce copies from any of the photographs ordered by Mr. Corliss, and that to do so would be a breach of contract or a violation of confidence, for which relief can be had in a court of equity. In support of this position, the plaintiffs say that Mr. Corliss never authorized Mr. Heald to make any prints from the negative, except those he ordered, and that after his death, in February, 1888, Mrs. Corliss obtained the original negative, and forbade Mr. Heald from exhibiting in his studio any pictures of Mr. Corliss.

When a person engages a photographer to take his picture, agreeing to pay so much for the copies which he desires, the transaction assumes the form of a contract; and it is a breach of contract, as well as a violation of confidence, for the photographer to make additional copies from the negative. The negative may belong to the photographer, but the right to print additional copies is the right of the customer. *Pollard v. Photographic Co.*, 40 Ch. Div. 345; *Tuck*

v. Priester, 19 Q. B. Div. 629. Independently of the question of contract, I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form; that this is a property as well as a personal right; and that it belongs to the same class of rights which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or of oral lectures delivered by a teacher to his class, or the revelation of the contents of a merchant's books by a clerk. *Duke of Queensberry v. Shebbeare*, 2 Eden, 329; *Gee v. Pritchard*, 2 Swanst. 402; *Folsom v. Marsh*, 2 Story, 100, Fed. Cas. No. 4,901; *Abernethy v. Hutchinson*, 3 Law J. Ch. 209; *Caird v. Sime*, 12 App. Cas. 326; *Tipping v. Clarke*, 2 Hare, 383, 393; *Williams v. Insurance Co.*, 23 Beav. 338. In case of *Prince Albert v. Strange*, 1 Mac. & G. 25, 2 De Gex & S. 652, this doctrine was extended so far as to prohibit the publication of a catalogue of private etchings. But, while the right of a private individual to prohibit the reproduction of his picture or photograph should be recognized and enforced, this right may be surrendered or dedicated to the public by the act of the individual, just the same as a private manuscript, book, or painting becomes (when not protected by copyright) public property by the act of publication. The distinction in the case of a picture or photograph lies, it seems to me, between public and private characters. A private individual should be protected against the publication of any portraiture of himself, but where an individual becomes a public character the case is different. A statesman, author, artist, or inventor, who asks for and desires public recognition, may be said to have surrendered this right to the public. When any one obtains a picture or photograph of such a person, and there is no breach of contract or violation of confidence in the method by which it was obtained, he has the right to reproduce it, whether in a newspaper, magazine, or book. It would be extending this right of protection too far to say that the general public can be prohibited from knowing the personal appearance of great public characters. Such characters may be said, of their own volition, to have dedicated to the public the right of any fair portraiture of themselves. In this sense, I cannot but regard Mr. Corliss as a public man. He was among the first of American inventors, and he sought public recognition as such.

The defendants, in the present instance, obtained a photograph of Mr. Corliss at a public shop in Providence. Whatever contract may have existed between the photographer and Mr. Corliss, they were not a party to it, and they had the same right to reprint copies from this photograph that they would have had from that of any other public man. Further, it does not seem that Mr. Corliss, personally, ever objected to the reproduction of his picture, but, on the contrary, that he permitted thousands of his pictures to be circulated. Ten thousand pictures of Mr. Corliss were sold or given away, without objection on his part, at the time of the Centennial Exhibition, in 1876. In 1886 there was published in Providence, by J. A. & R. A. Reid, about 10,000 copies of a book called "Provi-

dence Plantations," in which a picture of Mr. Corliss appears, which is a reprint from the Heald photograph, now in controversy. His picture also was printed in Harper's Weekly of March 3, 1888, and in the Scientific American of June 2, 1888. I am aware that Mrs. Corliss says that she wrote a letter, at the request of her husband, to the Messrs. Reid, forbidding the insertion of the picture in the "Providence Plantations," and that she also declares that the publication in the Harper's Weekly and Scientific American were authorized by the family; but, whatever may be the position now taken by the plaintiffs, there is no substantial evidence that Mr. Corliss, in his lifetime, ever prohibited the reproduction and circulation of his picture.

Upon the facts as now presented, and for the reasons given, I am of opinion that the defendants have a right to insert in the biographical sketch of Mr. Corliss published by them a print of his photograph, and the motion to dissolve the injunction is granted. Motion granted

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BARBER ASPHALT PAVING CO. v. CITY OF HARRISBURG.

(Circuit Court of Appeals, Third Circuit. November 13, 1894.)

CITIES—PAVING CONTRACTS—PAYMENT IN INVALID ASSESSMENTS.

Where a city having authority to pave its streets and pay therefor from its treasury, and supposing that it had authority also to assess the cost on abutting property and transfer the assessments in payment for the work, contracts with a person, who also supposed it had such authority in regard to assessments, to do such paving, and to pay him by assigning the assessments to him, the city, not having in fact any authority to make the assessments, will be liable on the contract for the work, though it is stipulated that the assessments shall be accepted in payment, and that the city shall not be otherwise liable under the contract, whether the assessments are collectible or not. 62 Fed. 565, reversed.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Action by the Barber Asphalt Paving Company against the city of Harrisburg on a contract for street paving. Defendant had judgment (62 Fed. 565), and plaintiff brings error. Reversed.

Charles H. Bergner and A. S. Worthington, for plaintiff in error.

William H. Middleton, for defendant in error.

Before ACHESON, Circuit Judge, and BUTLER and WALES, District Judges.

BUTLER, District Judge. The plaintiff, a citizen of West Virginia, and the defendant, of Pennsylvania, entered into a contract on August 13, 1887, which contained the following provisions:

"The said The Barber Asphalt Paving Company to furnish all tools, implements, materials and labor, and complete to the satisfaction of the city engineer of the city of Harrisburg all such work as may be requisite to pave and curb Market street from the eastern curb line of Front street to the Pennsylvania Railroad; to begin the work under this contract upon five days' notice from the city engineer and complete the same within ninety days from the com-

commencement of said work. The pavement to be laid as aforesaid under this contract to consist of a cement concrete base at least six inches thick, covered with a wearing surface of asphaltum at least two and a half inches thick; the curbing to be of granite; the materials to be of the very best kind obtainable, and the pavement to be laid and all the work to be done thereon in accordance with the plans and specifications prepared by the city engineer, and hereto attached, which plans and specifications are hereby made part of this contract.

"And the city of Harrisburg on its part, will pay to the said the Barber Asphalt Paving Company in accordance with the specifications and out of the assessments made and levied for the purpose, the following prices: For each and every square yard of pavement laid under this contract, the sum of two dollars and seventy-five cents (\$2.75), for each and every lineal foot of granite curbing the sum of one dollar and fifty cents, (\$1.50), but only upon the measurements of the city engineer, and at such intervals and in such installments as he may determine.

"It is also understood and agreed that the payments aforesaid provided for shall be paid as follows: First, out of the amount of the assessments paid into the city treasury by the property owners, and when that fund is exhausted, then the city of Harrisburg will assign to the said the Barber Asphalt Paving Company, the municipal claims assessed and levied upon the properties abutting on and along the said Market street between the points above mentioned, or mark the same of record to the use of the said company, and also permit the use of the corporate name of the said city in any legal proceedings necessary or proper to enforce the collection of the said assessments.

"It is also understood and agreed that the said company shall accept the said assessments in payment of the amount due it under this contract, and the city shall not be otherwise liable under this contract whether the said assessments are collectible or not."

The plaintiff performed its part of the contract, and received on account \$13,470.59, paid from assessments, leaving \$21,729.92 of the contract price unsatisfied.

At the date of the contract the defendant had authority to pave its streets, and pay for the same from its treasury. It believed it had authority also to assess the cost of such paving on abutting properties, and transfer the obligations thus created in payment for the work. The plaintiff had no reason to doubt the correctness of this belief. The legislature by an act of May 24, 1887, had provided for such assessments. The supreme court of the state, however, after the work had been completed declared the act invalid. *Shoemaker v. Harrisburg*, 122 Pa. St. 285, 16 Atl. 366; *Berghaus v. Harrisburg*, 122 Pa. St. 289, 16 Atl. 365; *Ayers' Appeal*, 122 Pa. St. 266, 16 Atl. 356. The defendant went through the form of making assessments; and the property holders paid \$13,470.59, before the invalidity of the statute was discovered. They refused, however, to pay more; and, the defendant denying liability for the balance due under the contract, this suit was commenced to recover it.

On demurrer filed to the plaintiff's statement the circuit court rendered judgment for the defendant; whereupon the plaintiff appealed, and assigned this action of the court as error.

Is the defendant liable? The suit is on the contract, and the liability must be found in it, if at all.

As we have seen the defendant had power to contract for paving its streets, at the cost of its treasury. It did not however, so contract, in terms. Is it liable to pay from this source in conse-

quence of the terms used and the facts stated? It undertook to pay the price specified by assessments, and the plaintiff agreed to accept these in discharge of its claim, adding that "the city shall not be otherwise liable whether the assessments be collectible or not." Omitting the language just quoted there could be no doubt of the defendant's liability. The case would be identical, in all respects, with *Hitchcock v. Galveston*, 96 U. S. 341. The language quoted does not however, we think, add anything to the force or effect of that which precedes it. It simply expresses what would be implied in its absence. The agreement to accept the assessments in payment relieved the city from liability to pay otherwise. By it the plaintiff assumed the risk of collecting. If the defendant, in such case, had made and transferred the contemplated assessments, it would have discharged its entire obligation; just as it would in the present case. This, however, it has not done. Its attempt to do it failed; its acts in this respect were a nullity. It is immaterial that the failure resulted from want of authority—as it would be if it resulted from any other cause beyond its control. It undertook, unconditionally, to make and transfer assessments, and its failure is a breach of the contract. To say its obligation is discharged by a vain attempt to make them; that the plaintiff is bound to accept useless forms of assessments, is unreasonable. The parties contemplated valid charges on the property. The term "*assessment*" clearly implies this; nothing short of a lawful assessment—one capable of enforcement, satisfies it. It was such assessments the plaintiff agreed to accept, and assumed the risk of collecting. The parties were mutually mistaken respecting the authority to pay in the special manner designated; but this does not relieve the defendant from its obligation to pay.

If anything is wanting to render this construction clearer, it may be found in the fact that the language involved is taken, word for word, from the statute, and must necessarily signify here what it does there. There the term "*assessment*" signifies, and can only signify a proceeding which creates a charge on the property specified. The statute first provides for this proceeding and charge, and then for its transfer to the contractor. It is *this charge* which is to be transferred, and which the contractor is to assume the risk of collecting. There is always some risk attending such collections. Prior liens, or other causes, may render the property insufficient to pay. And this only is the risk the statute, and the contract made under it, contemplated.

The defendant having failed to make the required assessments is in default upon its contract, and must make reparation by paying the consequent loss. There is no hardship in it, and if there was it would afford no justification or excuse for shifting it to the plaintiff. The defendant has received full value for what he is required to pay; and if the contract admitted of another construction we would strongly incline to the one adopted, because it is not only consistent with the intention of the parties, but avoids the great injustice of allowing the defendant to hold and enjoy the plaintiff's property without paying for it.

There is abundant authority for this construction. *Hitchcock v. Galveston*, 96 U. S. 341, is in point. The city contracted with Hitchcock to do certain work upon its streets, for which he was to accept its bonds in payment. It had, however, no authority to issue the bonds, and, discovering this while the work was in progress, stopped it and declined to pay for what was done, on the ground that the contractor had bound himself to depend upon this source of payment alone. The court, deciding that the contract contemplated and required valid bonds, and that the city had failed to furnish such, held the contract broken, and the city liable to pay from its treasury. In principle this case is not distinguishable from the one before us. The court says:

"It is enough that the city council had power to enter into the contract for the improvement, that such a contract was made, that the plaintiff has proceeded to furnish materials and do the work, as well as assume liabilities, that the city has received and now enjoys the benefit of what he has done and furnished; that for these things the city promises to pay; and that after having received the benefit of the contract the city has broken its promise. It matters not that the promise was to pay in a manner not authorized by law. If the payment cannot be made in bonds because their issue is *ultra vires* it would be sanctioning rank injustice to hold that payment need not be made at all."

*White v. Snell*, 5 Pick. 425; *Hussey v. Sibley*, 66 Me. 192; *Miller v. Milwaukee*, 14 Wis. 705; *Bill v. City of Denver*, 29 Fed. 344,—involved the same question, and were similarly decided. In *Chicago v. People*, 56 Ill. 327; *Maher v. Chicago*, 38 Ill. 272; *Louisville v. Hyatt*, 5 B. Mon. 200; *Fisher v. St. Louis*, 44 Mo. 482; and *Scofield v. City of Council Bluffs*, 68 Iowa, 695, 28 N. W. 20,—the contractor distinctly agreed to look to assessments alone for payment; and yet the municipalities, having no authority to make them, were held liable to pay otherwise.

The numerous authorities cited by the defendant are not inconsistent with this construction. *Peake v. New Orleans*, 139 U. S. 342, 11 Sup. Ct. 541, is based upon an essentially different state of facts. The city was not a party to the contract sued on, and in no wise responsible for it. The work was done under a scheme devised by the state legislature, and under a contract with officers designated by it, for the drainage of swamp lands, (a part only of which was within the city limits) for the benefit, primarily, of its owners. A careful examination of this case will show that it rests exclusively on these facts—though the last paragraph of the syllabus, read alone, would justify a different conclusion.

*Horter v. Philadelphia*, 13 Wkly. Notes Cas. 40, and *Dickinson v. Philadelphia*, 14 Wkly. Notes Cas. 367, as we understand them, rest on the same principle. In the first the improvement was made under the state statute of 1855, which provides that the cost of such work shall be borne by adjoining property holders. There was no authority, as it seems, to put it on the city. While the opinion of the court, and report of the case, are very brief, the decision appears to rest on this ground. If it were otherwise the case would be in direct conflict with *Chicago v. People*, 56 Ill. 327. In *Dickinson v. Philadelphia*, 14 Wkly. Notes Cas. 367, the city appears to have had no connec-



tion whatever with the work. The statute under which it was done designated an officer to do it, empowering him to make contracts and collect money to pay the cost. That he held the office of city commissioner of highways is immaterial; he was the agent of the state in discharging his duties under the statute. Here again the opinion of the court is very brief, and the report of the case so meager, that it was necessary to examine the records to understand what was decided—which we found to be no more than just stated.

The numerous other cases cited are equally inapplicable. In *Bellevue v. Hohn*, 82 Ky. 1, the municipality was without authority to pay except by assessments on adjoining properties. *Saxton v. St. Josephs*, 60 Mo. 153, rests on the city's want of power to contract as it did. *Casey v. Leavenworth*, 17 Kan. 198, was decided on the fact that the city had kept its contract, by collecting and applying the assessments named, with reasonable vigilance. *Newman v. Sylvester*, 42 Ind. 106, was a suit against individuals, and is inapplicable to the facts involved here. Other cases cited may be distinguished as easily.

The judgment is therefor reversed, and the case remanded to the circuit court for further proceedings.

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#### WESTERN UNION TEL. CO. v. THORN.

(Circuit Court of Appeals, Third Circuit. November 22, 1894.)

#### 1. TELEGRAPH COMPANIES—INJURIES BY BROKEN WIRE IN CONTACT WITH ELECTRIC WIRE—EVIDENCE.

In an action against a telegraph company for injuries to a boy 10 years old, it appeared that the boy took hold of a broken call wire hanging from the crossbar on one of defendant's poles, and received a severe electric shock; that there was an electric light wire on the pole, below the crossbar; that the electric light plant was not owned by defendant; and that soon after the accident the broken wire was repaired. *Held*, that evidence was admissible that nine months after the accident there was no guard or dead wire between the call wire and the electric light wire, as was usual in such cases, and that the call wire was then defective by reason of long use and rust.

#### 2. SAME—NEGLIGENCE—PROXIMATE CAUSE.

There was evidence that the call wire had become weakened by long exposure, and that it had been mended and patched in several places, so that it was liable to be broken from any slight cause, and that there was no guard or dead wire to prevent its falling across the electric wire and becoming dangerously charged. *Held*, that the questions of negligence and of proximate cause were properly left to the jury.

#### 3. SAME.

Where it was certain that plaintiff's injuries were the result of the contact of the call wire and the electric wire, it was immaterial whether the contact was at the place of the accident or elsewhere, if such contact was caused by defendant's negligence.

#### 4. APPEAL—REVIEW—OBJECTIONS WAIVED.

Objection to the denial of defendant's motion for nonsuit, made at the close of plaintiff's evidence, is waived by the subsequent introduction of evidence by defendant.

In Error to the Circuit Court of the United States for the District of New Jersey.

Action by Merritt Thorn, Jr., by his next friend, Merritt Thorn, Sr., against the Western Union Telegraph Company, for personal injuries caused by defendant's negligence. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Rush Taggart and Edw. H. Duryee, for plaintiff in error.

John W. Westcott, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and WALES, District Judge.

WALES, District Judge. This was an action by Merritt Thorn, Jr., by his next friend, Merritt Thorn, Sr., against the Western Union Telegraph Company, to recover damages for injuries received by the plaintiff, and alleged to have been caused by the negligence of the defendant. The action was originally brought in a court of New Jersey, and was removed by the defendant to the United States circuit court. The evidence was that on the 17th day of November, 1891, at about 4 p. m., the plaintiff, then aged between 10 and 11 years, was walking along Delaware avenue, in Camden, N. J., carrying a bundle of slats, and, seeing a telegraph wire hanging down between two poles, attempted to break off a piece for the purpose of tying the slats together, when he received a strong electric shock, which threw him to the ground. Being unable to relax his hold on the wire, his cries for help brought to his aid—First, Mr. Eckenrode, who, in endeavoring to release the boy, received a shock which "drew" him against a fence some seven or eight feet distant; and, second, Mr. Hatch, who, almost at the same time, came running from the opposite side of the street with an axe, and, cutting the wire, released the boy from his perilous situation. In the few seconds which had elapsed from the boy's first touching the wire, it had burned deeply into his hand. The plaintiff was seriously, if not permanently, injured by the result of the accident, before which he had been a healthy, strong, and unusually bright lad. His right hand is now badly, and perhaps incurably, crippled, his hearing and memory are impaired, and there is a general loss of nervous power. Thus far the plaintiff's testimony was uncontradicted, and the controversy between the jury was confined to two questions of fact: First, as to the ownership and control of the wire by the defendant; second, whether the defendant had been guilty of negligence. To support the affirmative of these issues, the witnesses produced for the plaintiff were Mr. Eckenrode and Mr. Duke; and from their testimony it appeared that the broken wire hung from the outer end of the top crossbar of the telegraph pole, and that below the under crossbar there ran an electric light wire supported by a bracket on the pole. There is an electric plant and power house in Camden, located a very short distance from the place where the plaintiff was hurt, but that wire was not the property nor under the control of the defendant. The broken wire was a messenger call wire, and the inference was that it had fallen across the electric wire, and, becoming strongly charged with electricity, caused the injuries complained of. That portion of the call wire which had been cut off by Mr.

Hatch was examined by Mr. Eckenrode immediately after being removed from the boy's hand, and found to be so rotten that it could be easily broken, exposing the center or core of the wire, which was about as thick as a pin, the rest of it being rusted through. After the break in the wire had been repaired, it was traced through various call boxes, some of which belonged to or were operated by the defendant, to the defendant's office in Camden, and intermediately it was found to be patched in a good many places. The call wire was not traced into the defendant's office, but only to the pole outside, from which it was looped into the office. This call wire is very slightly charged with electricity, and of itself is entirely harmless, but, when in contact with an electric light wire sufficiently charged to carry the lights of a city or propel a trolley car, will transmit a severe, dangerous, and possibly fatal current to whoever takes hold of it. There was no proof of the ownership of the electric light wire, nor of the precise point at which the broken wire had come into contact with it. Mr. Duke, who had had practical experience in the superintendence of telegraph wires, said that a call wire, such as the one described, exposed to the weather, would last six or seven years.

At the conclusion of the plaintiff's testimony the defendant's counsel moved for a nonsuit, because—First, there was no testimony legitimately tending to show that the wire which was broken was the property of the defendant, or that it was in its custody or control; second, the testimony of the plaintiff did not establish that the breaking of this wire was the result of any negligence on the part of the defendant; third, there was no testimony to show how the broken wire was charged with the electric current causing the injury, or that the defendant was in any way responsible for the transmission of such current. The motion for a nonsuit was refused by the court, and thereupon the defendant produced one witness, Louis Sharp, a lineman of the Delaware & Atlantic Telephone Company, who testified that the heavy wire spoken of by Messrs. Eckenrode and Duke was not run over the Delaware avenue poles until some time in the summer of 1893, and was used as a ground wire to form a metallic circuit, and not for electric light or car currents, and was entirely harmless. This witness had charge of the lines on Delaware avenue, and was familiar with their respective positions on the crossbar. On cross-examination he said:

"Q. Do you know where the Western Union lines are,—any of them? A. In the city? Q. Yes. A. Yes; I know where some of them are. Q. Do you know where any of them are on Delaware avenue? A. I know where they are on that line of poles. I know the wire. That is all I know about it,—that one wire. Q. Where is that one wire? A. It is the top wire on the fourth pin on the east side of the line. Q. That is the Western Union wire? A. Yes, sir."

This witness, before the close of his examination, said that he did not know who was the owner of the call wire. The plaintiff had a verdict, and the defendant excepted to the charge of the court. There are nine assignments of error, of which the first two are to the admission of evidence, and as they relate to the same matter may be

considered together. The witness Duke, being examined as to the number of wires on the crossbars, was asked, "Was there an electrical wire there?" replied:

"There was an electrical wire under the bottom crossbar, on a bracket. Q. Was there anything between this outside wire on the top row and the electrical wire beneath? A. Nothing that I seen at that time; no, sir. Q. What is usual, in the business, to protect an ordinary telegraph wire from coming in contact with an electrical wire on the same pole?"

The objection to this question having been overruled, the witness answered:

"All the wires that ever I supervised in having run were always provided with a guard wire when they crossed an electrical wire of any kind."

The witness described the guard wire as a dead wire running between wires of lighter and heavier currents, to prevent the latter two from coming into contact with each other. The same witness, on being asked what was the condition of the call wire at a place about two squares distant from the place of the accident, answered: "In pretty fair condition at that place; better than at the other place." This was also admitted against the defendant's objection. The exception in each case was that it was attempted to prove by the witness the condition of the wire, not at the time of the accident, but some nine months afterwards. The broken wire was repaired soon after the accident by the insertion of a new piece, and replaced on the crossbar. Eckenrode described its brittle condition at that time, and Duke, who saw the call wire some months later, testified that it had been patched in other places as well. The objection to this testimony, therefore, has no other foundation than the lapse of time between November 17, 1891, and September 1892; and the question arises whether a substance like this wire, exposed to the atmosphere and used as it was, would, within that period, have undergone such marked deterioration as to warrant the exclusion of the plaintiff's evidence. It is not necessary that evidence should be conclusive, to render it admissible. It had already been proved that the wire was patched in 1891, and the evidence objected to was corroborative, and to show that it was in the same condition in 1892. The absence of a guard wire, in 1892, was admitted to show, by inference, that it had not been employed in the previous year, and that if it had been in use on November 17, 1891, the accident would not have happened. It shifted the burden of proving the contrary on the defendant. These objections were untenable.

The third assignment is to the refusal of the court to grant the motion for a nonsuit, but exception to this refusal was waived by the subsequent introduction of evidence for the defense. This, however, did not preclude the defendant's counsel, at the close of the evidence on both sides, from presenting the same questions which were raised on the motion for a nonsuit, in his requests for instructions to the jury. In *Railroad Co. v. Hawthorne*, 144 U. S. 206, 12 Sup. Ct. 591, Mr. Justice Gray, speaking for the court, said:

"The question of the sufficiency of the evidence for the plaintiff to support his action cannot be considered by this court. It has repeatedly been de-

cided that a request for a ruling that, upon the evidence introduced, the plaintiff is not entitled to recover, cannot be made by the defendant, as a matter of right, unless at the close of the whole evidence; and that if the defendant, at the close of the plaintiff's evidence, and without resting his own case, requests and is refused such a ruling, the refusal cannot be assigned for error."

See, also, *Railroad Co. v. Mares*, 123 U. S. 713, 8 Sup. Ct. 321; *Robertson v. Perkins*, 129 U. S. 236, 9 Sup. Ct. 279; *Insurance Co. v. Crandal*, 120 U. S. 527, 7 Sup. Ct. 685; *Railroad Co. v. Daniels*, 152 U. S. 687, 14 Sup. Ct. 756; *Runkle v. Burnham*, 153 U. S. 222, 14 Sup. Ct. 837.

The fourth and fifth assignments are to the refusal of the court to charge the jury that the plaintiff failed to prove negligence on the part of the defendant, or that, if the defendant was negligent, its negligence was the direct and proximate cause of the injuries complained of. The court, on these points, instructed the jury as follows:

"A telegraph company is bound to see that its wires are in such condition and of such character that the free and uninterrupted and safe use of the highway shall not in the least degree be disturbed. It is not bound and does not insure the absolute strength and the absolute permanency of its plant, or its poles or its wires. But it is bound to take such care of them as a prudent, careful person would take of property of similar character, exposed to the effect of the atmosphere and of the weather, and in constant use, as those wires and poles were. Now, it is for you to apply this rule of care to the circumstances of this case, and to say whether the plaintiff has proved negligent conduct on the part of the defendant in this respect. And I charge you, as a matter of law, that the mere fact that a telegraph wire is broken does not, of itself, imply negligence. \* \* \* There must be something beyond that in order to convict them. Now, the plaintiff relies upon the actual, physical condition of the wire itself, at the time the accident occurred, as evidence of negligence. \* \* \* The only witness who speaks of it is Mr. Eckenrode, who says that at the time of the accident he picked up a piece of the wire cut off about twenty feet long; that it was rusty and considerably eaten into; the thickness of the wire undiminished in strength was about as thick as a common knitting needle. \* \* \* Now, the question for you is, is it negligence to permit a wire having the thickness and tenacity of a knitting needle to be stretched over a space as large as that between two telegraph poles which support it? Is that negligence? It may have been a much thicker wire when it was first stretched there, but if it had left in it, at the time of the accident, a sufficient strength and tenacity to maintain its position between two poles the distance apart usually taken for telegraph poles, was it an act of negligence to permit it to stay there? Understand that the mere breaking of it is not negligence, unless you find that the breaking was caused by the actual condition of the wire. But is there any evidence of that? Whatever we might personally think about it, the question is, what has been proved to you about that wire? And it is in that evidence it is for you to say whether that wire, in that condition, having it up between the poles, the thickness of a knitting needle, is an act of negligence or not."

The questions of negligence and of proximate cause were properly left to the jury to decide on the whole evidence. The defendant's counsel assumes that there was not sufficient evidence to require the submission of the case to the jury, but in this he is mistaken. The question of negligence, like any other disputed fact, is to be passed upon by the jury, except when the undisputed evidence is so conclusive that the court would be compelled to set aside a ver-

diet returned in opposition to it. Ordinarily, where there is any testimony tending to show negligence, it is a question for the jury. *Elliott v. Railroad Co.*, 150 U. S. 246, 14 Sup. Ct. 85; *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569; *Railroad Co. v. Stout*, 17 Wall. 657. And the like rule applies to the question of proximate cause, and is thus stated in *Railway Co. v. Kellogg*, 94 U. S. 469, by Mr. Justice Strong:

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. 2 W. Bl. 892. The question always is, was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen, in the light of the attending circumstances."

Injuries arising from the accidental contact of live wires with the dead wires or with gas pipes, etc., are of frequent occurrence, and in most instances might have been provided against by ordinary care and vigilance. The broken wire was the primary cause of the injuries to the plaintiff. If it had become weakened by long use and exposure, to such a degree as to part by its own weight, or from a slight motion produced by the wind, it was a fair question for the jury to decide whether the defendant had not failed in its duty to the public by allowing its wire to get into such a condition that it would easily break, and in breaking would be likely to fall across the electric light wire, and become dangerously charged. It was not incumbent on the plaintiff to prove more under this head.

The sixth assignment is to the refusal of the court to charge that, although the defendant might be guilty of negligence as to the broken wire, yet if the evidence satisfied the jury that there was a current sent from an electric light wire over this broken wire from some other locality than this (the place of the accident), as the result of some unexplained cause, in that event the defendant was not liable. In refusing this request the court said:

"I decline to charge that, because it admits the negligence of the defendant, and it was responsible for all the acts that might arise from that negligence. The negligence in this case would be, if at all, the breaking of the wire in such a way that it fell across a wire from which the electric shock could be given."

The defendant's counsel admits that perhaps he was not entitled to the request, in the form in which it was made, but contends that the language used by the court in refusing it was misleading to the jury, in that they would understand that, in case they found the wire broken, then they might proceed to treat the injury as the re-

sult of negligence, and hold the defendant liable. The argument goes back to the evidence of proximate cause. There is no reason why the plaintiff should have been compelled to prove the particular spot where the two wires came into contact. It is certain that the injury to the plaintiff was the result of the contact of these two wires. It can be accounted for in no other way. It would seem, therefore, to make very little difference, if any, in the liability of the defendant, whether that contact was at the place of the accident, or a hundred or more feet distant from it, provided that the coming into contact of the wires was caused by the defendant's negligence, for there can be no doubt that the broken wire conveyed the electric shock to the plaintiff's body. In all probability, the point of contact was somewhere between the two poles, and not far from where the boy was stricken down.

The eighth assignment is to the refusal of the court to charge that the plaintiff had not proved that the negligence of the defendant was the direct and proximate cause of the injuries complained of, and that, therefore, the verdict of the jury should be for the defendant. In refusing to so charge, the court said:

"I have very grave doubts upon that part of the case, but for the purpose of this case I have decided to leave the fact to you, the jury; and therefore I decline to charge, under the circumstances."

The question of proximate cause was thus brought prominently and specially to the attention of the jury, and was properly left to them for decision. The jury could not have misunderstood the instructions of the court, the whole tenor of which was to impress on their minds that the liability of the defendant must be directly consequent upon its negligence. The ninth assignment presents the same question of proximate cause, and requires no special notice.

The conclusion is that, on a careful review of the whole record, no reversible error has been found. The judgment of the circuit court is therefore affirmed.

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CHICAGO, ST. P. & K. C. RY. CO. v. PIERCE.

(Circuit Court of Appeals, Seventh Circuit. November 27, 1894.)

No. 192.

**RELEASE AND DISCHARGE—RATIFICATION—INSTRUCTIONS.**

Where, in action for personal injuries, it appears that plaintiff had received \$1,600 from defendant in settlement of damages, and that she waited two years before offering to return the money, and there is evidence tending to show that plaintiff was perfectly able to understand all about the settlement within ten days after it was made, and that she after that spent the money, it is error to leave to the jury, without definition, the question whether plaintiff disaffirmed the settlement within a reasonable time, and to refuse to instruct them that her expenditure of the money with knowledge of the settlement would ratify the settlement, and that such a ratification, once made, would be final and binding.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

**Action on the case by Nellie E. Pierce against the Chicago, St. Paul & Kansas City Railway Company. Plaintiff obtained judgment. Defendant brings error.**

Henry A. Gardner and William McFadon, for plaintiff in error.

Ernest Dale Owens and Seth F. Crews, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

**BUNN, District Judge.** This action was brought to recover damages for a personal injury sustained by the defendant in error, plaintiff below, on the 15th day of September, 1887, at Hudson, Iowa, while riding in one of the sleeping cars of the plaintiff in error. The injury was caused by reason of another train of cars running into the rear end of the train in which the plaintiff was riding at the time. Eight days after the accident, on September 23, 1887, at Chicago, the plaintiff settled for the injury with the company for the sum of \$1,600 cash paid, and executed in due form, under seal, a release of all damages growing out of the injury. Subsequently, on August 11, 1888, the plaintiff brought suit against the company in the United States circuit court for the Northern district of Illinois to recover for the same injury, but caused the same to be dismissed on September 1st following. One year afterwards, on September 1, 1889, the plaintiff, by her attorney, made a tender to the company of the \$1,600 received by her, with 6 per cent. interest, which tender was refused, and on September 3, 1889, the present suit was begun. The plaintiff declared upon the injury named as though no settlement or release had ever been made. The company pleaded in defense the release, and the plaintiff, by way of replication, set up that at the time of the execution of the release she was suffering from great agony of body and mind to such an extent that she was wholly deprived of her reasoning powers and in a condition which rendered her unfit and incapable of contracting; and that while in such condition the defendant, by its agent, took an unfair advantage of and overreached her, and thus obtained the execution of the release by duress and fraud. Issue was joined upon this plea, and a trial had of the issues thus made, and a verdict therein rendered in favor of the plaintiff on the 4th day of May, 1894, for the sum of \$15,000. It is not necessary to state the evidence introduced upon the trial. It was somewhat conflicting upon the main issue, the plaintiff's testimony tending to show that at the time she executed the release she was not in a condition to understand what she was doing, while, on the contrary, the defendant's evidence tended to show that she was fully competent to contract, and that after the release was executed, without offering to disaffirm the contract, she continued to spend the money she had received from the company, with full knowledge and understanding of the facts respecting the settlement.

There are 36 assignments of error, but according to the view we have taken of the case it will not be necessary to notice them all. The 19th, 20th, 21st, and 30th assignments refer to the question of the affirmance and disaffirmance of the settlement. The money was



paid and the release executed on the 23d day of September, 1887. On September 1, 1889,—nearly two years afterwards,—the plaintiff tendered back the money received, with interest, after bringing a suit and then discontinuing the same one year previously. The evidence showed that the money paid her by the company had all been expended for her benefit by herself and her brothers within seven or eight months after being paid to her. The evidence of the defendant tended also to show that, whatever her condition may have been at the time of the settlement, she was greatly improved, and her recovery was such as to render her quite competent to understand and appreciate the situation, within 10 days or two weeks afterwards. There was no claim that the plaintiff was insane or non compos. The disability, if any existed, to make contracts, was temporary; and it is quite evident that when that disability was removed, if it was removed, it would be incumbent upon her at once to disaffirm the contract of settlement, if she wished to elect to do so, and bring suit to recover for the injury. And if she once affirmed the contract, by knowingly and voluntarily spending the money she had received, she could not afterwards elect to disaffirm it.

On the trial defendant's counsel asked the court to charge the jury as follows:

"The court instructs the jury that even if they believe from the evidence that the release in evidence was not binding on the plaintiff, because procured by fraud, or because executed when the plaintiff did not have mental capacity sufficient to enable her to understand what she was doing, yet if the jury should believe from the evidence that, shortly after the date of its execution, the plaintiff was informed by her brother, or nurse, or other person, that she had executed said release, and received sixteen hundred dollars therefor, and that at the time of so being informed the plaintiff was then in such condition of mind that she was able to understand and appreciate what she had done, then the court instructs you that the expenditure at any time thereafter by the plaintiff, or by any one for her, with her knowledge, of any part of the said sixteen hundred dollars, would be a ratification of said release, and said release would be thereby made binding on the plaintiff."

This instruction the court refused to give, to which ruling exception was taken, and there is nothing in the general charge of the court covering the same ground.

Then defendant's counsel also asked the court to have the following instruction given, which was also refused:

"The court instructs the jury that one put to an election to ratify or disaffirm an instrument executed by him or her, after having elected to ratify the same, cannot reconsider such action, but the election thus made is final and binding on such party."

There was nothing in the general charge covering the same subject. But in the general charge to the jury the following instruction was given, to wit:

"If you find that within a reasonable time she disaffirmed this settlement, rejected it as a settlement, and brought the suit for the purpose of recovery for her injuries, and you find the release invalid under the circumstances that I have given you, then your further duties will be to inquire what are her damages."

This was objected to by the defendant on the ground that it is not a correct statement of the law on that subject, and that it overlooked the fact that there was evidence tending to show that plaintiff, after being told that she had settled with the defendant, continued expending, knowingly, the money received in settlement.

We think, in view of what the general charge contains, and does not contain, on the subject of the affirmance or disaffirmance of the contract of settlement, that these special requests should have been given. Clearly, the general charge does not fairly or substantially cover the whole ground. From all that was given to the jury on this subject, although they might believe from the testimony that the plaintiff, by waiting nearly two years after her recovery of mental capacity without offering to return the money or showing any sign of dissatisfaction, spending the money in the meantime, had fully ratified and affirmed the contract, still, if they found that within a reasonable time, without defining what a reasonable time was, she disaffirmed the settlement, and brought suit for the injury, she might recover. The jury were nowhere told that the plaintiff could not play fast and loose with the contract of settlement, affirming it to-day and disaffirming it to-morrow. This was the vital point in the case, and the defendant was entitled to have the law on the question fairly given to the jury. The plaintiff was a person in the prime of life. The contract was a valid and binding contract, if there was no fraud and she had the mental capacity at the time to make it. But allowing that she had not such capacity, as the jury must have found, still, after she had recovered her health and usual mental condition so as to render her capable of comprehending the settlement made, she was bound either to affirm or disaffirm, and if she did not elect to disaffirm at once, that is, within a reasonable time, she must be considered as having elected to abide by the settlement. And having once, by her conduct, affirmed it, she could not afterwards disaffirm it. She would be in no better condition, and much the same, as an infant, after arriving at majority, in reference to a contract entered into by him before arriving at the age of 21 years. And it has always been held that an infant in such a case must elect at once. He cannot wait an unreasonable time before disaffirming, and, after having ratified and affirmed the contract after coming to his majority, he cannot afterwards disaffirm it. 1 Whart. Cont. §§ 117, 120, 290; *Burton v. Stewart*, 3 Wend. 239; *Masson v. Bovet*, 1 Denio, 73; *Robinson v. Hoskins*, 14 Bush, 393.

In the case of *Grymes v. Sanders*, 93 U. S. 55-63, the court say:

"When a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be as conclusively bound by the contract as if the mistake or fraud had not occurred."

And the same doctrine is affirmed in *McLean v. Clapp*, 141 U. S. 429, 12 Sup. Ct. 29.

We cannot but think, also, that the instruction upon this question is faulty in not defining with more precision the reasonable time within which the election must be made. If the jury could find two

years a reasonable time, it is difficult to see why she could not make the election at any time prior to the running of the statute of limitations against the claim, except under supposable extraordinary circumstances not here disclosed. The judgment is reversed, and the case remanded to the circuit court for a new trial.

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CALLAWAY v. ALLEN.

(Circuit Court of Appeals, Seventh Circuit. November 27, 1894.)

No. 175.

**MASTER AND SERVANT—NEGLIGENCE—DANGEROUS MACHINERY.**

Where a servant is injured by the careless use by his fellow servants of a machine which is not necessarily dangerous, if properly used, and which is not furnished by the master, but by a fellow servant, against the master's orders, the master is not liable therefor.

Appeal from the Circuit Court of the United States, for the Southern District of Illinois.

Action by John Allen, administrator of the estate of Charles Allen, deceased, against S. R. Callaway, receiver of the Toledo & Kansas City Railroad Company. Plaintiff obtained judgment. Defendant appeals.

This is an action for damages for negligently causing the death of Charles Allen, appellee's decedent. In an action to foreclose a mortgage against the railroad company in the circuit court, appellee intervened by petition for the allowance of a claim by the receiver of said railroad company for \$5,000 on account of such death. On motion of petitioner, the cause was referred to a master to take testimony and report. Subsequently, the case was set down by the court for trial by a jury, trial had, and a verdict of \$5,000 rendered in favor of the petitioner, and a decree entered by the court. Objections were taken to the trial on the ground that no issue had been properly framed out of chancery, and that the trial was irregular; but as an appeal was taken from the decree, and the cause has been argued here upon the merits, it will be considered and decided in the same way,—that is, upon the merits, as they appear from the law and the testimony. The verdict of the jury, being advisory only, and for the information of the court, was not conclusive upon the facts in the court below, and is not in this court.

The ground of the action is the alleged negligence of the receiver in not furnishing safe and competent machinery and appliances for the decedent to work with, and in not informing him of the defective and dangerous character of that furnished, whereby the accident resulting in his death was caused.

Charles Allen, the decedent, was killed while in the employment of the receiver, upon said railroad, on the 1st day of July, 1892, while at work with a gang of men in the construction of a bridge and trestlework near a place called Coffeen, in Montgomery county, Ill. The receiver was at that time in general charge of, and was operating, the road. There was also a general superintendent, Arthur L. Mills, who had charge of the operating department, maintenance of way, including the bridge department, and transportation. The general superintendent was also purchasing agent, and had general charge of the purchase of supplies, tools, and machinery. There was under him one J. E. Johnson, who was master of the bridge and building department, as an independent department. Under Johnson were several gangs of men,—among others, the one where decedent worked,—who worked under bridge foremen appointed for that purpose by the superintendent of bridges. These foremen were under the direction of the master of bridges and buildings, and acted as boss of the particular work each had in charge

for the time, in the absence of the master of bridges and buildings. He employed his own men, subject to the approval of the master of bridges, and was authorized to discharge them for cause. In the absence of his superior, he controlled the mode and manner of work, subject to the supervision and approval of the same authority. The machinery, tools, and appliances deemed necessary for the work of the bridge department were purchased by the general superintendent, and furnished by him, through the master of bridges, to the foremen and their men. There is no complaint in the case that the machinery actually furnished by the superintendent for the work on this bridge was not safe and sufficient. The bridge and trestlework, several hundred feet in length and in the highest place about 40 feet above the ground, was being constructed over a ravine. Among the machinery and implements so furnished were certain push cars, being small flat cars propelled by hand; the men in charge walking behind or at the side, and pushing them with their hands. These were used by the men to carry timbers from one end of the trestlework out upon the bridge, for the purpose of being put into its construction, and, so far as anything appears, were safe and proper for such purpose. But it required hard labor to load and unload the timbers upon and from these cars by hand. Some two months before the accident, one Thompson, acting as a bridge foreman at another place, without the knowledge or authority of the receiver or the superintendent, or the superintendent of bridges and buildings, constructed from waste material a labor-saving addition to one of these push cars, which consisted in a V-shaped frame or platform with diagonal braces, designed to be placed upon and used with the car. Upon this platform was constructed a windlass, with rope and pulley, and at one end of the rope a hook. This rope passed through the pulley and wound upon the windlass in such a manner that the free end of the rope hung out over the push car when the machine was in use. The device was designed to lift bridge timbers, transport them to the point upon the work where needed, and deposit them there. This was done by attaching a chain to the hook in the end of the rope, and encircling the timber with the other end, and lifting it by means of the pulley and windlass. The timber, when so raised, would be carried forward by pushing the car to the desired place, and then unloaded and put in place by releasing the cranks of the windlass, and lowering the timber by means of the rope and derrick. But these timbers, being suspended more upon one side, required something on the other side of the car to counterbalance; otherwise, there was danger of unloading truck, frame, timbers, and all into the ravine below. For this purpose, the men were accustomed to pile timbers upon the other edge of the truck, or, more commonly, to seat men, as live weight, to counterbalance the load. On the occasion in question, the men, under charge of Charles Anderson, as foreman, loaded upon this instrument, and by these means, three large oak pieces, each 18 feet long, 18 inches wide, and 7 inches in thickness, weighing nearly, but not quite, a ton, and carried them to the place of deposit. This was more than they had ever attempted to carry before. They had theretofore carried two such pieces of oak, or three of pine. On that day, Allen was engaged and at work with other employes, as a bridge carpenter, at that place, not in transporting, but in framing, the timbers. The men engaged in loading them, having some difficulty in raising them by the device in question, called upon Allen to "give them a lift," which he did. He got upon the platform on the push car, to assist in lifting the timbers, or to act as a counterbalance to their weight when raised, or both, perhaps, and remained upon the platform, with three other employes, while the car was being pushed to its place over the center of the depression. One end of the stringers extended diagonally across the track in the rear of the car, and the stringers were held steady by one of the gang until the car had reached the proper place for deposit. When the car stopped, the man who was steadying the timbers pushed one end of them out over the side of the car and trestle so that they hung suspended beyond the trestle, and about parallel with the track. At this moment, for some reason,—whether from so swinging the timbers out beyond the trestle, or from some change in the position of the men, who, with Allen, were performing the office of live weight to counterbalance the stringers,

is not entirely clear,—the timbers proved too heavy for the counterbalance, and the car and platform began gradually to tilt, and finally upset, and fell with Allen to the bottom of the gulf, the other men escaping by jumping off in time. A prior foreman, one Thompson, had constructed and used the platform and windlass device at another place. It was brought to this trestle by Foreman Anderson, and used under his direction. Neither the receiver nor superintendent, nor superintendent of bridges and buildings, authorized its construction or use. On the contrary, whenever the attention of Johnson, the master of bridges, had been called to it, he had forbidden its use, and only a few days prior to the accident he told Anderson to throw it away. He did not put the prohibition of its use on the ground of its being dangerous, but on the ground that it retarded the work, and more could be accomplished without it than with it.

Brown & Geddes (Clarence Brown, of counsel), for appellant.  
J. A. Connolly and T. C. Mather, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge (after stating the facts as above). The principal questions in the case are whether the device constructed by Foreman Thompson and afterwards used by Foreman Anderson, was of itself an unsafe and dangerous device, and, if so, whether its being such was the primary cause of the accident, and whether the receiver was responsible for its use upon the occasion in question. We do not understand that it was contended by counsel for appellee on the oral argument, or in the printed brief, that Anderson, the foreman of the gang, was a vice principal of the receiver. This proposition could not be maintained, in view of the decision of the supreme court in *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914. Anderson was not in any sense the head of any department of the service. He, as well as the men with him, was working under the supervision and direction of Johnson, the superintendent of bridges and buildings. Johnson and the general superintendent of the road, under the receiver, were, so far as appears, the only ones who could be considered as standing, so far as this bridge device was concerned, in the place of the receiver. The following illustration by the court in the *Baugh Case* seems entirely applicable here:

"So sometimes there is, in the affairs of such a corporation, what may be called a manufacturing or repair department, and another strictly operating department. These two departments are, in relation to each other, as distinct and separate as though the work of each was carried on by a separate corporation. And from this natural separation flows the rule that he who is placed in charge of such separate branch of the service—who alone superintends and has control of it—is, as to it, in the place of the master. But this is a very different proposition from that which affirms that each separate piece of work in one of these branches of service is a distinct department, and gives to the individual having control of that piece of work the position of vice principal or representative of the master."

But, as we understand the contention of the appellee, it is this: That it is the absolute duty of the master to furnish safe and suitable machinery and appliances; that this duty cannot be delegated; and that, therefore, when the foremen, Thompson and Anderson, constructed this dangerous device, and used it, the receiver became

liable for its use, though it was wholly unknown to him, and neither himself nor his general superintendent, nor superintendent of bridges and buildings, had provided it, or authorized its use. This contention, we think, is not maintainable. A railroad corporation must act through its agents, and, where a railroad is in the hands of a receiver, the receiver represents the company, and acts through its agents in the same way. Of course, the receiver must use all reasonable care to provide suitable machinery. The evidence shows that he did so provide in this case. The employés, however, were not satisfied with it; and they themselves provided something in addition that would make the work of lifting timbers easier for them, though the evidence showed that it was rather a hindrance than a help to the progress of the work. It is true, the superintendent of bridges knew that this device had been used, and its use had been forbidden by him; and he had very recently told Foreman Anderson to throw it away, and that if he used it he should hold him responsible. Anderson insisted on using it because it was easier on the men, to which the superintendent replied that he (Anderson) was picking up two stringers 600 feet from the bridge, when, without his device, he could carry six or eight, and it took him two weeks to do what he could do without it in one. On the third day before the accident, the superintendent of bridges came to Coffeen, and again found the men using the car with this attachment. They were going out on the bridge, four men on one platform with one stringer, and two men pushing, when he told Anderson to throw the thing to one side and break it up. The objection to its use seemed to be founded wholly upon its want of effectiveness in aiding the work. No suggestion was made by Johnson or the men that it was not safe. The most that can be said of the superintendent is that he did not succeed in stopping the use of the device. Probably, his objection that it retarded the work may have been the reason why the men afterwards tried to carry three stringers at a time instead of one and two, as they had done before. We do not think, under the circumstances, that the receiver should be held liable for the use of this device. He neither furnished it, nor authorized its use. It could not be expected that he or the superintendent should be present at all times and at all places to see that such a device was not used, or that they should take means to destroy it, or prevent its use by force. The orders of the superintendent were disobeyed and his wishes disregarded by the employés, and the responsibility for its use should rest with them.

But assuming that the superintendent had, by implication or otherwise, authorized its use, still we think there can be no recovery. The primary cause of the accident was the careless and negligent use of the car by Anderson and the men under him. The weight of evidence is clear that the car, with the added superstructure, was not ordinarily or necessarily dangerous, if carefully handled and not overloaded. Any machine may be made dangerous if wrongfully or negligently used. The evidence shows clearly that the car was overloaded. The timbers were too heavy for the counterbalancing weight, and that was the fault of coemployés,

and was the primary and controlling cause of the accident. For these reasons, without considering the question of the danger being open and apparent, and the hazard being assumed by decedent, the decree is reversed, and the cause remanded to the circuit court, with directions to enter a decree in favor of the appellant.

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## ILLINOIS CENT. R. CO. v. DAVIDSON.

(Circuit Court of Appeals, Seventh Circuit. November 27, 1894.)

No. 179.

## CARRIERS OF PASSENGERS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

A passenger who unnecessarily and negligently exposes himself to danger while alighting from a train is guilty of contributory negligence, even though he does not know of the dangers to which he is exposed.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Action on the case of Wilbur F. Davidson against the Illinois Central Railroad Company. Plaintiff obtained judgment. Defendant brings error.

This is an action brought by Wilbur F. Davidson, the defendant in error and plaintiff below, against the Illinois Central Railroad Company, to recover damages for a personal injury to the plaintiff, the result of an accident happening upon defendant's road in the city of Chicago, on February 27, 1893. The plaintiff was a citizen of Michigan, and resided at Port Huron, in that state. He was engaged in the business of selling on commission various kinds of electrical apparatus for the General Electric Company of New York. In the latter part of February, 1893, he came to Chicago, with a Mr. Annesley, for the purpose of showing him a certain electric plant in active operation, of the kind sold by plaintiff, situated at Hyde Park, in Chicago, near the line of the defendant's railroad. Mr. Annesley was an expert for another company, who wished to buy an apparatus. On arriving at Chicago, Davidson, the plaintiff, arranged with John L. Martin, a friend of his, residing in Chicago, and engaged in the same business, to go with plaintiff and Annesley to Hyde Park, to examine this plant. They all embarked at Van Buren street on a suburban train belonging to the defendant at about 5:45 o'clock on the evening of February 27th, and reached Hyde Park station at 6:10 p. m. The accident happened after the plaintiff and his party had left the car at Hyde Park. The railroad company, pursuant to an ordinance of the city, had, shortly previous to this time, been engaged in raising its tracks at this point, of which they had had theretofore six in use. The four most easterly of these had been raised to a height of nineteen feet above the city datum, by substantial earth embankments. Trains were running on all of these four tracks. The road ran at this point north and south. The most westerly of these four tracks was the regular south-bound suburban track, and over which the plaintiff passed. The next most westerly track was the north-bound suburban track. The third track, counting from the west, was for south-bound through passenger and freight trains, and the most easterly track was for north-bound through passenger and freight trains. The two other tracks lying west of these four had not been raised, and were not then being used. A platform, 230 feet long, had been provided by the company for the use of passengers on the west side of the track over which the plaintiff passed, leading down north by a pair of stone stairs in No. Fifty-Third street. This platform and stairs were built and intended for the use of passengers landing at Hyde Park from these suburban trains. There was no platform on the east side of the track intended

for passengers. There was planking, however, placed between the different tracks, and east of all was a platform ending in an incline leading down to the level of the street, for the purpose of carrying baggage to and from the through trains. The evidence of plaintiff, however, showed that people living on the east side of the tracks were in the habit of getting off on that side and crossing the other tracks, and some of the evidence tended to show there were stairs not far distant on that side, where passengers descended to the street. This was denied by the witnesses for the defendant. On the arrival of the train at Fifty-Third street, about dark, Mr. Davidson and his friends got off on the east side, and crossed over track No. 2, and started to walk north upon the planking between that track and No. 3. For some cause, not explained, Martin and Annesley got off a little sooner than Davidson, and Davidson lost sight of them. He says, after alighting there were people between them and him, and he could not see them; that he stepped out of the car on the platform at the north end, and looked to the right and left, and did not see them, and that a trainman, or person in uniform that he took for a trainman, standing right opposite to him on the platform of the next car, seeing him, plaintiff, hesitate, said, "This way," or "Down here," or "This side," by which plaintiff understood the man to mean that his friends had gone that way; that he saw other people getting off there, and that he got off upon the ground, looked up and down to see there was no train coming, and then crossed over one track upon the planking between two tracks,—the first one he came to; that he looked up, and saw people going north, and among them his two friends, and that he walked rapidly along in that direction; that there was no platform there on that side, but only a board or plank walk on a level with the other tracks; that he walked a short distance, when a freight train came up from the north, on his right side, and that a little after he felt he had been hit, and lost consciousness. The train that struck him, however, was not the freight train which he saw going south, but a suburban passenger train from the south on track No. 2, west of him on his immediate left, and which he had just crossed. He was knocked down, receiving a blow on the head, and other injuries, and was taken by his friends to a drug store near by, and from there back to the city that night. The evidence shows that these railroad tracks were 13 feet apart from center to center; that the width of the suburban coaches, as well as the freight cars, was 8 feet 8 inches, outside measurements; that two such cars, passing each other, would leave a space between them of 4 feet 4 inches; that the planking between the tracks, upon which the plaintiff was walking while injured, consisted of five 1-foot planks, laid parallel with the tracks; that the distance between the east rail of the north-bound suburban track and the west rail of the south-bound through track, on which the freight train passed, was 7 feet 11 inches; that there was a space of about 9 inches between the edge of the planking and the rail on either side; and that the planking was laid on about the same level with the tracks. The evidence of defendant tended also to show that this planking laid between the tracks was placed there for the convenience of passengers arriving on the north-bound suburban and the south-bound through tracks in getting from their respective trains to the platform and stone steps on the west side of all the tracks, and leading down through the stone abutment to Fifty-Third street. These are the main facts, so far as seems necessary to state them for the proper understanding of the points of law.

Sidney F. Andrews (James Fentress, of counsel), for plaintiff in error.

Edward R. Woodle, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge (after stating the facts as above). There were a great many exceptions taken by the defendant to the intro-



duction of evidence upon the trial, as well as to the charge of the court, and to refusals to give special instructions, but it will be unnecessary to notice them all. One of the principal contentions on the part of the plaintiff in error is that the case was submitted upon issues not raised by the pleadings, and that under the allegations of the declaration there could be no recovery upon the evidence submitted. But we think there is no substantial variance between the pleadings and proofs which should prevent a recovery. The negligence on the part of the company, if there was any, consisting in constructing its tracks, and planking between, and running trains in such a way that the cars of passing trains would extend upon either side over the edge of the planking, so that in running their trains, as was done in this case, one on each side of the walk or planking, it left a space of only four feet and four inches between passing trains for passengers to walk upon, so that a passenger, to avoid being struck, must take care to keep near to the center of the planking; also in permitting or directing passengers to alight upon the east side of the track in the nighttime, where there was no depot or platform provided for them, and where trains were frequently passing each way, so that the passenger, unless very cautious, would be in great danger of being hit by a passing train. The evidence in this case showed that not only the plaintiff, but Annesley and Martin, were struck by one or other of those two trains, which were passing at the time they were endeavoring to make their way between the tracks. The plaintiff was seriously injured, the other two but slightly. But the company was not misled by any variance between the pleadings and proofs. In fact, we think the declaration, containing as it does, the following and other similar allegations, is all that it need be to admit the evidence:

"And it then and there became and was the duty of the said defendant to provide reasonably safe means at its said Hyde Park station, whereby the said plaintiff could leave the train and premises of the said defendant without unnecessary or unreasonable hazard or injury to his person; but the said defendant, disregarding its duty in that behalf, carelessly, negligently, and willfully, then and there, at, to wit, its said Hyde Park station, provided means for leaving its said train and premises that, as the said defendant well knew, were grossly unsafe and inadequate in this, to wit: It then and there provided a narrow platform of the width, to wit, of four feet, between two of the tracks of its said railway, and close to, to wit, within one foot of, the rails thereof, on either side of said platform, for its passengers and the said plaintiff to go and walk upon in leaving the train aforesaid, at, to wit, its said Hyde Park station, which platform was of insufficient width to permit passengers to be or walk thereon with reasonable safety from injury from passing trains, and was so constructed that the defendant's engines and trains running upon its two tracks last mentioned, in passing by the said platform on either side thereof, extended, to wit, six inches over the said platform, leaving an unreasonably insufficient and narrow space for the defendant's passengers upon said platform between such trains when so passing each other, of but, to wit, three feet in width; and also permitted and caused its servants in charge of its said trains to manage and drive the same in approaching and passing the said platform at frequent intervals and at a rapid and dangerous rate of speed, and by reason of the said grossly and inadequate and unsafe means so afforded its passengers and the plaintiff, as aforesaid, the said defendant then and there exposed its

passengers and the said plaintiff upon the said platform to great and imminent danger of being struck and injured."

If the planking between the tracks was intended for the use of passengers to walk between trains passing in opposite directions, as was done in this case, it seems quite evident that the construction was faulty, or that the running of trains extending over the planking, while passengers were walking on it, was gross negligence. But the contention of the company was that this planking was not intended for any such use, but was for the convenience of passengers in crossing the tracks when there were no trains running, in order to reach the platform and steps on the west side, built expressly for the use of passengers in leaving these trains. For such a purpose there was no evidence tending to show that the planking was not entirely adequate. It was only when passengers attempted to walk lengthwise on the planking while trains were coming along that the danger arose.

Another exception and assignment of error relates to the evidence upon the matter of damages. The declaration did not contain an allegation of special damage, and the plaintiff on the trial was permitted to testify, against the defendant's objection, that his earnings from profits arising from commissions on sales in his regular employment had amounted for the two or three previous years to the sum of \$25,000 annually, and for 1891 to the sum of \$31,000. It is contended that this was error, as no special damages were alleged. This is a question arising under the law of pleading in Illinois, where the decisions seem to be in some conflict, and we have not deemed it necessary to determine it in view of the fact that we find the next assignment of error to be considered conclusive against the judgment, and as, if there should be a new trial, it will be competent for the plaintiff to ask to be allowed to amend his declaration in this regard, if he should be advised that such a course were necessary or prudent.

Some special instructions were asked on the trial by defendant's counsel on the question of contributory negligence on the part of the plaintiff, which the court refused to give, but in its general charge gave the following, which was the only instruction given on that subject, and to which proper exception was taken, to wit:

"(2) The next question would be whether the plaintiff himself was guilty of contributory negligence, for, although it might be the duty of the railroad company to prevent passengers from alighting on the east side of their cars at this particular place, and under the dangers that surround such a discharge of their passengers, yet, if the plaintiff knew of the danger, and in the face of that knowledge got down on that side of the car, and met with this injury, the railroad company would not be liable. For that purpose you have a right to look into the plaintiff's knowledge on that subject. Had he traveled over that road,—over that suburban line, and gotten off at that place before? Is there any evidence that he had the dangers of that place in mind? Is there any evidence that he knew, when he was getting off on the east side of the car, he was getting off on the tracks instead of on the platform that was provided for that purpose? If you can find any evidence in the record to that point, it is your duty to look at it, and if you find that the plaintiff, at the time that he alighted, knew, or had good reason to

know from his past experience,—if he had any past experience at that place,—of the dangers that menaced him there, then he is not entitled to recover; but if he did not have such experience, and did not have such knowledge, although other passengers may have had,—although the man whom he accompanied may have had,—he would be, nevertheless, free from the charge of contributory negligence, and would be entitled to recover, the other element of negligence on the part of the railroad company being made out.”

This instruction is wrong in itself and wrong in not covering the entire ground which such an instruction should cover. By this instruction the whole question of contributory negligence was made to turn upon a matter of fact of which there had been no dispute in the testimony, to wit, whether or not the plaintiff had been there before, got off at the same place, and become acquainted with its dangers. The plaintiff testified he had never been there before, and there was no evidence to the contrary, and the jury were told that they should look into the evidence, and, if they found that the plaintiff, at the time that he alighted, knew or had good reason to know from his past experience,—if he had any past experience at that place,—of the dangers that menaced him there, then he would not be entitled to recover; but if he did not have such experience, and did not have such knowledge, although others may have had,—although the men whom he accompanied may have had,—he would be, nevertheless, free from the charge of contributory negligence, and would be entitled to recover, the other element of negligence on the part of the railroad company being made out. As there was no dispute about the plaintiff ever having been there before, or ever having had any past experience at that place of the dangers that menaced him there, this instruction, withdrawing as it did from the jury all consideration of contributory negligence founded upon other considerations, was equivalent to directing a finding in favor of the plaintiff upon the question of contributory negligence, and submitting the case to the jury upon the question of the defendant's negligence alone. The jury was nowhere told that if the want of ordinary care and prudence upon the plaintiff's part contributed materially to produce the injury, he could not recover. Of course, the plaintiff's previous knowledge or want of knowledge of the place was a material circumstance to be considered by the jury in determining the question of contributory negligence, but it was not the only circumstance to be considered. Whether he had had any past experience of the dangers of the situation or not, he was bound to exercise his senses. He must use his eyes and ears, and exercise the care and prudence which a man of ordinary care and prudence would be expected to use in the same circumstances to avoid accident. If the question had been submitted to them, who can say that the jury might not have found that the plaintiff did not exercise ordinary care in making inquiry as to the proper place of alighting from the train, or that he was guilty of negligence in not keeping a more constant lookout for approaching trains while he was walking between the tracks upon the planking. None of these questions, or that of contributory negligence generally arising from any cause, were submitted to the jury.

On the question of the plaintiff's negligence, the following special

instructions were asked for by defendant's counsel, and refused by the court, and exceptions duly taken:

"(4) Where a proper landing place is provided, and the passenger knows, or would, by the exercise of ordinary care, have ascertained, its locality, he should make his exit at the place so provided; and if, in attempting to alight elsewhere, he unnecessarily and negligently exposes himself to danger, and is thereby injured, this injury is the result of his own act, and he cannot recover damages therefor from the railroad company. (5) If you believe from the evidence that the plaintiff knew, or would, by the exercise of ordinary care, have known, that the planking between tracks 2 and 3 was not of a reasonably safe width for him to walk or remain upon should another train pass by upon track 2, and you further find from the evidence that he voluntarily and unnecessarily remained on such planking, and by reason thereof was injured as complained of, then the plaintiff is not entitled to recover, and your verdict must be for the defendant."

We see no good objection to either of these requests, and, as nothing in the general charge covered the same ground, we think it was error not to give them. For these reasons the judgment is reversed, and the cause remanded to the circuit court for a new trial, or for such proceedings as may be proper.

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SHELLABARGER v. OLIVER.

(Circuit Court, D. Kansas, Second Division. November 21, 1894.)

DEPOSITIONS—TAKING BEFORE TRIAL.

Act. Cong. March 9, 1892 (27 Stat. 7), providing that, in addition to the mode of taking depositions in the federal courts, depositions may be taken "in the mode prescribed by the laws of the state in which the courts are held," only adopts the state practice as to the manner of taking depositions, and does not, in connection with Gen. St. Kan. par. 4442, providing that "either party may commence taking testimony by deposition at any time after service on defendant," authorize the taking of defendant's deposition before trial, in the absence of any of the grounds therefor prescribed by Rev. St. U. S. §§ 863, 866.

At Law. Action by Isaac Shellabarger against Mark J. Oliver. Heard on rule to show cause why defendant should not be attached for contempt in refusing to testify before an officer authorized to take depositions. Rule discharged.

Chas. S. Cairns and T. W. Sargeant, for plaintiff.

O'Bryan & Gordon and W. E. Stanley, for defendant.

FOSTER, District Judge. The plaintiff brought an action at law against the defendant to recover on a promissory note, and at the same time took out an attachment against defendant's property on the ground prescribed by the statutes of Kansas. After making service of summons in the case, he proceeded at once to take the deposition of the defendant in the manner provided by the statutes of Kansas, and the practice recognized by the courts of the state. This practice is not materially different from the usual mode of taking depositions *de bene esse* under the laws of the United States (section 863). Notice of the time and place of taking the deposition was duly given, but no reason was given, or required in the state

practice, for taking the deposition. The defendant appeared before the notary, as required by the subpoena, but refused to give his testimony, asserting that none of the grounds existed for taking his depositions, etc. Among other questions put to the witness, were the following:

Q. You are the defendant in this action? A. I decline to testify, for the following reasons: First, I reside at Wichita, Kansas, at the seat of the court in which this case is pending; second, I am a party to this suit; third, I expect to continue my residence in Wichita, and to be present at the trial in this case when the same is called for trial, and then I will give my testimony in the case, if so desired; fourth, I am not sick, aged, or infirm. Q. What transfer of property did you make to your wife, Stella Oliver, on or about the 13th day of August, 1894? A. I decline to testify, for the reasons before given. Q. What consideration did you receive for the transfer referred to in the last question? A. I decline to testify, for the same reasons before given. Q. Were you, or were you not, in an embarrassed condition, financially, at that time? A. I decline to answer, for the reasons before stated. Q. What transfer of property did you make to your father, Hiram Oliver, on or about the 13th day of August, 1894? A. For reasons given before, I decline to answer. Q. Did you, on or about the 13th day of August, 1894, execute to Hiram Oliver a deed for real estate? A. Same answer as before. Q. What consideration have you received from anybody for transfer of property to your father since the 1st day of July, 1894? A. Same answer as before. Q. Have you received any consideration for transfer of property to your father or to your wife since July 1, 1894? A. Same answer as before.

The plaintiff procured a rule for defendant to show cause why he should not be attached and punished for contempt.

The defendant resides in the city of Wichita, where this suit is pending. It is not shown that he is about to go out of this district, or that he is aged or infirm, nor does the plaintiff assert that he expects to use his deposition on the trial of the case. He plants himself on the broad ground that under the statutes of Kansas, and the practice thereunder, he has the right to commence taking depositions of witnesses as soon as process is served; and he bases his contention on the Kansas statute (section 4442) and the act of congress of March 9, 1892 (27 Stat. p. 7), which last act reads as follows:

"That in addition to the mode of taking the depositions of witnesses in cases pending at law or equity, in the district and circuit courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held."

It is insisted that this act, in all respects, adopts the practice of the state in which the court is held, in the matter of taking depositions. It was decided by the supreme court (Ex parte Fisk, 113 U. S. 713-725, 5 Sup. Ct. 724) that the act of congress (section 914, Rev. St.) adopting the practice, pleading, and forms and mode of proceedings in law actions of the court of the state in which the federal court is held, did not thereby conform the mode of taking depositions to be used in the federal court to a statute of a state authorizing an order for the examination of a defendant under oath before trial; that such statute was in conflict with section 861, Rev. St. U. S., and was therefore inoperative. The court lays down the rule that, to justify the taking of the depositions of witnesses to be used on the trial, some one of the reasons for taking the same, as set

forth in sections 863, 866, Rev. St., must be shown. Mr. Justice Miller, speaking for the court, says (page 725, 113 U. S., and page 724, 5 Sup. Ct.):

"We are well satisfied that the circuit court cannot enforce the order of the state court to procure evidence which, by the act of congress, is forbidden to be introduced on the trial if it should be taken."

It will be observed that the act of 1892, in addition to the then existing modes of taking depositions, specifically adopts the mode prescribed by the laws of the state in all cases pending, both at law and in equity, in the United States courts; but it would be going too far to assume that congress, in adopting the mode of taking such deposition and testimony, intended to add new cases for taking and reading such testimony to those already set forth in sections 863 and 866. It adopts the mode or manner of taking the deposition practiced in the state courts, but not the causes or grounds for taking such deposition. Those remain as heretofore prescribed, and it is perhaps reasonable to assume that, with this exception, we may safely take the laws of the state as our guide in all matters pertaining to the taking of depositions in law and equity cases pending in the federal courts. Of course, the statutes, both state and federal, contemplate taking the deposition of witnesses in anticipation of the happening of certain events which will make them competent testimony at the trial of the cause; and parties do not have to accept as conclusive the statement of witnesses as to the probability of those events occurring, but may proceed to take the testimony if there are fair grounds to apprehend the happening of the event, and the party is acting in good faith to procure the evidence of witnesses to be used at the trial. And this rule is not in conflict with the precedent established in *Ex parte Fisk*, supra, and is in harmony with the decisions of the supreme court of Kansas. The statutes for taking depositions cannot be used as a means to compel a party to disclose his case in advance to his adversary, nor to pump his witnesses, to ascertain what they will testify at the trial. See *In re Davis*, 38 Kan. 413, 16 Pac. 790. In *Re Abeles*, 12 Kan. 452, the court say, "Giving the right to use a deposition under the contingencies named gives the right to prepare for those contingencies." To the same purport, see *In re Merkle*, 40 Kan. 27-30, 19 Pac. 401. From these cases the rule may be deduced that a party may proceed to take the depositions of his adversary or other witnesses as soon as his action is pending, so it is done, in good faith, in anticipation of the contingency which will make it competent, and with a bona fide intent to preserve the testimony to be used at the trial, but not for the mere purpose of fishing for information, or to compel his adversary to disclose what he will testify to on the trial. Applying this rule to the case at bar, it does not sustain the broad claim of plaintiff's counsel. It is true there is an intimation that defendant intends, some time in the future, to change his residence, and leave the state, but plaintiff does not put his case on that ground. As well as can be gathered from the whole proceeding, the real purpose is to compel the defendant to disclose the facts connected with the dis-

position of his property, to assist the plaintiff to sustain his attachment, and not for the purpose of using the testimony on the trial of the cause. There is no motion pending to discharge the attachment, nor any showing of the existence of any of the grounds for taking depositions under the acts of congress, nor any bona fide expectation of using the deposition on the trial of the case. Hence, the defendant cannot be compelled to submit to an examination under oath, and the rule for him to show cause must be discharged, and it is so ordered.

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**BERNARD & LEAS MANUF'G CO. v. PACKARD & CALVIN, Limited.**

(Circuit Court of Appeals, Third Circuit. October 30, 1894.)

No. 22.

**1. LIMITED PARTNERSHIP—PENNSYLVANIA STATUTE — HUSBAND AND WIFE AS MEMBERS.**

An act (Pa., June 2, 1874) which requires not less than three persons to unite to form a limited partnership is complied with where two of the persons uniting are married women, and the others are their husbands.

**2. SAME—"LTD." IN FIRM SIGNATURE.**

Where an act (Pa., June 2, 1874) providing for limited partnerships requires that the word "Limited" shall be the last word in the name of every such partnership, the contention that the use of the abbreviation "Ltd." in a signature creates a general liability has no force.

**3. SAME—CONTRACT SIGNED BY ONLY ONE MANAGER.**

Where an act relating to limited partnerships (Pa., June 2, 1874) provides that no liability exceeding \$500 shall bind the firm, except the person incurring it, unless reduced to writing, and signed by at least two managers, it is plain that the act of a single manager, in disregard of such provision, cannot extend the liability to the other members.

**In Error to the Circuit Court of the United States for the Western District of Pennsylvania.**

This was an action by the Bernard & Leas Manufacturing Company against Packard & Calvin, Limited, in which it was sought to charge the defendants as general partners. The defendant was a limited partnership association formed under the act of the legislature of Pennsylvania of June 2, 1874 (P. L. 271), which provides for a limitation of the liability of such association to the amount of capital contributed by the members. Section 1 provides that "when any three or more persons may desire to form a partnership association, for the purpose of conducting any lawful business or occupation, \* \* \* it shall and may be lawful for such persons to sign and acknowledge, before some officer competent to take the acknowledgment of deeds, a statement in writing, \* \* \*." Section 3 provides that "the word 'Limited' shall be the last word of the name of every partnership association formed under the provisions of this act." Section 5 provides that "no debt shall be contracted or liability incurred for said association, except by one or more of the said managers, and no liability for an amount exceeding five hundred dollars, except against the persons incurring it, shall bind the said association, unless reduced to writing and signed by at least two managers." A compulsory nonsuit was entered at the trial, at the close of plaintiff's evidence, which the court refused to strike off. Plaintiff brings error.

J. G. White, for plaintiff in error.

Q. A. Gordon, for defendant in error.

Before SHIRAS, Circuit Justice, DALLAS, Circuit Judge, and WALES, District Judge.

DALLAS, Circuit Judge. The bill of exceptions set forth that:

"Upon the trial the evidence on the part of the plaintiff showed, as the basis of his suit, a written contract for the construction of a mill, at a cost exceeding five hundred dollars,<sup>1</sup> made by plaintiff with 'Packard & Calvin, Ltd.,' a company claiming to have been organized under the limited partnership act of Pennsylvania, approved June 2, 1874, and its supplements. The plaintiff's evidence further showed that M. L. Packard was the wife of W. R. Packard, and that Tabitha L. Calvin was the wife of William J. Calvin, and that these four persons, who are the defendants in this case, were the only members or stockholders of the said alleged limited partnership, and that they had complied with all the requirements of the said act of 1874 and its supplements, if they, as two husbands and their respective wives, were competent, under said act and its supplements, to organize and constitute a limited partnership association. It further appeared by the plaintiff's evidence that the contract in suit was signed, 'Packard & Calvin, Ltd.,' by only one manager of said alleged limited partnership. The plaintiff, having shown these facts, rested his case; and the court, upon motion of defendant's attorney, entered a compulsory nonsuit, which the court afterwards refused to take off."

The question which was raised in the circuit court, and which is now presented here, is whether the four persons who had associated themselves together as stated in the foregoing extract are liable, as general partners upon the contract sued on, notwithstanding the fact that it was "made by plaintiff with Packard & Calvin, Ltd." The action was brought to enforce such supposed general liability, and the plaintiff contends that, to that end, it should have been sustained. This contention is put upon several grounds, which will be separately disposed of, but without extended discussion.

1. The Pennsylvania statute of June 2, 1874, which requires not less than three persons to unite to form a limited partnership, is complied with where, as in this instance, two of the persons uniting are married women, and the others are their respective husbands. This understanding of the law seems to be supported by the opinion of the supreme court of Pennsylvania delivered in the case of *Steffen v. Smith*, 159 Pa. St. 207, 28 Atl. 295; and, apart from this, we have no doubt of its correctness.

2. The fact that the abbreviation "Ltd.," and not the entire word "Limited," was made part of the signature to this contract, is claimed in the plaintiff's brief to have created the general liability averred; but this point has not been very strenuously urged in oral argument, and we do not perceive that it has any force.

3. The proposition that, because the contract was signed "by only one manager of said alleged limited partnership," all the members thereof became generally liable, is untenable. It is founded on the provision of the Pennsylvania statute (section 5) that "no liability for an amount exceeding five hundred dollars, except against the person incurring it, shall bind the said association, unless reduced to writing and signed by at least two managers." But it is quite plain that the act of a single manager, in disregard of this provision, cannot have the effect of extending the liability of the other members of the asso-

<sup>1</sup> Note. The record shows that the amount involved in the action exceeded \$2,000, and no question as to the jurisdiction of the court was presented.



ciation. It was intended for their benefit, and should not be construed to their disadvantage. The person so incurring a liability is himself bound, but, as this results from an express exception, applied to him only, it follows that the legislature could not have intended that his comembers would be similarly bound. The judgment is affirmed, with costs.

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FISHER v. SIMONS et al.

(Circuit Court of Appeals, Third Circuit. November 2, 1894.)

No. 5.

**NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDERS—NOTE BORROWED BY BANK.**

A negotiable promissory note for \$5,000 was made, without consideration to the makers, for the benefit of a national bank, at the solicitation of its president, for use by the bank as a collateral deposit at the clearing house, and was so used. The "offering book" of the bank indicated that the note was discounted as upon the offer of the makers, but, by the direction of the president, the proceeds of discount were carried to his individual credit. He did not, however, draw out the money, and the bank was not damnified otherwise than by this entry in the president's overdrawn account. By the settled course of business, the president was permitted habitually to borrow money for the bank and to exercise entire control in its affairs. *Held*, that neither the bank nor its receiver, who is clothed only with its rights, can be esteemed a bona fide holder of the note, as against the makers.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was an action by B. F. Fisher, receiver of the Spring Garden National Bank, against John F. Simons, Frederick M. Simons, and Edwin S. Simons, copartners, trading as Simons Bros. & Co., on a promissory note. The circuit court directed a verdict for plaintiff, whereupon the defendants brought error; and the judgment was reversed by the circuit court of appeals, and the cause remanded, with directions to grant a new trial. 5 C. C. A. 311, 55 Fed. 905. The new trial was had April 11, 1894; BUTLER, District Judge, charging the jury as follows:

The plaintiff urges that the recent case of *Bank v. Armstrong* (just published in the Supreme Court Reporter for April 2, 1894) 14 Sup. Ct. 572, is in conflict with the decision of the circuit court of appeals of this circuit in this case, and sustains his position. If this were true (and I have not examined the subject with sufficient care to ascertain certainly whether it is or not), I would nevertheless be bound by the decision of the court of appeals, as it was made in this case. If the decision is to be reversed, it must be done by the court that made it. As I understand the decision last named, it rests upon three distinct grounds: First. The note having been obtained fraudulently, the plaintiff was required to produce evidence that the bank gave value for it without knowledge of the fraud, and the evidence produced was not sufficient to establish these facts. Second. Kennedy, as president of the bank, had authority, by virtue of his office, to borrow the note in the bank's name for its use, and the bank is therefore responsible for his acts and representations at the time he obtained it. Third. That, if the foregoing propositions were not correct, still the defendant might prove, as he offered to do, that the president, Kennedy, was the general manager of the affairs of the bank, and in case he did so this would be sufficient proof that the bank had invested him with special authority to borrow the paper. As the testimony

now is substantially the same as was produced on the former trial, supplemented by what has been given under the offer then rejected, we instruct you that the defendant is entitled to a verdict, if the jury believes his evidence respecting the circumstances under which the note was obtained; and, as it is uncontradicted and undisputed, you will not hesitate to believe it.

And thereupon the counsel for the said plaintiff did request the learned judge who tried the cause to charge the jury as set forth in the first point of the said plaintiff, to wit:

(1) The undisputed evidence in this case shows that F. W. Kennedy, president of the Spring Garden National Bank, had the original of the note in suit discounted by the bank, and applied the proceeds thereof to his own use; and, as there is no evidence of his authority to borrow the note for the use of the bank, the verdict should be for the plaintiff.

And thereupon the learned judge who tried the cause did answer the same as follows:

In view of the decision of the circuit court of appeals in this case, and the fact that the evidence is substantially the same now as before, the point must be disaffirmed.

And thereupon the counsel for the said plaintiff did then and there except to the answer of the said judge to the said first point of the plaintiff, and the learned judge did then and there, at the request of the counsel for said plaintiff, seal his bill of exception thereto. And thereupon the counsel for the said plaintiff did further request the court to charge as set forth in the second point of the said plaintiff, which is as follows:

(2) The undisputed evidence in this case shows that F. W. Kennedy, president of the Spring Garden National Bank, had the original of the note in suit discounted by the bank, and applied the proceeds thereof to his own use; and the evidence also shows affirmatively that said F. W. Kennedy, president, had no authority to borrow the note for the use of the bank, and therefore the verdict should be for the plaintiff.

And thereupon the learned judge who tried the cause did answer the said second point of the said plaintiff as follows:

I make the same answer to this point as I have already made to the first point, and, for further answer, refer to my general charge already made.

And thereupon the counsel for the said plaintiff did then and there except to the said answer of the said court to the second point of the plaintiff, and the learned judge who tried the cause did then and there, at the request of counsel for the said plaintiff, seal his bill of exception thereto.

Plaintiff brings error.

Silas W. Pettit, for plaintiff in error.

Robert H. Hinckley, for defendants in error.

Before SHIRAS, Circuit Justice, ACHESON, Circuit Judge, and WALES, District Judge.

ACHESON, Circuit Judge. By this suit the receiver of the Spring Garden National Bank sought to compel Simons Bros. & Co. to pay a promissory note for \$5,000, dated February 13, 1891, and payable three months after date, made by them to their own order, and by them indorsed, for which they had received no consideration, and

which note they had made for the benefit of the bank, at the solicitation of its president, who gave them a receipt therefor, signed in his official capacity, setting forth that the note was for the use of the bank, and was to be paid by it.

The Spring Garden National Bank was a member of the Philadelphia Clearing-House Association. By a rule of that institution, each member thereof was required to keep on deposit at the clearing house collateral security for the payment of its daily balances upon exchanges. The note in suit was procured from the makers by Francis W. Kennedy, the president of the Spring Garden National Bank, avowedly for use by the bank as a deposit at the clearing house to secure its daily balances, and it was actually so used by the bank. By uncontradicted evidence it was shown that, by the settled course of the business of the bank, its president, Mr. Kennedy, was permitted to borrow money for the bank. Indeed, it appeared that he was in the constant habit of thus borrowing money for the use of the bank. Furthermore, it was distinctly shown that in the actual management of the bank he exercised entire control by the sufferance of the directors. The proof was complete that in all the affairs of the bank he was allowed to act in its behalf according to his own discretion. In the fall of the year 1890, at a time of general financial stringency, Mr. Kennedy borrowed for the bank, from Simons Bros. & Co., their four promissory notes, each for the sum of \$5,000, for use by the bank as collateral security in the clearing house, and gave them a receipt signed by him as president, stating that the notes were for the use of, and were to be paid by, the bank. At that time he stated to Simons Bros. & Co. that the bank had plenty of "small business paper," which he would not "care to offer in the clearing house," and for their protection he promised "to set aside twenty thousand dollars of that paper." The good faith of Simons Bros. & Co. in the transaction is conceded. The note in suit was a renewal of one of the four above-mentioned notes. Two others thereof were returned to the makers before the bank was closed. One of the four, or a note given in renewal thereof, was held by the clearing house when the bank failed; and it the makers settled, paying the money to the clearing house. The "Offering Book" of the bank, under date of November 21, 1890, had an entry indicating that the original note, of which the one in suit was a renewal, was discounted as upon the offer of Simons Bros. & Co. But it appears that on the previous day, by the direction of the president, Mr. Kennedy, the proceeds of discount had been carried to his individual credit. He did not, however, draw out the money, and the bank was not damnified otherwise than by this entry of credit in the president's overdrawn account.

Upon the indisputable facts, it seems to us that neither the bank nor its receiver can be esteemed a bona fide holder of the note in suit, as against the makers. The receiver has no distinct title of his own, but is clothed with the rights only of the bank. *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148; *Morris' Appeal*, 88 Pa. St. 368. Now, we cannot separate the bank from its president without violating established principles, and doing rank injustice to innocent

persons. In this matter the president stood for the bank. The evidence of his general authority to represent the bank in all its affairs was so clear, and especially were the proofs of his authority to borrow funds for the bank so full, as to warrant the inference of his rightful power to act for and bind the bank in this particular transaction. *Martin v. Webb*, 110 U. S. 7, 14, 3 Sup. Ct. 428. There, speaking of the authority of a cashier in matters outside of his ordinary duties, the supreme court said:

"His authority may be by parol and collected from circumstances. It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors. When, during a series of years, or in numerous business transactions, he has been permitted, without objection, and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who, in good faith, deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations."

These views are applicable here, and, we think, are controlling. It will be perceived that it was part of the arrangement between the bank, through its president, and *Simons Bros. & Co.*, that other, smaller notes were to be set aside by the bank for the protection of *Simons Bros. & Co.* Had this actually been done, it could not have been contended with any show of reason that the transaction was impeachable. But why should the failure of the bank to fulfill its obligation prejudice the defendants? The note was borrowed for legitimate use at the clearing house, and the arrangement, as a whole, was open to no valid objection. We are not, then, disposed to lend a ready ear to an argument based on supposed public policy and the doctrine of *ultra vires*. The bank has had the full benefit of the arrangement, and it cannot now be repudiated without grievous wrong to the defendants. It has been more than once authoritatively declared that a national bank cannot set up its want of legal capacity to escape a just responsibility. *Bank v. Case*, 99 U. S. 628; *Bank v. Graham*, 100 U. S. 699.

Our conclusion is entirely consistent with the ruling in the case of *Bank v. Armstrong*, 152 U. S. 346, 14 Sup. Ct. 572. In their facts the two cases are essentially different. In the case referred to, the vice president, without any authority whatever, undertook to borrow an enormous sum in the name of his bank. The transaction was out of the ordinary course of business, and the bank received no advantage therefrom. The judgment of the circuit court is affirmed.

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CHICAGO LUMBERING CO. v. HEWITT et al.

(Circuit Court of Appeals, Sixth Circuit. October 22, 1894.)

No. 192.

EVIDENCE—BOOKS OF ACCOUNT.

A book in which one person sets down the total amount of logs scaled from memoranda furnished him by another person, who did the work, is not admissible to prove the amount of logs scaled, unless supplemented by the testimony of the person furnishing original data.

In Error to the Circuit Court of the United States for the Western District of Michigan.

Action by Henry Hewitt and Elisha D. Smith against the Chicago Lumbering Company. Plaintiffs recovered judgment, and defendant brings error.

The plaintiff in error, the Chicago Lumbering Company, has a large saw-mill near the mouth of the Manistique river, which empties into Lake Michigan from the Upper Peninsula of Michigan. About two miles above the mill of appellant is a mill called the "James," and owned by the defendants in error. There was a boom across the river above each mill. Logs to supply these mills were put into the Manistique from 2 to 70 miles above its mouth. The Indian river emptied into the Manistique between said mills. Plaintiffs in the court below owned lumber lands on the Manistique from 25 to 40 miles above defendant's mill, and on the Indian river from 15 to 20 miles above said mill. Both of said streams are very winding and crooked, and in some places have low banks and bayous, extending out into the woods from the stream. Plaintiffs were having their logs sawed at the James mill. Those on the Manistique were floated down that river until they reached the James. Those on the Indian river were floated down that river to the Manistique, and then towed up to the James. Plaintiffs, in the fall of 1880, made an oral bargain with defendant that it would saw and pile on its dock for shipment all the logs which should escape from the James boom into defendant's boom, and all logs which the James mill could not saw, and which plaintiffs should pass into defendant's boom. The evidence tended to show that all logs cut on the Manistique and its tributaries could go nowhere save into one of these booms, and that the logs escaping from the James boom must go into that of the defendant. There was evidence that logs were liable to escape from defendant's boom, and go out of the river into Lake Michigan; and that some of plaintiffs' logs did thus escape into Lake Michigan, and were not brought back by defendant. Evidence was given of the circumstances attending this loss of logs. Plaintiffs claimed that this evidence showed negligence in defendant.

Plaintiffs' evidence tended to show that while defendant was sawing their logs some portion of the lumber was carelessly mixed with defendant's lumber, and not delivered to plaintiffs. Defendant's evidence tended to show that there was very little of this, and that as much of defendant's lumber got mixed with and was delivered to plaintiffs as there was of plaintiffs' lumber which became mixed with that of defendant. There was no proof of the quantity of plaintiffs' logs which escaped into the lake, or of their lumber which got mixed with that of defendant. Plaintiffs' evidence tended to show that in the winters of 1879-80, 1880-81, 1881-82, 1882-83, they had cut and put into the Manistique and Indian rivers and their tributaries, according to the scale of logs made in the woods, 15,346,191 feet, board measure; that said logs were driven down these rivers, and must have gone to the James mill, or that of defendant; that said drives were what the lumbermen call "clean drives," and that not exceeding 1 per cent. were hung or sunk. Plaintiffs' evidence also tended to show that the amount of lumber cut at the James mill for them in the years named was 11,036,476 feet, and that the amount received from defendant was 2,119,000. Plaintiffs claimed that they were entitled to recover for an amount of lumber equal to the difference between the wood scale and the amount they received from the James mill and the defendant. This difference is stated in the declaration as 1,323,200 feet, but the amount the evidence is claimed to show is 2,190,715.

To maintain the issue presented by the plaintiffs below, and for the purpose of showing the quantity of logs put into the river above the boom of the Chicago Lumbering Company, they called one Patrick McFadden as a witness, who, being sworn, testified that he was foreman at a lumber camp of the plaintiffs on one of the tributaries of the Indian river in the winter of 1879 and 1880, looking after their lumbering operations at that point, and that a quantity of pine saw logs was put into the stream from that

point, and driven down the river as part of the entire quantity above mentioned. He testified further that the logs cut at said camp during that winter and put into the stream were scaled by one Foley; that witness' duty was to see that they were scaled in good order; that said Foley kept a tally of his scales upon tally boards hung on a piece of wire, putting down on these boards the length of each log and the number of feet it contained; that this tally on the board was kept in pencil, and rubbed off at night; that every evening the witness and said Foley would sit down and figure up from the tally board the quantity of logs so scaled during the day, and Foley and the witness set down in a book the date and the total number of feet scaled during the day according to said tally boards; and he examined Foley's scaling, sometimes twice and sometimes three or four times a day; that this book gives the tally of the logs scaled,—referring to scale book in court, which scale book was offered in evidence. Evidence was further given tending to show that said scaler, Foley, could not be found so as to obtain his testimony in regard to said scale. Said plaintiffs' counsel therefore offered in evidence the book so made by the witness McFadden from the tally boards so kept by scaler, Foley, during said winter, purporting to show the year and day of the month, and the total footing of each day's scale, and the number of logs scaled each day. Defendant's counsel objected thereto on the ground that the report of said scale was hearsay, and further, that said book did not purport to be a copy of the tally boards, but was simply the gross amount of the scale each day as put down by the witness, and that said book was incompetent as evidence to show the amount of timber so scaled during that winter. The court overruled said objection, and admitted said book as evidence, and to said ruling defendant's counsel excepted. Other testimony of like character as to logs scaled by other scalers was offered, and received over the objection of plaintiff in error. There was judgment for the plaintiffs below for \$2,607.70.

C. A. Kent, for plaintiff in error.

F. O. Clark, for defendants in error.

Before TAFT and LURTON, Circuit Judges.

LURTON, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The ruling under which the book kept by the witness McFadden was admitted as evidence seems to have been rested upon the ground that the evidence afforded by Mr. McFadden's entries was the best evidence of the facts sought to be proven which it was in the power of the plaintiffs to produce. It is true that the book is one which had been kept by the witness, and the entries offered had been all made by him. But it is equally true that the data upon which those entries had been made had been obtained from another, and that the witness had no such personal knowledge as to the correctness of these data as to enable him to say anything more than that he had correctly recorded the results obtained from data furnished by another. McFadden's book was not even a copy of the temporary memoranda made by Foley. Foley's data constituted a detailed statement as to the number, length, and lumber contents of each log placed in the river during the day; while the book entry showed only the aggregate lumber contents of the logs, ascertained by adding together the separate contents of each log as noted on the tally board. The mere fact that a temporary entry is made on a slate, or by chalk scores, or, as in this case, by pencil memoranda on tally boards, for the purpose of convenience and aiding the memory until a book entry could be made at the close of the day, would not operate to deprive such

subsequent entry of the character of an original entry, nor the book in which it was made of its character as an original book of accounts. *Whitney v. Sawyer*, 11 Gray, 242; *Faxon v. Hollis*, 13 Mass. 427; *Smith v. Sanford*, 12 Pick. 139. The original rough memoranda are not books of original entry, and need not be produced; and the fact that such memoranda had been made to aid the memory until a formal entry could be made will not make the book into which they were at once transcribed secondary evidence. *Whart. Ev.* § 682. The difficulty in this case lies in the fact that the book entries were made from the tally-board memoranda by a person other than the one who made the tally-board entries, and who knew nothing of the correctness of the data transcribed. That McFadden was able to testify that his additions were correct, and that he had correctly entered the sums thus ascertained, is not enough. The fact which it was important to the plaintiffs to prove was the lumber contents of the logs placed in the river above the defendant company's boom from the camp of which McFadden was foreman. What McFadden knew was that Foley, whose duty it was to scale the logs put in the river each day from that camp, had by his tally-board memoranda reported a given number of logs, containing, when aggregated, a given number of feet, as having been set afloat on a particular day. If McFadden had made his entries from oral statements made by persons having knowledge of the number and contents of logs floated each day, such entries would not have been competent without calling the persons who knew the facts, and on whose authority the entries had been made. Is there any distinction in the evidential value of entries made on the oral statement of clerks or servants who know the facts and memorandum made for convenience in aiding the memory of such clerks or servants? We can see none. Mr. McFadden's book could not refresh his memory as to the facts sought to be established by his entries, for the obvious reason that he had no personal knowledge of the truth of the facts recorded by him. That the book was not admissible to refresh McFadden's memory is therefore most obvious. Whether memoranda made by a witness of facts concerning which he had personal knowledge are admissible as independent evidence, or for any other purpose than to refresh the memory of the witness, is a question upon which there is great conflict of authority, and an open question in the courts of the United States. *Bates v. Preble*, 151 U. S. 157, 14 Sup. Ct. 277. Was this book receivable as independent evidence under the common-law rule concerning the admission of books of account? In the case last cited, Mr. Justice Brown said:

"There is no doubt that books of accounts, kept in the usual and regular course of business, when supplemented by the oath of the party who kept them, may be admitted in evidence," etc.

He adds:

"But whether this rule extends to memoranda made by a witness contemporaneously with the event they purport to record is open to very considerable doubt, courts and elementary writers being about equally divided on the subject. 1 *Greenl. Ev.* § 437, note 3; 1 *Smith, Lead. Cas.* (6th Am. Ed.) 508, 510. In New York they are held to be admissible. *Halsey v. Sinse-*

baugh, 15 N. Y. 485. The cases in Massachusetts apparently favor a different view. *Com. v. Fox*, 7 Gray, 585; *Duggan v. Mahoney*, 11 Allen, 572; *Com. v. Ford*, 130 Mass. 64; *Com. v. Jeffs*, 132 Mass. 5."

The book involved is not what the common-law rule denominates a "tradesman's book." In no true sense was it a book of accounts at all. At most it purports to contain memoranda made contemporaneously with the fact which they purport to record. That fact is the aggregate lumber contents of the logs placed in the river on each of a series of days from a lumber camp above the sawmills of the company for which they had been cut. If admissible as independent evidence at all, it must be, not because the book is technically an account book, but upon some rule making memoranda made by a witness admissible as independent evidence of the truth of the facts thus recorded.

The case of *Chaffee v. U. S.*, 18 Wall. 516, is much in point, inasmuch as the certificate book there received as evidence was subject to the objection that it was not strictly a book of accounts, nor was it kept by one who personally knew the correctness of the facts recorded. There, as here, the memoranda were based on data furnished by others. The court in that case said that for the admissibility of such entries the rule required, "not merely that they shall be contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts, and be corroborated by their testimony, if living and accessible, or by proof of their handwriting, if dead or insane, or beyond the reach of the process or commission of the court." It added: "This knowledge of the party making the entry is essential to its admissibility." *Id.* 541. In *Insurance Co. v. Weide*, 9 Wall. 677, the suit was for the value of a stock of goods destroyed by fire. The stock inventories had been destroyed, as well as some of the books of accounts. A daybook and ledger were offered in evidence, and a memorandum on the fly leaf of the ledger, containing an abstract from the lost inventories. The books and this fly-leaf memorandum were admitted in evidence. Mr. Justice Nelson, in an opinion sustaining the ruling, saying:

"There can be no doubt but the daybooks and ledger, the entries upon which were testified to be correct by the persons who made them, were properly admitted. They would not have been evidence, per se, but, with the evidence accompanying them all, objection was removed."

The abstract on the fly leaf was also held admissible, proof of the loss of the original inventories being made, and the correctness of the facts shown by the memorandum having been testified to by the plaintiff who made the entry.

But it is argued that *Foley* could not be found, and that, therefore, the memoranda made upon his knowledge were admissible. This contention is sought to be supported by the rule stated by Mr. Justice Field, and heretofore quoted. The observation of Mr. Justice Story in *Nicholls v. Webb*, 8 Wheat. 331, is also thought to justify such an extension of the rule of evidence. That observation quite meets our approval. It was this:

"The rules of evidence are of great importance, and cannot be departed from, without endangering private as well as public rights. Courts of law



are, therefore, extremely cautious in the introduction of any new doctrines of evidence which trench upon old and established principles. Still, however, it is obvious that, as the rules of evidence are founded upon general interest and convenience, they must, from time to time, admit of modifications, to adapt them to the actual condition and business of men, or they would work manifest injustice."

When the principle so well stated by Judge Story is invoked to induce an extension of the rules of evidence relating to books of accounts, it should be borne in mind that, since the parties to a suit are no longer incompetent as witnesses, books of account are deprived of much of the peculiar significance which formerly attached to them. It was always competent for a litigant to call his clerk or other stranger, who had personal knowledge of the correctness of the book entry, to testify, using the book, if the witness had kept it, as a means of refreshing his memory. So in this case Foley was a competent witness to the correctness of the memoranda shown by the tally boards. Did the book kept by McFadden become competent independent evidence because Foley could not be found and produced as a witness? There is nothing, when rightly understood, in either *Chaffee v. U. S.*, or *Nicholls v. Webb*, which will justify such a conclusion. In the case last cited the question was whether the book kept by a notary public, showing his action upon commercial paper placed in his hands to be protested, could be used as evidence of the facts there recorded by the notary after his death. The opinion was by Mr. Justice Story, and the rule concerning such books was thus stated:

"We think it a safe principle that memoranda made by a person in the ordinary course of his business, or acts or matters which his duty in such business requires him to do for others, in case of his death, are admissible evidence of the acts and matters so done. It is, of course, liable to be impugned by other evidence, and to be encountered by any presumptions or facts which diminish the credibility or certainty. A fortiori, we think the acts of a public officer, like a notary public, admissible, although they may not be strictly official, if they are according to the customary business of his office, since he acts as a sworn officer, and is clothed with public authority and confidence." 8 Wheat. 336.

Now, if Mr. McFadden had made these entries from his own personal knowledge, the book might have been competent evidence for the plaintiff, upon evidence of that fact and of the further fact that he was "dead or insane, or beyond the reach of the process or commission of the court." In this case, McFadden knew nothing of the correctness of the facts which he recorded. His death or absence could not make admissible evidence which was inadmissible if he were present. As the entries were not made by Foley at all, the book not being one kept by him, his declarations, either written or verbal, were incompetent as supplementing a book which he had not kept. To extend the admissibility of books founded on the declaration of absent or dead witnesses is not authorized by decided cases, and would not be justified by our idea of a wise policy. The failure of the appellees to produce Foley was doubtless due to their great laches in bringing this suit; several years having elapsed after their action accrued before this suit was begun. Their negligence should not operate to place their adversaries under all the disad-

vantages consequent upon being subjected to the effect of hearsay evidence. For the error in the admission of this book, the judgment must be reversed, and a new trial awarded.

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Ex parte LENNON.

(Circuit Court of Appeals, Sixth Circuit. October 2, 1894.)

No. 175.

1. HABEAS CORPUS—EFFECT OF WRIT.

The writ of habeas corpus does not perform the office of a writ of error or an appeal in respect to the proceedings complained of, if, in such proceedings, the court had jurisdiction of the subject-matter and of the person.

2. FEDERAL QUESTION—INTERSTATE COMMERCE.

A suit by which a railroad company engaged in interstate commerce seeks to restrain other railroad companies, having relations with it in such commerce, from refusing it the rights and privileges accorded it by law, as an agency in such commerce, is one involving a federal question, since it seeks to enforce rights secured by the interstate commerce act.

3. INJUNCTION—VIOLATION OF—NOTICE.

It is not necessary, in order that a person should be bound to obey an injunction restraining a party to a suit, his agents, etc., from doing an act, that such person should himself be a party to the suit, or should be served with a copy of the injunction order, but it is sufficient that, being such agent, he has actual knowledge that the order has been made, to make him liable to punishment if he aids or assists the party to violate the injunction.

Appeal from the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

Application by James Lennon for a writ of habeas corpus. The circuit court denied the application, and the petitioner appeals.

This was a proceeding by habeas corpus instituted in the court below by the petitioner, James Lennon, to be relieved from imprisonment to which he was committed to enforce the payment of a fine imposed by that court upon him for the violation of an injunction ordered by it in a cause therein pending between the Toledo, Ann Arbor & North Michigan Railway Company, as complainant, and the Lake Shore & Michigan Southern Railway Company and five other railroad companies and two managing officers of other companies, as defendants. The circumstances out of which the present proceedings grew were substantially these: The locomotive engineers of the first-named railway had, in current phrase, "gone out on a strike." The Associated Brotherhood of Locomotive Engineers, to which they belonged, and of which the engineers on the Lake Shore & Michigan Southern and the other railroad companies were members, had taken up their cause, and indicated their purpose to refuse to take from or deliver to the Toledo, Ann Arbor & North Michigan Railway Company cars of freight coming from or destined to points on the line of that road, the natural consequence of which would be to compel the other railroad companies to discontinue interstate freight traffic relations with it. The Toledo, Ann Arbor & North Michigan Railway Company, finding itself in this situation, hampered and impeded in its business, filed its bill in the court below against the several railroad companies and officers above mentioned, setting forth its employment and agency in interstate commerce, and its relations with the other railroad companies in that business, and that these companies threatened to refuse and deny to it the rights and privileges accorded to it by law as an agency in such commerce, by refraining from receiving from or delivering to it freight which was in course of transportation from state to state, and praying for an in-

junction restraining the defendant companies, their officers, agents, servants, and employes, from refusing to offer to the complainant all reasonable and proper and equal facilities for the interchange of traffic with it; from refusing to receive from the complainant, for transportation over their respective lines, any and all cars of freight which might be tendered to them by it; and from refusing to deliver to the complainant all cars of freight which might be billed over its line of railroad. Upon the filing of this bill, the court awarded an injunction against the defendants therein, ordering and enjoining them, their officers, servants, agents, and employes, in the terms, substantially, as prayed in said bill. The injunction was issued accordingly, bearing date March 11, 1893. The petitioner was a locomotive engineer in the service of the Lake Shore & Michigan Southern Company, and a member of the association above mentioned. On the following 18th day of March, the complainant in that suit made an application to the court, stating that the petitioner and others having notice of the injunction had violated it, in that they had refused to haul certain cars laden with interstate freight, standing on the tracks and in the yards of the Lake Shore & Michigan Southern Railway, destined to delivery at points along the line of the Toledo, Ann Arbor & North Michigan Railway by the said last-named railway; that they had refused to obey the order and mandate of the court, and had deserted their locomotives and engines for the reason that they were required to haul the freight going to the Toledo, Ann Arbor & North Michigan Railway Company,—and praying that they be arrested and punished for their contempt. An order of arrest was issued, and the petitioner and others were brought before the court. The petitioner pleaded not guilty. A hearing was had, and evidence was adduced by both sides upon the issue thus made. The court, upon hearing the evidence and arguments of counsel for the respective parties, found the petitioner guilty, and adjudged him to be in contempt, and that he pay a fine of \$50 and costs, and stand committed until the fine should be paid. These proceedings, including the opinion of the court therein, are reported in Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. 746. The petitioner thereupon resorted to the same court for a writ of habeas corpus, and, this being denied, he appealed to the supreme court of the United States. That court, holding that it had no appellate jurisdiction in the case, dismissed the appeal. *In re Lennon*, 150 U. S. 393, 14 Sup. Ct. 123. He then renewed his application to the circuit court for the writ, and, that being denied, he brings his case here by appeal.

G. M. Barber, Frank H. Hurd, and J. H. Southard, for appellant.  
George C. Greene, for L. S. & M. S. Ry. Co.

Before LURTON, Circuit Judge, and BARR and SEVERENS, District Judges.

SEVERENS, District Judge, having stated the case as above, delivered the opinion of the court.

In exercising its jurisdiction upon this petition, the circuit court was bound to observe the well-settled rule that the writ of habeas corpus does not perform the office of a writ of error or an appeal, in respect to the matters of fact involved in the proceedings complained of. If, in those proceedings, the court had jurisdiction of the subject-matter and of the person, the validity of its judgment cannot be collaterally attacked on this writ for error in the original suit, nor can the truth of the facts there found be controverted in the new and collateral proceedings. *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77; *Cuddy*, Petitioner, 131 U. S. 280, 9 Sup. Ct. 703; *Savin*, Petitioner, 131 U. S. 264, 9 Sup. Ct. 699; *In re Tyler*, 149 U. S. 167, 13 Sup. Ct. 785; *U. S. v. Pridgeon*, 153 U. S. 48, 14 Sup. Ct. 746. In the latter case it was said by Mr. Justice Jackson, in delivering the

opinion of the court, that "under a writ of habeas corpus the inquiry is addressed, not to errors, but to the question whether the proceedings and the judgment rendered therein are for any reason nullities; and, unless it is affirmatively shown that the judgment or sentence under which the petitioner is confined is void, he is not entitled to his discharge." See, also, *Church, Hab. Corp.* 227; *Turner v. Conkey*, 132 Ind. 248, 31 N. E. 777. This court is, of course, bound by the same rule in determining the case on appeal. If the conviction and punishment ordered by the court were not open to an appeal, it was none the less final on that account. In the case of *Johnson v. Wharton*, 152 U. S. 252, 14 Sup. Ct. 608, the defendant sought to obviate the conclusive effect of a former judgment between the same parties in a suit tried and determined in a circuit court of the United States, upon the ground that the amount of that judgment was too small to enable the defendant to obtain a review in a court of error. The defendant was, however, held concluded by the former judgment, Mr. Justice Harlan, delivering the opinion of the court, saying that "the question is not controlled by the inquiry whether the judgment in the first action could be reviewed upon appeal or writ of error." In that opinion the rule was spoken of as a general one, "having its foundation in a wide public policy, and deeply imbedded in the jurisprudence of all civilized countries, that the final judgment of a court—at least one of general jurisdiction—competent, under the law of its creation, to deal with the parties and the subject-matter, and having acquired jurisdiction of the parties, concludes those parties and their privies in respect to every matter put in issue by the pleadings and determined by the court."

The errors assigned by the petitioner are four in number. The first is that the court erred in holding that there was a federal question presented by the bill of complaint, and that on that account it had jurisdiction of the case in which the order of injunction was issued. In support of this assignment it is argued that although the bill avers the citizenship of the complainant to be in the state of Michigan, and that of the defendants to be in other states, yet that it was subsequently developed in the proof that the Michigan Central Railroad Company, one of the defendants, was a citizen of Michigan, instead of Ohio, as alleged in the bill. While this is not technically a federal question, and so not strictly within the assignment of error, we shall disregard the variance. It may well be doubted whether, in view of the fact that defective and insufficient allegations of citizenship in the pleadings do not render the proceedings and judgments of the circuit courts absolutely void, but only voidable on error or appeal, the petitioner has any standing on which he can collaterally attack the jurisdiction on such ground, and set up for himself the privilege of determining that question for the court, and thereupon treat its mandate as void. *Kemp's Lessee v. Kennedy*, 5 Cranch, 173; *Skillerns v. May's Ex'rs*, 6 Cranch, 267; *Cameron v. McRoberts*, 3 Wheat. 591; *McCormick v. Sullivant*, 10 Wheat. 192; *Ex parte Watkins*, 3 Pet. 193. These and other later cases are reviewed in *Dowell v. Applegate*, 152 U. S.

327, 14 Sup. Ct. 611, where it was declared that the doctrine had been already established that a judgment or decree of a circuit court of the United States cannot be collaterally assailed, or treated as a nullity, even though its jurisdiction as to citizenship do not appear on the record. But there can be no doubt whatever that, so far as concerns the petitioner, the court had jurisdiction of the case. If the citizenship of the Michigan Central Railroad Company was not as stated in the bill, it was the privilege of that defendant to raise the question, and have the bill dismissed as to it, and thereupon the suit could proceed against the other defendants. *Horn v. Lockhart*, 17 Wall. 570. Upon the record, the requisite citizenship existed. It could not be tolerated that the petitioner should, upon an assumption that the bill would be challenged and disproved in this particular, undertake to defy an order of the court to which he was subject. But, independently of the citizenship of the parties, the case was one in which the complainant sought to enforce rights secured to it by a law of the United States; that is to say, the interstate commerce act. Although some criticism of the allegations of the bill in that regard is made by counsel for petitioner in the second branch of the argument on this head, and although it may be admitted that the pleading is not very precise, yet we think it sufficiently appears from the bill that the complainant therein set up rights accorded to it by that act, and sought relief from the court against their threatened violation. The contention, therefore, that the court had no jurisdiction of the case in which the proceedings for contempt took place, is not sustained.

Secondly, it is assigned as error that the court found that petitioner had such notice and knowledge of the order of injunction as to be punishable for a violation of its provisions. The argument is that—First, the petitioner was not a party to the suit; and, second, that he was not served with the order of injunction, or with a copy of it. As to this, it is not necessary that one should be a party to the suit in which an injunction issues, in order to render him liable to punishment for a violation of it. Any person who, having notice that such an order has been made against a party to the suit, aids and assists that party in its violation, is as much amenable to proceedings for contempt as if he were a party named in the record. *Wellesley v. Mornington*, 11 Beav. 181; *Rorke v. Russell*, 2 Lans. 242; *High, Inj.* § 1435. This rule is of peculiar application where the actual party is a corporation, for in such case the act enjoined, if done at all, must be done by some officer, agent, or servant to whose province the particular act relates. In the present case, the conduct imputed to the petitioner was one actively and directly impelling the Lake Shore & Michigan Southern Railway Company, whose servant he was, to the violation of the order of the court. In respect to the objection that he was not served with the injunction, or a copy of it, it is to be said, also, that this was not necessary. If he had notice of the fact that it was ordered, that was enough. *High, Inj.* § 1422, and cases there collected. But it is contended that the evidence on the hearing in the proceedings for contempt did not prove that he had such notice.

This question was raised and fully litigated on that hearing, and the court held against the petitioner. We are very strongly inclined to think that the question was concluded by that finding. But if that point were still open in the case, upon the suggestion that the court could not acquire jurisdiction over the petitioner without evidence of the necessary fact by simply deciding that it had such jurisdiction, reference to the proof which is in the present record shows that there was ample evidence from which the court could have found that the petitioner had notice of the order. It is claimed that the evidence showed that the petitioner, when required to take the objectionable car into his train, quit the service of his employer; but the evidence showed that he was shortly after in its service, and it was a question for the court whether his quitting was actual or otherwise. It is therefore unnecessary for us to discuss the question under what circumstances a locomotive engineer may quit the service of his company.

The third and fourth assignments of error are concluded by what has already been said. They are that the court "erred in holding that the acts set out in the affidavit were in violation of the order of injunction," and that "it erred in holding that under the facts, as stated in the bill, in connection with those set forth in the affidavit and those proven at the hearing, a court of equity had jurisdiction to issue the injunction which was issued in the case, and to punish appellant for contempt in disobeying its command." It is manifest that these are, in substance, mere allegations of error in the findings of fact and law by the court in the proceedings for contempt; and, under the rule preliminarily referred to in this opinion, they were not reviewable in the court below in this proceeding, nor can they be reviewed here. If there be an exception to this proposition in the fourth assignment, in so far as it refers to the jurisdiction of the court, it is covered by the points already decided. The question is much discussed by counsel for the petitioner in their brief whether the court could rightfully award what is termed a "mandatory injunction" in the principal case. Whatever objection there might be to this, it touches, not the jurisdiction, but the propriety of its exercise upon the then existing facts. Undoubtedly, a court of equity has authority to order an injunction of that kind. Whether it should do so in a given case is a matter depending upon its view of the facts, and, even though there should be error in the decision, that does not affect the validity of the order. It must be respected until reversed. The power and duty of the court in ordering such a writ were fully considered in an opinion delivered by Judge Taft upon a motion for an injunction against still other parties in the original suit out of which the present proceeding issued. *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730.<sup>1</sup> We abstain from any consideration of the subject now, for the reason that that branch of the case has been brought here for review, and because, also, we are of opinion that the question whether the order here involved was a proper one, in the circumstances, cannot be collaterally reviewed in this proceeding. It follows that the order appealed from should be affirmed.

<sup>1</sup>The appeal in this case has been voluntarily dismissed since this opinion was filed.

KING v. McLEAN ASYLUM OF THE MASSACHUSETTS GENERAL HOSPITAL et al.

(Circuit Court of Appeals, First Circuit. June 4, 1894.)

No. 95.

1. CIRCUIT COURT OF APPEALS — JURISDICTION — DETERMINING CIRCUIT COURT JURISDICTION.

The rule that, under the act creating the circuit court of appeals (section 5, cl. 1), such court has jurisdiction over questions touching the jurisdiction of the circuit courts, unless the issue has been made in the court below and certified to the supreme court as directed by the act, notwithstanding section 6 apparently deprives the circuit court of appeals of such jurisdiction, is not limited by the subsequent clause of section 5, touching cases involving the construction or application of the United States constitution; and the circuit court of appeals has jurisdiction, on appeal by a petitioner for a writ of habeas corpus from a judgment remanding him to the custody of an insane asylum, to pass on the jurisdiction of the circuit court, when such jurisdiction is challenged on constitutional grounds.

2. HABEAS CORPUS — JURISDICTION OF CIRCUIT COURT — SUFFICIENCY OF PETITION.

A petition for a writ of habeas corpus, which merely alleges that petitioner is restrained in violation of the constitution and laws of the United States, and is illegally imprisoned without due process of law, but does not set out in detail anything touched by the federal laws or constitution, does not state facts giving the circuit court jurisdiction.

3. SAME — INSANE PETITIONER — APPEAL BY PROCHEIN AMI.

The prochein ami of an insane petitioner for a writ of habeas corpus may appeal from a judgment of the circuit court remanding petitioner to an insane asylum, and may prosecute such appeal until especially challenged for some cause, or until the circuit court of appeals, for some reason satisfactory to it, appoints a guardian ad litem therein; and it is for this purpose immaterial whether such prochein ami was superseded as such in the circuit court.

4. SAME — REMAND OF INSANE PETITIONER — CONTEMPT — REMOVAL OF PETITIONER.

An insane petitioner for a writ of habeas corpus was remanded by the circuit court for the district of Massachusetts to the custody of the McLean Asylum of the Massachusetts General Hospital. Afterwards, he was removed from such asylum to the Butler Insane Asylum, at Providence, within the district of Rhode Island, but within the same circuit. After such removal a citation on appeal by his prochein ami was allowed, and the circuit court ordered that, pending the appeal, petitioner should not be removed from the jurisdiction, but should remain in the district of Massachusetts, subject to the further order of court. Afterwards, the circuit court of appeals ordered that petitioner go into and remain in the custody of the marshal of the district of Rhode Island, at the said Butler Insane Asylum, until the further order of the court, and that such order was without prejudice to any question. *Held*, that a petition by such prochein ami, in the circuit court of appeals, for process of contempt because of such removal, should be dismissed.

5. SAME.

Nor under the circumstances of this case can rule 33 of the circuit court of appeals form the basis of an attachment for contempt by such court because of the removal of petitioner to another district, after the judgment remanding him.

6. SAME.

In such case, Rev. St. § 765, which relates to proceedings on appeal to the supreme court authorized by section 764, as amended by Act March

3, 1885 (23 Stat. 437), does not apply, since such section has no reference to appeals to the circuit court of appeals, which do not depend on Rev. St. §§ 763, 764, but on the act establishing such court.

This was a petition by William H. King, by Caleb Eaton, his next friend, for a writ of habeas corpus. The circuit court discharged the writ, and remanded petitioner to the custody of the McLean Asylum of the Massachusetts General Hospital. Petitioner appealed. After appeal, appellant filed a petition for a process of contempt, on the ground that he had been removed from such asylum, in the district of Massachusetts, to the Butler Insane Asylum, at Providence, within the district of Rhode Island.

Edward Avery, Henry Hyde Smith, and James Tillinghast, for petitioner.

George O. Shattuck, William F. Wharton, and William A. Munroe, for Massachusetts General Hospital, McLean Asylum.

William F. Wharton, for Edward Cowles.

George O. Shattuck, for the Butler Hospital.

George O. Shattuck, Richard L. Sweezy, and William A. Munroe, for George Gordon King.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

PUTNAM, Circuit Judge. This hearing was based on two petitions,—one filed by the appellant on the 15th day of May, 1894, setting out that since the writ was discharged in the court below, and the petitioner, King, remanded to the custody of the McLean Asylum of the Massachusetts General Hospital, one of the appellees, the petitioner was removed from that asylum and out of the district of Massachusetts, to the Butler Insane Asylum, at Providence, within the district of Rhode Island, but within this circuit, and therefore praying for process for contempt, and also praying the protection of the court, that the petitioner may be forthwith taken into its custody, and that "he shall be brought and had before this court, to be dealt with as to justice and right shall appertain." The other petition was filed on the 22d day of May, 1894, by the Massachusetts General Hospital, praying for dismissal of this appeal; but it need not be stated, except as hereinafter referred to.

Ordinarily, the first question for consideration is that of the jurisdiction of this court; but it is more convenient, in the present case, to look at the outset at that of the jurisdiction of the circuit court. This is sought to be maintained on two grounds,—one, that the petition for the writ of habeas corpus raises a federal question, —and the other, that it shows diverse citizenship.

Notwithstanding the letter of the act establishing this court, as found in the opening paragraph of the sixth section, apparently deprives this court of jurisdiction over fundamental questions touching the jurisdiction of the circuit courts, yet, in view of the provision found in the first clause of the fifth section for especially certifying questions of that particular class to the supreme court, that court has held that, notwithstanding that clause, we have jurisdic-



tion over such questions, unless the issue has been made in the court below and certified to the supreme court as directed by the statute. We need cite only the latest cases on this point. *Carey v. Railway Co.*, 150 U. S. 170, 14 Sup. Ct. 63, and *Maynard v. Hecht*, 151 U. S. 324, 14 Sup. Ct. 353. These decisions render it unnecessary that we should consider *Manufacturing Co. v. Barber*, 9 C. C. A. 79, 60 Fed. 465, or *Sugar-Refining Co. v. Johnson*, 9 C. C. A. 110, 60 Fed. 503. We are clear that this rule is not limited by the subsequent clause of the same fifth section, touching cases involving the construction or application of the constitution of the United States, and that we have jurisdiction, on records in the form of that now before us, to pass on the jurisdiction of the circuit courts as much when that jurisdiction is contested on constitutional grounds as when it depends solely on the construction of statutes. In this instance, subsequent enumeration in the statute does not operate as an exclusion. In view of the fact that the jurisdiction of the circuit courts may always be challenged on constitutional grounds, any other interpretation would bring the statute to unfruitful results.

The petition alleges that the petitioner is restrained in violation of the constitution and laws of the United States; but this allegation is only a formal one, covering conclusions of law as well as of fact (*Cuddy*, Petitioner, 131 U. S. 280, 286, 9 Sup. Ct. 703), so that it is necessary to look elsewhere in the petition for specific allegations raising this issue. There are none. It is not claimed that the petition sets out anything touched by the federal laws; and for the rest, while it alleges an illegal imprisonment, without due process of law, it does not show that such process was refused by the state, which is essential under the fourteenth amendment, or by the United States, which is essential under the fifth amendment. The latest statement of this last rule is in *Miller v. Texas*, 153 U. S. 535, 14 Sup. Ct. 874. If the facts set out show any illegal detention, it is only in violation of the common law, or of the statutes of Massachusetts. Therefore, the circuit court had no jurisdiction, unless on the ground of diverse citizenship.

The question thus raised, namely, that of the jurisdiction of the circuit courts in matters of habeas corpus merely on the ground of diverse citizenship, has remained undecided by the supreme court for over a century, although Judge Story, at the circuit, took jurisdiction on this ground, apparently without hesitation. *U. S. v. Green*, 3 Mason, 482, Fed. Cas. No. 15,256. Under these circumstances the question must be regarded as a grave one, and, in the limited time given counsel, they have not had opportunity to discuss it in this case with full apprehension of the original habeas corpus statute, now Rev. St. § 751, nor of the late statutes touching the jurisdiction of the circuit court, nor of the distinction, if any is essential to the proceedings at bar, between cases of mere unlawful detention and those in which the court sits as *parens patriae*. We therefore direct this question to be reargued, in connection with the argument on the merits of the case.

With reference to the jurisdiction of this court, we are first met by the claim that *Eaton*, as next friend, could not take this appeal.

We deem it unimportant to inquire whether he was, either expressly or impliedly, superseded as such in the circuit court. This appeal having sole reference to this court, this court will admit its own *prochein ami* or guardian ad litem, regardless of the circuit court. In favor of liberty, we think we ought to receive the appeal, and admit the *prochein ami*, until he is especially challenged for some cause, or until we, for some reason satisfactory to ourselves, appoint a guardian ad litem in this court. At present there seems no occasion to make this latter appointment. It is intended that all proceedings in the circuit court may be challenged on appeal in habeas corpus cases. In *re Neagle*, 135 U. S. 1, 42, 10 Sup. Ct. 658. And, in favor of liberty, there certainly should be an opportunity to do so. Unless a *prochein ami* may intervene, as has been done in this case, for the purpose of taking an appeal, this general challenge could not be effected when the proceedings had been dismissed below by a *prochein ami* or guardian ad litem, with the approval of the court, as under those circumstances the *prochein ami* or guardian ad litem would not appeal if he could. Circumstances might be such that, if the person in whose behalf proceedings had been commenced had been brought into court on habeas corpus, he might personally intervene by appeal; but, on the other hand, the aid of a *prochein ami*, in cases of this character, including appeals, is necessary for the protection of those who, on account of the rigorous nature of their detention, or of their mental inability, are incapable of acting for themselves. There is no practice which requires us, at the outset, to inquire whether, under the circumstances of this case, King himself had opportunity, or was capable, of taking an appeal in person; and, in favor of liberty, we ought not to do so, as the record now stands, or at this stage of the cause. Wherever a proceeding is commenced by *prochein ami*, the presumption that it was properly so commenced stands until rebutted; and what, under that contingency, would be the further progress of the cause, need not now be considered. It is enough to say that while an appeal or a writ of error is, for some purposes, not an original proceeding, each is so far of that nature that the same reasons which justify the interposition of a *prochein ami* in instituting the original cause may justify the intervention of the same person, or another person, in the character of a new *prochein ami*, to institute such appeal or writ of error. In fact, circumstances can easily be conceived why this should be allowed even when the original suit was brought by the plaintiff or moving party in person or by attorney. That such is the law would be clearly apparent in the event the original plaintiff or other moving party was suddenly stricken by a violent mental disease at the very period of time within which the law permits an appeal or a writ of error to be taken or sued out. *William Henry King's Case*, 161 Mass. 46, 36 N. E. 685, if it touches this point at all, may easily be distinguished by the summary nature of the appeal to which it related, which seems essentially unlike the appeal in the present cause to a new tribunal. At the most, it could not be allowed to control our practice or our discretion. The broad and flexible character of the

rules of practice relating to next friends and guardians ad litem, and their adaptability to reach every case where they can be needed for the protection of those classes which they are intended to protect, or for effectuating natural justice, will be made plain by turning to Story, Eq. Pl. (10th Ed.) § 57, and sequence, and Daniell, Ch. Pr. (5th Ed.) p. 74 et seq.; bearing in mind that the general rules which apply to infants, in this particular, apply also to persons of diseased intellectual powers, and to other classes which need not be enumerated.

If the petition had been so framed that the court below would necessarily pass on some question arising under the constitution of the United States, or had in fact done so, or if this appeal required the consideration of any question of that class, other than that of the jurisdiction of the circuit court, we would be embarrassed by the fourth clause of the fifth section of the act establishing this court, in connection with the first paragraph of the sixth section; but it will be seen from the explanations we have given, and the history of the case, that no constitutional questions were passed on by the court below, or now arise. As the reasons of appeal bring up for review only questions relative to the proceedings of the court below in connection with the guardian ad litem, and exclude the consideration of any touching the construction or application of the constitution of the United States, and especially as it is not certain that the circuit court will ever, even if the case is remanded to it, be required to pass on any constitutional question, our jurisdiction is clear. Although the fourth clause referred to is not inapplicable merely because other questions than those of a constitutional character may be involved, on which the suit might have been disposed of (*Nishimura Ekiu v. U. S.*, 142 U. S. 651, 664, 12 Sup. Ct. 336, and *Horner v. U. S.*, 143 U. S. 570, 577, 12 Sup. Ct. 522), yet it is not enough that the construction or application of the constitution is only incidentally involved, or may possibly come in issue (*Carey v. Railway Co.*, 150 U. S. 170, 180, 14 Sup. Ct. 63; *In re Lennon*, 150 U. S. 393, 401, 14 Sup. Ct. 123). This is the general rule in the application of kindred statutes, as shown in very numerous decisions. *Powder Works v. Davis*, 151 U. S. 389, 14 Sup. Ct. 350. A case of special significance, although it relates to the jurisdiction of the circuit court, is *Mining Co. v. Turk*, 150 U. S. 138, 143, 14 Sup. Ct. 35. There it was held that, when the jurisdiction of a circuit court is invoked solely on the ground of diverse citizenship, the judgment of the circuit of appeals is final, although another ground for jurisdiction in the circuit court may be developed in the course of subsequent proceedings; and in determining this proposition the supreme court referred fully to the construction given in prior cases to the general statutes conferring jurisdiction on the circuit courts in cases involving federal questions.

We now come to the petition filed May 15th, touching the alleged contempt and the custody of the petitioner pending these proceedings on appeal. As the basis of an attachment for contempt, the petitioner relies on the thirty-third rule of this court, and on Rev.

St. § 765. This section relates to the proceedings on appeal to the supreme court especially authorized by the preceding section of the Revised Statutes, which was subsequently enlarged by amendment by the act of March 3, 1885 (23 Stat. 437). It has no reference to appeals to this court, which do not depend on Rev. St. §§ 763, 764, but on the act establishing this court, as construed by various decisions of the supreme court relating thereto, the leading one of which is *Lau Ow Bew v. U. S.*, 144 U. S. 47, 12 Sup. Ct. 517.

Neither was any order made in this case, as provided in the second clause of rule 33, which applies when a writ of habeas corpus is discharged after it has been issued, except only that the petitioner was remanded to the custody from which he had been taken, namely, the Massachusetts General Hospital. No order was made that he be detained in the custody of the court or judge, or be enlarged on recognizance. Subsequently, an order was made by the circuit court, after the citation on appeal was allowed, that pending the appeal the petitioner should not be removed from the jurisdiction, but should remain in the district of Massachusetts, subject to the further order of the court. At that time he had been already removed to the Butler Insane Asylum at Providence, in the district of Rhode Island, but still within this circuit. The circumstances under which the petitioner was removed to that asylum were so clearly such as to negative any intent of disrespect to either this court or the circuit court that we have no occasion to consider whether the circuit court had the power to require the Massachusetts General Hospital to retain the custody of the petitioner, or whether this court has any power to punish for contempt of an order issued by the circuit court, or whether or not the appeal takes effect from the time it is claimed in open court, without any allowance thereof being made by the court (*Jacobs v. George*, 150 U. S. 415, 14 Sup. Ct. 159), or, what is a more difficult question, whether, in view of the limitations with reference to proceedings for contempt imposed on the federal courts by Rev. St. § 725, either the circuit court or this court could proceed for contempt for an act looking to defeat indirectly the result of an appeal which had not been taken, but which might be expected, in the absence of any express order regarding the same. It behooves counsel, who are responsible to the court even where their clients may not be liable for contempt, to caution their clients as to their duty towards the court pending the possibility of an early appeal in cases like this at bar, and to advise them under such circumstances, in case change of custody is desired, to apply to the court touching the same. But we are not now called on to approve or disapprove what was done, or perhaps permitted to be done, as shown by the record now before us, and we refer to it only to prevent its being drawn into a precedent. It is sufficient for all present practical purposes that on the 15th day of May, 1894, this court passed the following order:

"Ordered, that the petitioner go into and remain in the custody of the marshal of the district of Rhode Island, at the Butler Insane Asylum, in Providence, R. I., until the further order of this court. This order as to custody is without prejudice to any question."

For the future, if the court foresees any contingency which may justify it, the court, while appreciating the delicacy of dealing with the custody of persons alleged to be subject to mania or dementia, or other forms of mental or physical weakness, may deem it prudent to direct that before the final judgment of this court is announced the petitioner be brought back within the jurisdiction of the circuit court for the Massachusetts district, and it undoubtedly has the power to do so. It is not to be understood, however, from this, that we decide that an appeal in a matter of habeas corpus brings the body into the custody of this court, any more than on an appeal in an admiralty cause the res is transferred to its custody. We mean by this only that in one case, as in the other, and indeed in all appeals, this court has the power to make all interlocutory orders necessary to effectuate the purposes of the appeal, although this proposition seems to have been doubted in some of the other circuits.

It is ordered that the order entered May 15, 1894, touching the custody of the petitioner at the Butler Insane Asylum, continue until further ordered; that, except so far as effectuated by the above order, the petition filed in this cause by the petitioner May 15, 1894, touching the alleged contempt of court, and as to the custody of the prisoner, be dismissed; and that the petition filed by the appellees for dismissal of this appeal stand over to the final hearing, for reargument on the question of jurisdiction of the circuit court, so far as based on diverse citizenship of the parties to the petition for the writ of habeas corpus.

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KING v. McLEAN ASYLUM OF THE MASSACHUSETTS GENERAL HOSPITAL et al.

(Circuit Court of Appeals, First Circuit. October 12, 1894.)

No. 95.

1. CIRCUIT COURTS—JURISDICTION—HABEAS CORPUS—PARENS PATRIAE.

The circuit courts have no jurisdiction, as parens patriae, to determine, upon habeas corpus, the custody of an insane person, where the question of such custody is one of discretion, as to the place and character of confinement, and not of the legality of any restraint.

2. SAME—DIVERSE CITIZENSHIP.

A petition for a writ of habeas corpus by a citizen of one state, seeking release from illegal restraint by a citizen of another state, is a suit or controversy between such parties; and the circuit court has jurisdiction, upon the ground of diverse citizenship, to issue the writ and determine such controversy, where the question involved is that of the petitioner's legal right to a discharge from restraint, and not one of discretion as to the place or character thereof.

3. PRACTICE—NEXT FRIEND—GUARDIAN AD LITEM.

Where proceedings are instituted in behalf of a party by his next friend, the court has undoubted power to supersede such next friend by a guardian ad litem, who may investigate the circumstances of the party and of the proceeding, and, in its discretion, to stay such proceedings, or direct their abandonment.

4. HABEAS CORPUS—INSANE PERSON—POWER OF CIRCUIT COURT.

K., by his next friend, presented his petition for a writ of habeas corpus, alleging that he was illegally restrained as a lunatic by the M. Asylum; making no specific allegation touching his sanity or insanity, but alleging

defects in the proceedings for his commitment. The return alleged that at the time of his commitment, and at the time of the return, K. was dangerously insane, which the reply neither admitted nor fully denied. A guardian ad litem was appointed by the court, who, after examination, reported, advising against the prosecution of the writ. No testimony was offered by K. or by the next friend to show K.'s sanity. Held that, as the circuit court has no power to provide for the care of a person in K.'s alleged condition, it would be prohibited, both by public policy and humanity, from merely discharging him from custody; and, in the absence of proof of K.'s present sanity, the writ should be dismissed, without regard to defects in the original commitment.

5. SAME—RES ADJUDICATA.

The dismissal by a state court of a petition for a writ of habeas corpus, though accompanied by a formal order that the petitioner remain in custody, does not constitute res adjudicata in a similar petition in a federal court, where, as in Massachusetts, the dismissal would not be a bar to a new proceeding in the state court.

6. SAME—PRACTICE—MODE OF REVIEW.

A proceeding upon habeas corpus is properly removed from the circuit court to the circuit court of appeals by appeal, and not by writ of error.

7. APPEAL—ASSIGNMENT OF ERRORS.

The appellate court will only permit those matters to be assigned for error that were brought to the attention of the court below during the progress of the trial. *Manufacturing Co. v. Joyce*, 54 Fed. 332, followed.

This was a petition by William H. King (by Caleb Eaton, his next friend) for a writ of habeas corpus. The circuit court discharged the writ, and remanded the prisoner to the custody of the McLean Asylum of the Massachusetts General Hospital. Petitioner appealed, pending which he petitioned for a process of contempt, on the ground that he had been removed to an asylum in another district. The contempt proceedings were dismissed (64 Fed. 325), and the cause is now before the court on final hearing.

Edward Avery for appellant.

Geo. O. Shattuck, Wm. A. Munroe, Wm. F. Wharton, and Richard L. Sweezy, for appellees.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

PUTNAM, Circuit Judge. The opinion filed in this case June 4, 1894 (64 Fed. 325), disposed of the question of the jurisdiction of this court, and also of that of the jurisdiction of the circuit court, so far as the latter relates to any alleged restraint contrary to the constitution or laws of the United States, but left open the question of its jurisdiction, so far as based on the diverse citizenship of the parties to the petition. We must dispose of this, because it is necessary to determine whether we should affirm or reverse, or only direct the circuit court to dismiss.

The allegations in the petition touching the citizenship of the petitioner are not in the usual form, and it may well be questioned whether they are sufficient; yet there is so much doubt touching them that the court does not feel itself called on to dismiss the case on this account of its own motion. If the case before the court was one, admittedly, of such degree of insanity in the petitioner

that it was apparent the essential question was of the place and character of his confinement, either for restraint or cure, a very different question would be presented from that which we understand is raised by the record. In that event the circuit court would have been asked to perform the duties ordinarily vesting in a superior court of common law, or in the chancellor, as *parens patriae*; and under such circumstances it would have had no jurisdiction, as we will explain hereafter. We conclude, however, that the strict issue here is that the petitioner is not of unsound mind, to that extent that he is incapable of self-control or self-care, or needs hospital treatment, and that he is entitled to his liberty on the ground that restraint of him as an insane person anywhere cannot be authorized. We have come to this understanding, although the pleadings are not positive on this point. The precise question of jurisdiction thus raised has not been authoritatively determined. In *Re Burrus*, 136 U. S. 586, 10 Sup. Ct. 850, the following occurs on pages 595 and 596, 136 U. S., and at page 850, 10 Sup. Ct.:

"So far as the question whether the custody of a child can be brought into litigation in a circuit court of the United States, even where the citizenship of the opposing parties is such as ordinarily confers jurisdiction on that court, the matter was left undecided in the case of *Barry v. Mercein* [5 How. 103]. Obviously, although the statutes of the United States have since enlarged the jurisdiction of the circuit courts by declaring that they shall have original cognizance, concurrent with the courts of the several states, of all civil suits arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, the difficulty is not removed by this provision, for, as we have already said, the custody and guardianship by the parent of his child does not arise under the constitution, laws, or treaties of the United States, and is not dependent on them. But whether the diverse citizenship of parties contesting this right to the custody of the child could, in the courts of the United States, give jurisdiction to those courts to determine that question, has never been decided by this court, that we are aware of. Nor is it necessary to decide it in this case, for the order for the violation of which the petitioner is imprisoned for contempt is not a judgment of the circuit court of the United States, but a judgment of the district court of the same district."

In addition are the expressions cited on page 595, 136 U. S., and page 850, 10 Sup. Ct., from *Barry v. Mercein*, 5 How. 103, to the effect that the questions involved in writs of habeas corpus are ordinarily incapable of being reduced to any standard of pecuniary value. We are entirely satisfied, however, that none of the statutes relating specifically to the jurisdiction of the circuit courts, and involving money values as a condition of such jurisdiction, including that of March 3, 1875, c. 137 (18 Stat. 470), and that of March 3, 1887, as re-enacted by the act of August 13, 1888, c. 866 (25 Stat. 433), has taken from them jurisdiction of the issue in this case, so far as it can be found, if at all, in any older statute, and that, therefore, we are not required in this case to look for a money value. That such statutes have only a limited range, either in vesting the circuit courts with jurisdiction, or, on the other hand, of divesting them of jurisdiction given them by any authority outside of statutes of that particular class, was settled in *Re Hohorst*, 150 U. S. 653., 14 Sup. Ct. 221. The proposition is also supported by *U. S. v. Mooney*, 116 U. S. 104, 6 Sup. Ct. 304. Here it was held that the

general terms of the act of March 3, 1875, did not invest the circuit courts with jurisdiction over suits for penalties and forfeitures, which had been before exclusively vested in the district courts. The court said (page 106, 116 U. S., and page 304, 6 Sup. Ct.):

"To sustain the contention of plaintiffs [that is, the United States], we must hold that the purpose of section 1 of the act of March 3, 1875, was to repeal by implication, and supersede, all the laws conferring jurisdiction on the circuit courts, and, of itself, to cover and regulate the whole subject. But this construction would lead to consequences which it is clear congress did not contemplate. All the laws in force December 1, 1873, prescribing the jurisdiction of the circuit courts, were reproduced in Rev. St. § 629; and the jurisdiction was stated under twenty distinct heads, eighteen of which had reference to the jurisdiction in civil cases. In sixteen of these eighteen heads the jurisdiction is conferred without reference to the amount in controversy. \* \* \* The act of 1875, it is clear, was not intended to interfere with the prior statutes conferring jurisdiction upon the circuit or district courts in special cases, and over particular subjects. *Bank v. Harrison*, 3 McCrary, 162, 8 Fed. 721. Its purpose was to give to the circuit courts a jurisdiction which the federal courts did not then possess, by enlarging their jurisdiction in suits of a civil nature at common law or in equity, and not to take away from the circuit or district courts jurisdiction conferred by prior statutes, or to divide the jurisdiction which had for so long a time been vested exclusively in the district courts."

Section 751 of the Revised Statutes, giving power to issue writs of habeas corpus, stands, so far as the statutes of March 3, 1875, August 13, 1888, and other statutes of that class, are concerned, on the same footing as section 629, referred to in *U. S. v. Mooney*; so that if section 751, and the original enactment out of which it arose, ever vested in the circuit courts jurisdiction when the issues arose as they arise in the case at bar, that jurisdiction remains unaffected by any other legislation. In *re Louisville Underwriters*, 134 U. S. 488, 10 Sup. Ct. 587, also tends to confirm our conclusions on this point.

It is claimed by the appellees that this proceeding is not a controversy, in the sense of the constitution, and that it is only an inquisition in behalf of the state. The appellees rely even on the method of entitling the cause, but this palpably goes too far. Cases of habeas corpus in the federal courts may, after the writ issues, be entitled in behalf of the United States, as was done in the first one before the supreme court. *U. S. v. Hamilton*, 3 Dall. 17. So that, if the entitling was of effect, we would have here a proceeding in behalf of the United States, over which its courts would clearly have jurisdiction. However, this matter of entitling with the name of the sovereign or state, and substantially all that was formerly said touching the prerogative character of certain writs, have long ceased to be of value. *Com. v. Dennison*, 24 How. 66, 97. It is true that, as claimed by the appellees, Judge Betts, in his opinion in *Re Barry*, 136 U. S. 597, 42 Fed. 113, did say, on page 615, 136 U. S., and page 113, 42 Fed., as follows:

"A procedure by habeas corpus can in no legal sense be regarded as a suit or controversy between parties. It is an inquisition by the government, at the suggestion and instance of an individual, most probably, but still in the name and capacity of the sovereign, to ascertain whether an infant is in this case wrongfully detained, and in a way conducive to its prejudice."



But the latter of his two sentences qualifies the first, and shows that he had in mind the same class of writs which Chief Justice Shaw observed upon, when, in *Com. v. Briggs*, 16 Pick. 203, he said, on page 205, that "as a general rule the writ of habeas corpus, and all action upon it, are governed by the judicial discretion of the court, in directing which all the circumstances are to be taken into consideration." The writ before Judge Betts, as well as that which Chief Justice Shaw was considering, involved only the question of the custody of a child, with reference to which the court sits *parens patriae*, and the remarks of these learned judges were appropriate to that subject-matter. We may as well emphasize at this point the distinction between proceedings under the writ, when they truly involve personal liberty, and proceedings like those before Judge Betts and Chief Justice Shaw, touching the custody of a child,—a distinction which we have already made the basis of our consideration of the issues in this case. The former involve matters of right, but the latter only the exercise of a wise discretion as to care, nurture, or education, and the writ is merely a convenient incident of the litigation. The distinction was well made by Judge Betts, in 136 U. S., on page 602, and in 42 Fed., page 113, as follows:

"The incongruity of awarding proofs, at the instance of husband or wife, to take away an infant child from the parent having it in nurture and keeping, upon the allegation that such keeping is a wrongful imprisonment, is most palpable and striking. It is a bold figure of speech, or rather fiction, to which the law ought not to resort, unless indispensably necessary to be employed in preservation of parental rights, or the personal fondness of the child."

To follow these suggestions to their legitimate conclusion, the inference from them is that where the court proceeds *parens patriae* this writ continues its prerogative character; but where the issue is that of actually illegal restraint the proceeding in the suit of the petitioner, and not of the state. But the appellees rely on a supposed distinction between the use of the word "cases" and the word "controversies" in the section of the constitution defining the federal judicial power. That section uses the word "cases" in the first three clauses, namely, "cases, in law and equity," arising under the constitution and the laws and treaties of the United States, "cases affecting ambassadors, other public ministers and consuls," and "cases of admiralty and maritime jurisdiction." So far it has relation mainly, although not entirely, to the subject-matter of the litigation, and not to the parties involved. It then changes to the word "controversies," and uses this with reference to "controversies to which the United States shall be a party," "to controversies between two or more states," and then, without repeating the word, continues, "between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects." The eleventh amendment to the constitution, which limits the judicial power of the United States with reference to the states, provides that it shall not extend "to any suit" of the class described in it. As to the change in phraseology found in this amendment, the

supreme court very soon,—that is, in 1821,—in *Cohens v. Virginia*, 6 Wheat. 264, after great deliberation, determined in effect that the word "suit" is not so broad as the word "controversy," because the court maintained its jurisdiction on a writ of error, although the defendant was the state of Virginia; pointing out carefully that a proceeding in error is not a suit, although it cannot be denied that it is a controversy. Mr. Justice Iredell, in *Chisholm v. Georgia*, 2 Dall. 419, 431, 432, distinguished between the word "controversies" and the word "cases," in this connection, by confining the former to such as are of a civil nature; and Mr. Justice Story, in the first edition of his *Commentaries on the Constitution*, both in the text, at section 1634, and in the note to section 1668, recognized the possibility of this distinction, but did not positively approve or disapprove it. It has been suggested that the word "all," used in connection with the word "cases," and omitted in connection with the word "controversies," has peculiar force. This does not seem well sustained, but if it were it would not touch the question we are considering. The change under consideration, from the word "cases" to the word "controversies," will be found to have been a mere matter of style, and to have no relation to any limitation or extension of the class of questions to be adjudicated. As we have already said, so long as this section of the constitution speaks especially with reference to the nature of the questions involved, it uses the word "cases," but, when it considers more particularly proceedings having relation to the existence of parties, it uses the word "controversies," probably because, when parties are spoken of as arrayed against each other, literary style suggested the change. A lengthy examination of its history is excusable, because of the interesting character of the topic, and of the clear result to which it brings us. Prior to the adoption of the Articles of Confederation, the powers exercised by congress were of a revolutionary character, and were not accurately defined. Their growth and general features were well explained in *Penhallow v. Doane*, 3 Dall. 54. It was said that:

"The powers of congress at first were, indeed, little more than advisory; but in proportion as the danger increased they were gradually enlarged, either by express grant, or by implication arising from a kind of undefined authority suited to the unknown exigencies that might arise."

Mr. Justice Iredell, in his opinion, on page 92, touching the power of the Congress of the Confederation in prize appeals, said:

"It never was considered that before the actual signature of the Articles of Confederation a citizen of one state was, to any one purpose, a citizen of another. He was, to all substantial purposes, as a foreigner to their forensic jurisprudence. If rigorous law had been enforced, perhaps he might have been deemed an alien, without an express provision of the state to save him. And as an unjust decision upon the law of nations in the case of a foreigner to all the states might, if redress had not been given, have ultimately led to a foreign war, an unjust decision on the same law in one state, to the prejudice of a citizen of another state, might have ultimately led, if redress had not been given, to a civil war,—an evil much the more dreadful of the two. I have made these observations merely as to the propriety that this power should have been delegated, and therefore to show that, if it was assumed without adequate authority, it was not an arbitrary and unnatural assumption of a power that ought exclusively to belong to a single state."

This was a distinct shadowing out of the necessity of the exercise of federal judicial power with reference to every question which might arise between citizens of different states. The Congress of the Confederation did not go, in terms, to that extent, but it did in spirit, because its resolutions of March 6, 1779, embraced the following:

"That congress is by these United States invested with the supreme sovereign power of war and peace; that the power of executing the law of nations is essential to the sovereign supreme power of war and peace; that the legality of all captures on the high seas must be determined by the law of nations; that the authority ultimately and finally to decide in all matters and questions touching the law of nations does reside and is vested in the sovereign supreme power of war and peace."

The context shows that congress had especially in mind in these resolutions prize cases, or, at the most, causes arising under the law of nations, so far as it relates to war and peace; but the underlying principle announced may be involved in any controversy between citizens of different states, who, as the law is now well settled, are entitled in the federal tribunals, under very many circumstances, to appeal, as against each other, to the general commercial law and the rules of international jurisprudence.

The first official appearance of this topic in the convention which framed the constitution was in the ninth of the resolutions of Mr. Randolph, which formed the basis of its deliberations. Nearly all of this resolution, which subsequently became the thirteenth, and afterwards the sixteenth, was akin to those portions of the section of the constitution under consideration, which had more in view the subject-matter of litigation than the parties; and it used the word "cases," except at the very last, where it enlarged to the expression, "and questions which involve the national peace or harmony." This expression is very important, as it ran throughout the proceedings, until they came down to the mere matter of arrangement and style. The following appears (Madison's Debates, p. 332) to have occurred July 18th:

"The thirteenth resolution, 'The jurisdiction of the national judiciary,' etc., being then taken up, several criticisms having been made on the definition, it was proposed by Mr. Madison so to alter it as to read thus: 'That the jurisdiction shall extend to all cases arising under the national laws, and to such other questions as may involve the national peace and harmony,'—which was agreed to, *nem. con.*"

In this broad form, using the sweeping word "questions," than which no word could more explicitly cover every issue of a judicial character, this subject-matter went, without further amendment or discussion, to the committee of detail, as the sixteenth resolution officially sent to it as agreed to by the convention. The committee of detail, of which Mr. Randolph himself was a member, was appointed July 21st, in accordance with the following proceedings:

"It was moved and seconded that the proceedings of the convention for the establishment of a national government, except what respects the supreme executive, be referred to a committee for the purpose of reporting a constitution, conformably to the proceedings aforesaid, which passed unanimously in the affirmative."

The only amendments we need note, which were made by the convention in that part of the draft constitution, reported by the committee, touching the federal judicial power, were as follows: The words "in law and equity" were inserted; but if these were intended as anything more than to shut out, as a matter of greater caution, an implication of limitation, it is to be said that they affect only the word "cases," and not the word "controversies." The provision touching cases arising under the constitution and treaties, and that touching controversies to which the United States shall be a party, likewise came in by amendment. But, except the one relating to cases arising under the constitution, which evidently had been passed over by the committee of detail because the policy of the convention had not been settled in regard to it, these amendments were adopted, *nem. con.*, and there is nothing to show that the failure of the committee to include them was anything more than a failure in detail. All the other amendments were verbal, and in no view was there anything in any of the amendments which affects the question we are considering. After this draft was completed by the incorporation of such amendments as the convention desired, it was sent, September 8th, to a second committee, which also was merely one of style and arrangement. Mr. Bancroft says of this committee as follows:

"The committee to whom the constitution was referred for the arrangement of its articles and the revision of its style were Johnson, Hamilton, Gouverneur Morris, Madison, and King. The final draft of the instrument was written by Gouverneur Morris, who knew how to reject redundant and equivocal expressions, and to use language with clearness and vigor; but the convention itself had given so minute, long-continued, and oft-renewed attention to every phrase in every section that there scarcely remained room for improvement, except in the distribution of its parts."

After the second committee reported, no amendment was made in this part of the constitution we are considering, except by striking out the superfluous word "both." The details of the work of the committee in framing section 2, art. 3, of the constitution, now under consideration, may easily be imagined. In addition to the resolutions which had been adopted, expressing the sense of the convention, there was sent to the committee of detail for its assistance, but without receiving in any way the approval of the convention, Charles Pinckney's draft of a constitution, and also the resolutions of William Patterson. Mr. Pinckney's draft, as it comes to us, is disputed, but no doubt it is sufficiently reproduced on this topic. This and Mr. Patterson's resolutions conformed to each other in certain verbal expressions touching the matter of Federal judiciary jurisdiction; each, throughout, using the word "cases." Mr. Pinckney's draft on this topic is said to have run on as follows:

"One of these courts shall be termed the 'Supreme Court,' whose jurisdiction shall extend to all cases arising under the laws of the United States, or affecting ambassadors, other public ministers and consuls, to the trial of impeachment of officers of the United States, to all cases of admiralty and maritime jurisdiction."

As is well understood, the matter of trials of impeachments dropped out; yet, so far as the rest is concerned, it is apparent that section 2 was framed from Mr. Pinckney's draft, so far as that draft went. But, in order to carry out the direction of the convention touching "such other questions as involve the national peace and harmony," it was necessary to add what further appears, covering questions between various parties; and at this point the word "controversies" was introduced, undoubtedly only for the reason we have already stated.

In this historical sketch we have made no reference to the Articles of Confederation, as they were confessedly of a limited and peculiar character. Our conclusion is that this history of the proceedings of the convention shows a settled purpose to include within the federal judicial jurisdiction all "questions which involve the national peace and harmony," and that the word "questions" includes every issue capable of a judicial determination.

The rulings of the supreme court have been in the direction of the view which we take. In *Smith v. Adams*, 130 U. S. 167, 9 Sup. Ct. 566, Mr. Justice Field groups together, within the same quotation marks, the words "cases" and "controversies," as though they were entirely interchangeable, and he says (page 173, 130 U. S., and page 566, 9 Sup. Ct.), "Whenever the claim or contention of a party takes such a form that a judicial power is capable of acting upon it, then it has become a case or controversy." In *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, the supreme court cites, on page 475, 154 U. S., and page 1125, 14 Sup. Ct., with approval, this phraseology of Mr. Justice Field, and itself, on the same page, and on page 478, 154 U. S., and page 1125, 14 Sup. Ct., uses the same words as interchangeable. It must be admitted that both of these decisions should be classed as relating to cases in law and equity arising under the laws of the United States. These expressions, therefore, so far as the case at bar is concerned, might be regarded as dicta, yet the cases touching the writ of habeas corpus itself come directly in point. In *Holmes v. Jennison*, 14 Pet. 540, it was held that this proceeding constitutes a "suit," within the meaning of that word, as used in the judiciary act of 1789, § 25 (1 Stat. 85). In *Kurtz v. Moffitt*, 115 U. S. 487, 6 Sup. Ct. 148, the court, on page 494, 115 U. S., and page 148, 6 Sup. Ct., said, "A writ of habeas corpus sued out by one arrested for a crime is a civil suit or proceeding, brought by him to assert the civil right of personal liberty against those who are holding him in custody as a criminal." *Ex parte Milligan*, 4 Wall. 2, is still more in point. On page 112 the court said: "In any legal sense, 'action,' 'suit,' and 'cause' are convertible terms. *Milligan* supposed he had a right to test the validity of his trial and sentence, and the proceeding which he set in operation for that purpose was his 'cause' or 'suit.'" The court goes on at considerable length to develop this proposition. Thus it was determined in advance that the pending case is a suit, and therefore a controversy, and also that it is the suit, not of the state, but of the petitioner.

We now come to the question whether congress has vested in the circuit courts of the United States the power which it might constitutionally so vest, to issue the writ of habeas corpus under the circumstances shown by the pleadings now before us, as we have construed them. Before proceeding to examine the history of the legislation of congress and the decisions of the supreme court, it is necessary that we consider the rules for determining the weight to be given the various expressions in the opinion in *Re Burrus*, 136 U. S. 586, 10 Sup. Ct. 850, already referred to. That case arose from a proceeding on habeas corpus, which was determined by the supreme court to have originated in a district court, touching the custody of a child, upon a dispute with reference thereto between its grandfather and its father. The only question necessarily involved was essentially distinct from that in the case at bar, as we have already shown, and jurisdiction could be maintained in the latter without at all involving the judgment in the former. Evidently, the supreme court would not regard itself as bound by *In re Burrus*, beyond what was actually determined by it. There have been numerous instances where certain dicta, especially of the English judges, and certain decisions of the king's bench, common pleas, or exchequer, and even certain rulings at *nisi prius*, have fitted the state of the law so aptly, or have been acquiesced in so long, that they ultimately have been recognized as law, even by the house of lords. Yet, although this court is subject to correction by the supreme court, and although it is bound by any solemn determination by it, nevertheless, in contemplation of law, it is classed among courts of final jurisdiction, and is not only permitted, but even required, to weigh independently all unnecessary expressions, and to refrain from aiding them to crystallize into permanent legal deformities. On this topic we stated, in *Beal v. City of Somerville*, 1 C. C. A. 598, 50 Fed. 647, on page 652, 50 Fed., and page 598, 1 C. C. A., as follows:

"There are many dicta and general expressions touching this matter, some of which had in view the solving of other issues, and some of which were built up from the first class without recognizing the method of its origin. So far as this appeal is concerned, this court must maintain itself as a tribunal of final jurisdiction, notwithstanding the possibility that it may in some form reach the supreme court. If we had a determination in point from that court, it would necessarily conclude us; and, if the question at issue had been met by the United States circuit court of appeals in any other circuit, we should, of course, lean strongly to harmonize with it; but we are obliged to proceed without either. Although, whenever the law is very doubtful, or the propositions complicated, this court may derive great aid from dicta, expressions of learned judges or text writers, or decisions of local tribunals, it cannot permit itself to be bound or embarrassed by them, when the facts naturally and easily lead to such just conclusions as we now seem required to accept."

In *Cohens v. Virginia*, 6 Wheat. 264, Chief Justice Marshall said, on page 399, as follows:

"It is maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to

control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court was investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Since these observations were made, there has been a vast increase in the number of cases coming before the courts for decision, which has necessarily increased correspondingly the liability that opinions—even those filed in behalf of the whole court—may contain expressions which were not necessary to the adjudications, and which have not received the approval of all the judges concurring. A striking instance of this character, with a subsequent illustration of the proper method of dealing with it, appears in *Landes v. Brant*, 10 How. 348. The opinion in that case held that a certain judgment could not be attacked collaterally, and gave reasons therefor which were sufficient. The opinion afterwards continued, on page 371, as follows:

"Furthermore: This suit in ejectment is collateral to the judgment, and it cannot be impeached collaterally. So the supreme court of Missouri held in 1848, in the case of *Landes v. Perkins*, 12 Mo. 254, on the same title, and a similar record in all respects to that before us, and with the views on this point there expressed we entirely concur."

In one sense this was not a mere dictum, because it was in the line of consideration of the question involved; and, from the standpoint of the opinion itself, the other reasons given for the conclusion of the court might have been stricken out, leaving this as a necessary link in the logical chain. Yet, in *Thompson v. Whitman*, 18 Wall. 457, 464, this paragraph was rejected, for the reasons that it was unnecessary, and had been in effect overruled. Another marked case is *Cross v. Burke*, 146 U. S. 82, 13 Sup. Ct. 22, in which the court said, on pages 86 and 87, 146 U. S., and page 22, 13 Sup. Ct., as follows:

"It was to this act that Mr. Justice Miller referred in *Wales v. Whitney*, 114 U. S. 564, 565, 5 Sup. Ct. 1050, as 'restoring the appellate jurisdiction of this court in habeas corpus cases from decisions of the circuit courts, and that this necessarily included jurisdiction over similar judgments of the supreme court of the District of Columbia.' But the question of jurisdiction does not appear to have been contested in *Wales v. Whitney*, and where this is so the court does not consider itself bound by the view expressed."

The courts of appeals in the various circuits will find sufficient difficulties, without also shirking their duty, on proper occasions and under proper limitations, to sift out from the real judgments of the supreme court what was not necessary thereto, and to deal with the same in a proper spirit of investigation. The result of these observations will be returned to when we come to examine *In re Burrus*, already referred to, in its proper historical place in the line of statutes and decisions touching the question of jurisdiction now before us.

There probably was no topic which went into the constitution of the United States, or into the early constitutions of the various states, about which their framers were more anxious than that

of the right to the great writ of habeas corpus ad subjiciendum. The provision of the federal constitution that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it" (article 1, § 9), is one to which congress cannot give complete effect except through the federal tribunals. For congress to have refused or omitted to vest the power to issue this writ would have been a suspension of the writ in advance; and, so far as it might refuse or omit to vest it to the full extent of its constitutional authority to do so, it would be the equivalent of such suspension pro tanto. In *Ex parte Bollman*, 4 Cranch, 75, Chief Justice Marshall, referring to this constitutional injunction, said, on page 95:

"Acting under the immediate influence of this injunction, they [the congress] must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity, for if the means be not in existence the privilege itself would be lost, although no law for its suspension should be enacted."

Also, in *Ex parte Yerger*, 8 Wall. 85, the court said, on page 95:

"In England, all the higher courts were open to applicants for the writ [meaning the writ of habeas corpus], and it is hardly supposable that under the new government [meaning the United States], founded on more liberal ideas and principles, any court would be intentionally closed to them."

Again it said (page 96):

"It would have been indeed a remarkable anomaly if this court, ordained by the constitution for the exercise in the United States of the most important powers in civil cases of all the highest courts of England, had been denied, under a constitution which absolutely prohibits the suspension of the writ, except under extraordinary exigencies, that power in cases of alleged unlawful restraint which the habeas corpus act of Charles II. expressly declares those courts to possess."

The presumption therefore stands that congress would intend to vest in its judicial tribunals, and, if necessary, part in one and part in the others, the entire jurisdiction permissible under the constitution, so far as it appertains to this writ. It follows that all general expressions touching all that part of the constitutional jurisdiction relative to this writ which could not be vested in the supreme court are to be construed subject to the presumption that it was intended by congress to be vested in some other judicial tribunal. On this point, Chief Justice Marshall, in *Ex parte Bollman*, said further, on page 96:

"Whatever motives might induce the legislature to withhold from the supreme court the power to award the great writ of habeas corpus, there could be none which would induce them to withhold it from every court in the United States."

In accordance with this presumption, the statute was framed as soon as possible after the organization of the new government, commonly known as the "Judiciary Act,"—Sept. 24, 1789, c. 20 (1 Stat. 73),—containing the following, and which refers to the supreme court, the circuit courts, and the district courts:

"Sec. 14. And be it further enacted, that all the before mentioned courts of the United States, shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may



be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. Provided, that writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

Although it would seem that this provision of law should have had the broadest construction, in view of the presumption to which we have already referred, it was always regarded as possessing some obscurity. *Ex parte Burford*, 3 Cranch, 448, 449. First, it was denied that the writs of habeas corpus specified were the great writs of *ad subjiciendum*; second, it was claimed that, like the writs not enumerated, they could be made use of only as incidental to jurisdiction acquired in a pending cause; and, third, that the word "commitment," used in section 14, in direct connection with the power vested in justices and judges, referred back to and controlled the powers vested in the courts themselves, and, moreover, had a narrow, technical meaning, to such an extent as to prohibit the writ except in behalf of persons in custody on criminal or civil process. Indeed, some authorities have gone so far as to maintain that unlawful restraint on civil process was not within the purview of this section. It would seem that *Ex parte Bollman* should have been understood as sweeping away the more substantial of these doubts. Certainly, that case held that the writs specified in the statute included the writ *ad subjiciendum*. It ought also to have been understood as disposing of the proposition that the power to issue the great writ was limited to such as were necessary to enable the courts to exercise their respective jurisdictions in pending causes; in this respect, distinguishing from writs of *mandamus*, and other writs not specified in the section cited. *McIntire v. Wood*, 7 Cranch, 504; *Rosenbaum v. Bauer*, 120 U. S. 450, 7 Sup. Ct. 633. *Ex parte Wilson*, 6 Cranch, 52, has been cited and relied on as establishing, to its full length, the proposition that this writ could not issue under the judiciary act unless there was a commitment on a criminal process, although Chief Justice Marshall, who spoke for the court in that case, afterwards, in 1833, in *Ex parte Randolph*, 2 Brock. 447, Fed. Cas. No. 11,558, sitting in the circuit court, united in discharging the petitioner from custody under a treasury warrant. The effect of the opinion of the chief justice in *Ex parte Bollman* was clearly understood by Mr. Justice Story to sweep away all these doubts, because, in the first edition of his *Commentaries on the Constitution*, published in 1833, he said, in section 1335, "Congress have vested in the courts of the United States full authority to issue this great writ in cases falling properly within the jurisdiction of the national government." In subsequent editions of his work this expression was repeated in the same terms. Yet some of the doubts and refinements to which we have referred were subsequently persisted in, and are found in authors of such respectability as Hurd on Habeas Corpus, at various points. Judge Betts, in *Re Barry*, 136 U. S. 613, 42 Fed. 113, although conceding

that *Ex parte Randolph* decided that the writ lies to inquire into the cause of commitment, if made on a civil process, still insists on his doubt touching this proposition. Under these circumstances it becomes necessary to consider the effect of the rearrangement in the Revised Statutes of the provisions of the judiciary act touching writs of habeas corpus, and the purging which they there received of some of the expressions referred to, on which these doubts have been built up.

It will be noticed, first of all, that in the revision the enactment touching the writ of habeas corpus was dislocated from that touching all others, and from that touching the powers of justices and judges, so that we find an entire section as follows:

"Sec. 751. The supreme court and the circuit and district courts shall have power to issue writs of habeas corpus."

So much of the judiciary act as related to the issue of other writs appears in section 716, and the supposed limitation arising out of the word "commitment" in section 752. Thus, whatever doubt could be raised by the grouping in the act of 1789 disappears, unless we are compelled to hold that the ordinary rule applies to this case,—that the Revised Statutes did not intend to change the law.

Another marked departure is found in the next provision of the Revised Statutes, as follows:

"Sec. 752. The several justices and judges of the said courts within their respective jurisdictions shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty."

In this the word "commitment," so much relied on as restricting the effect of the original statute, disappears, and the words "restraint of liberty" take its place,—a change of a marked character.

It is claimed by the appellees that, notwithstanding these changes, the usual rule applies here,—that a revision does not affect the law; and for this the appellees cite section 5600 of the Revised Statutes, and state that *In re Burrus*, 136 U. S. 586, 10 Sup. Ct. 850, treated the effect of the old and new statutes as identical. We fail to find this, and we have not been referred to the page where it occurs, if at all. Section 5600 has a very narrow effect, and clearly does not extend to cases of change of phraseology, as it is expressly limited to matters of arrangement and classification. On the other hand, there is enough in these changes to overcome the ordinary presumption about revisions, and to support the use in this case of the rule given in *U. S. v. Bowen*, 100 U. S. 508, and applied in a very marked way to a change in the removal statutes, in *Iron Co. v. Ashburn*, 118 U. S. 54, 57, 6 Sup. Ct. 929, as follows:

"The Revised Statutes of the United States must be accepted as the law on the subjects which they embrace as it existed on the 1st of December, 1873. When their meaning is plain, the court cannot recur to the original statutes to see if errors were committed in revising them, but it may do so when necessary to construe doubtful language used in the revision."

But we are not left to presumptions pro and con. The act of June 27, 1866, c. 140 (14 Stat. 74), initiating the revision of the federal laws, contained, in section 2, directions to the commissioners

"for making such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text." The third section also provided for submitting to congress the result of their labors, and said that "at the same time they shall also suggest to congress such contradictions, omissions, and imperfections as may appear in the original text, with the mode in which they have reconciled, supplied and amended the same." Reports of commissioners of revision, suggesting changes which have been adopted, have been constantly accepted in Great Britain, and in the various states in this country, for aiding the construction of the statute as changed, even when less specific provisions were made for amendments, and for stating the reasons thereof, than are found in the statute last referred to. There can be no doubt, therefore, that under this statute, whenever the commissioners have stated in their report reasons for changing the text, accompanied with amendments which have been followed by their adoption by congress, it must ordinarily be held that there was an intention to change, and that the report aids in the construction of the new statute.

Touching what is now section 751 of the Revised Statutes, the report of the commissioners, which will be found in the edition of 1872, under title 13, commencing on page 133, is very full; and its effect is of a decided character, and works out a clear result. These words should perhaps be qualified to some degree as to the use of the words "cause of restraint of liberty," appearing in section 752, in lieu of the original words of the judiciary act, "cause of commitment." We will therefore interpose at this point to say, as to these expressions, that certainly the changed phraseology will allow writs of habeas corpus to stand, and that at common law they do stand, for all unlawful restraints, whether under color of process, or through the illegal acts of individuals, or under such commitments as are found in the case at bar. The conclusions which have suggested any different view, arose from accepting the statute of 31 Car. II. c. 2, as being in lieu of the whole common law on this subject, while its purpose was to improve only a part of it. High and unquestionable authority sustaining the generally understood proposition that the common law extended the writ of habeas corpus to every case of illegal restraint is found in 2 Kent, Comm. \*26, and sequence, and some of the most eminent supporters of this proposition are referred to by Judge Barbour in *Re Randolph*, 2 Brock. 447, 476, 477, Fed. Cas. No. 11,558, already referred to.

To return to the commissioners' report, among other things it is to be noted that it refers to the expressions in *Ex parte Yerger*, 8 Wall. 85, appearing on page 101, as follows:

"The great and leading intent of the constitution and the law must be kept constantly in view upon the examination of every question of construction. That intent, in respect to the writ of habeas corpus, is manifest. It is that every citizen may be protected by judicial action from unlawful imprisonment. To this end the act of 1789 provided that every court of the United States should have power to issue the writ. The jurisdiction thus given in law to the circuit and district courts is original. That given by the constitution and the law to this court is appellate. Given in general terms, it must

necessarily extend to all cases to which the judicial power of the United States extends, other than those expressly excepted from it."

The commissioners cite the last clause of this citation. Then they use this language:

"Now, the constitution declares that 'the judicial power shall extend,' not only to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority,' but to \* \* \* controversies between a state or the citizens thereof, and foreign \* \* \* citizens or subjects."

They afterwards touch on the question of *parens patriae*, and conclude, as follows:

"It is assumed, then, in this revision that the writ authorized by the judiciary act would have applied to every case of restraint of liberty to which the judicial power of the United States extended, but for the restrictive effect of the proviso, which forbade all interference with prisoners in jail under state authority, except when they were needed as witnesses in the courts of the United States, and that the only effect of the subsequent acts has been to do away with this restriction in the cases which they specify. For this reason they have been stated in a separate section, and consolidated with the proviso to the fourteenth section. At the same time it has been held that the later acts require the substitution of the words 'restraint of liberty' for the words 'cause of commitment.'"

Clearly, they intended to remove the doubts which had been built up touching section 14 of the judiciary act, to which we have already referred, and purge its language, and extend the jurisdiction of the federal courts to every class of restraint to which the judicial power of the United States extends, including that based on the mere matter of diverse citizenship, not necessarily or expressly excepted. They so reported to congress; they adopted language apt and effective for that purpose; and congress, by accepting that language, has effected their purpose. In this connection, we have not considered the intervening statutes touching the writ of habeas corpus, and we have no occasion to do so. They consist mainly of exceptions to the provision at the close of section 14 of the judiciary act. They throw no direct light on the question involved in this case, and are not of any indirect value, except to indicate that the improvements in the law which we insist occurred in the sections of the Revised Statutes referred to were in harmony with a general policy to broaden out the privilege of the writ of habeas corpus, shown by all the legislation of congress.

The provisions of the original judiciary act having thus been purged of the doubts to which we have referred, and the sweeping phraseology of sections 751 and 752 having been substituted in lieu thereof, we will consider whether any other difficulties remain in the way of the exercise by the court below of jurisdiction in this case. Almost immediately after the organization of the supreme court, it asserted, under the general grant of power to issue writs of habeas corpus contained in the judiciary act, the entire jurisdiction which could be vested in that court under the limitations of the constitution. The first case was that of *U. S. v. Hamilton*, 3 Dall. 17, in which the supreme court reviewed, on a writ of habeas corpus *ad subjiciendum*, the action of the district court for the district of

Pennsylvania in committing a person charged with high treason. The report does not show that the question of jurisdiction was particularly considered. But in *Ex parte Bollman*, 4 Cranch, 75, Chief Justice Marshall said, on page 100, that *Hamilton's Case* was expressly in point on that question; adding that it was several days under advisement, and the question could not have escaped the attention of the court. In *Ex parte Bollman* the question was examined at length, and it was held, in substance, that there was no restraint lying against the issue of writs of habeas corpus ad subjiciendum by the supreme court, except the constitutional limitations on its jurisdiction. In *Ex parte Watkins*, 3 Pet. 193, 7 Pet. 568; and *Ex parte Milburn*, 9 Pet. 704,—the same question was again brought before the court, and with the same result. The last three cases are of special importance, because Mr. Justice Story sat in each of them. So that, when he gave the rule in the broad terms we have cited from his *Commentaries on the Constitution*, we must infer that he fully understood the views of the supreme court touching this subject-matter. The underlying principle of these decisions has always been acted on by the supreme court, although there have been, from time to time, questions whether or not, in some particular case, the jurisdiction assumed by it was properly appellate,—questions which were particularly considered in *Re Kaine*, 14 How. 103. The whole line of these early decisions was referred to and acted on in *Ex parte Lange*, 18 Wall. 163, the first important case of the series of like cases which have followed it, where the supreme court has, on habeas corpus, discharged a person in custody under a void judgment of the district or circuit court, within which class *In re Burrus*, 136 U. S. 586, 10 Sup. Ct. 850, already referred to, also falls. Chief Justice Marshall, in *Ex parte Watkins*, 3 Pet. 193, said, on page 201, that “no law of the United States prescribes the cases in which this great writ shall be issued.” This applies alike to the supreme court and the circuit courts, and, if the former found no lack of statute authority for issuing the writ of habeas corpus, why should the latter find such lack? It is conceded on all sides that although the supreme court finds its existence in the constitution, while no specific inferior court does, yet it cannot exercise jurisdiction beyond that expressly vested in it by statute, and in this particular it stands precisely like each of the inferior courts. This was firmly settled in its early decisions, having been formally stated at length as early as *Rhode Island v. Massachusetts*, 12 Pet. 657, 721, and it was the basis of almost the entire discussion of that court touching this very writ in *Ex parte Bollman*. In all particulars, the supreme court and the circuit courts, so far as this topic is concerned, stand in precisely analogous positions under the judiciary acts. As already said, neither can exercise any powers not vested in them by statute. The powers of each were carefully defined and limited in the judiciary act of 1789, and each was recognized by it as a common-law court of the superior grade, and the circuit court clearly established as such. The fact that each also exercises to a certain extent, on appeal, jurisdictions not known to the common

law, does not change their characteristics in this particular, any more than the house of lords ceased to be the great common-law court of England when it was vested by the judicature act with jurisdiction over admiralty appeals. On the other hand, under the original judiciary act, the district courts, although clothed to a limited extent with certain common-law powers, were essentially courts of admiralty and maritime jurisdiction. Whether or not, on this account, a distinction could properly be made against the district courts, we need not determine. Such a distinction seems to have been suggested, if not made, in *Re Burrus*, 136 U. S. 586, 596, 597, 10 Sup. Ct. 850, where it is said that the jurisdiction of the district court is not founded on the citizenship of parties.

On the whole, we can perceive nothing which prevents applying to the circuit courts the full force of the decisions we have cited, by virtue of which the supreme court has exercised the power of issuing this writ to the full extent of its judicial jurisdiction permitted by the constitution. While, in view of the doubts that have been expressed throughout the judicial history of the United States, and the careful avoidance by the supreme court of a determination of the issue in advance of its being directly presented to it, we have investigated this question with great anxiety, and consequent care and patience, we cannot avoid the conclusion that the power granted by the judiciary act of 1789, as remodeled by sections 751 and 752 of the Revised Statutes, goes to the entire extent of the jurisdiction which congress could, under the constitution, vest in the supreme court or the circuit courts, except as expressly excluded by other provisions of statute, and except as also necessarily excluded by the inherent nature of the courts themselves, and of the machinery given them by law with which to work out practical results. There is no such express exclusion by other statutes reaching this case; and, as already explained, there is nothing in the latter exception which, so far as the circuit courts are concerned, bars them from exercising jurisdiction over the simple issue of alleged illegal restraint, which we interpret the record in this case to have presented.

We have asked ourselves where the line is to be drawn, if at all. In *Ex parte Bollman*, *ubi supra*, the supreme court decided that the writs of habeas corpus named in the statutes we are considering included the great writ; and in *Ex parte Watkins*, 3 Pet. 193, it used the expression we have already cited,—that no law of congress prescribes the cases in which this writ shall issue. We have asked ourselves, therefore, what part of this field the circuit court occupies, if it does not occupy the whole, and we are unable to find any assistance in answering this question. Therefore, we hold that the circuit court had jurisdiction over the petition in the record, and over the writ issued in consequence thereof. As we have already held in the opinion passed down June 4, 1894, that this court has full jurisdiction on this appeal, it only remains for us to retain it, consider the merits of the case, and reverse, affirm, or modify the judgment of the circuit court as it may require.

In this connection, we have not deemed it necessary to refer

more particularly to the decision of Judge Betts in *Re Barry*, 136 U. S. 597, 42 Fed. 113, and rendered in May, 1844; or to that of Judge McAllister in *Ex parte Des Rochers*, 1 McAll. 68, Fed. Cas. No. 3,824, rendered in 1856; that of Judge Leavitt in *Ex parte Everts*, 1 Bond, 197, Fed. Cas. No. 4,581, rendered in 1858; or that of Judge Deady in *Bennett v. Bennett*, Deady, 299, Fed. Cas. No. 1,318, rendered in 1867. All these cases related to the doctrine of *parens patriae*, except that of *Ex parte Des Rochers*, which was directly in point on the case now before the court, and reached the same result which we have. Moreover, we have not deemed it necessary to comment on them, because none of them are authoritative, they are conflicting, and they have long since passed into the general body of discussion which this topic has involved. In *U. S. v. Green*, 3 Mason, 482, Fed. Cas. No. 15,256 (decided in 1824), Mr. Justice Story took jurisdiction on habeas corpus to dispose of the custody of a child; but the case involved no discussion of the question before us, and we have already sufficiently referred to his views in the citations made from his Commentaries on the Constitution. That part of *In re Burrus*, 136 U. S. 586, 10 Sup. Ct. 850, already referred to, which went beyond the case immediately before the court, which case touched only the custody of a child, may be said to involve an inference against the jurisdiction of the circuit court, because it is not easy to see why, if the jurisdiction of the district court is cut down, that of the circuit court, which stands on the same general statute authority, should remain unlimited. Yet the expressions which we have cited from the case apparently rebut this inference. We are compelled, however, to refer to what we have already said touching expressions, even those of the supreme court, not necessary to the determination of the issue. It cannot be controverted that the sole issue in *Re Burrus* was the power of the district court to exercise jurisdiction *parens patriae*. The opinion, to a large extent, adopts the opinion of Judge Betts, already referred to. While he discussed at great length various questions which we have discussed, his conclusions were summed up (page 626, 136 U. S., and page 850, 10 Sup. Ct.) as follows:

"(1) If granted [meaning the writ of habeas corpus, and a return was made admitting the facts stated in the petition], I should discharge the infant, on the ground that this court cannot exercise the common law function of *parens patriae*; and has no common-law jurisdiction. (2) Because the court has not judicial cognizance in the matter by virtue of any statute of the United States."

That was the real issue before him, although it is true that the supreme court, on page 594, 136 U. S., and page 850, 10 Sup. Ct., uses the following language:

"Mr. Barry then made application to the circuit court of the United States for the southern district of New York, where his case was heard by Judge Betts, who delivered a very careful and a very able opinion, which has been furnished to us, in which he held that his court could not exercise the common-law function of *parens patriae*, and therefore had no jurisdiction over the matter, nor had it jurisdiction by virtue of any statute of the United States."

On the whole, in view of the considerations which we have stated in an earlier portion of this opinion, we feel ourselves unauthorized to accept *In re Burrus* beyond the issue solemnly determined in the case, which was that the district courts of the United States have not jurisdiction, *parens patriae*, to issue the writ of habeas corpus.

Although this is a common-law proceeding, yet we have no doubt that it was properly removed from the circuit court to this court by appeal, as distinguished from a writ of error. As the issues were left by our opinion passed down June 4th, and by what we have said touching them in this opinion, the case is not one of the classes to be taken to the supreme court under any provision of law existing when this court was established. Yet, for the reasons stated in this opinion filed June 4th, it may be taken to this court. There is no law directing the form of removing this particular case to this court, but, so far as the statutes make provision for any cases, it is by appeal. Rev. St. §§ 763, 764; Act March 3, 1885, c. 353 (23 Stat. 437). It would be an anomaly of the law to have cases not thus provided for come up by a different method, involving the exercise of essentially different powers on the part of this court. Our rule 33, which, it is well known, was adopted with the approval of the justices of the supreme court, evidently contemplates that there is no method of removing a proceeding on habeas corpus to this court except by an appeal. Moreover, this form of proceeding brings the entire case to the appellate court (*Ex parte McCardle*, 6 Wall. 318, 327; *In re Neagle*, 135 U. S. 1, 42, 10 Sup. Ct. 658), and is thus in favor of liberty. We, therefore, hold that this proceeding should be by an appeal, and not by writ of error. No question of this sort was raised at the argument, and neither was it noticed in our former opinion, but we deem it proper to cover it.

Certain proceedings on habeas corpus, on behalf of the present petitioner, in the supreme judicial court of Massachusetts, which resulted in an appeal, disposed of by the opinion in *King's Case*, 161 Mass. 46, 36 N. E. 685, have been set up in the return on this writ. Although that petition, like the one at bar, was brought by a next friend, yet, as the writ issued on it, and King was actually taken into the custody of the court, the case thereupon became his case, as was determined in the opinion referred to. Consequently, the result would constitute *res adjudicata*, except for the fact that in Massachusetts the rule ordinarily held seems to apply, —that a refusal of a discharge on habeas corpus is not a bar to a new petition. *Bradley v. Beetle*, 153 Mass. 154, 26 N. E. 429. What the result would be in the federal courts, where the entire case may be taken up on appeal as a matter of right, we need not determine. On the present state of the decisions, we are unable to find that the order finally entered in the proceedings in Massachusetts would be a bar in that state. Therefore, it cannot be in the pending case. The final order of that court directed that King should remain in the asylum where he was confined at the date of the petition. There would be some ground, therefore, for holding that this order con-



stitutes *res adjudicata*, and especially that it is a direction of a state tribunal, which a federal tribunal would be holden to regard, except for the fact that it seems to have been merely incidental to the discharge of the writ; and, indeed, it concluded with a formal dismissal of the proceedings. Thus, apparently, the substantial effect of the final judgment of the state court was merely the usual one of the dismissal of a petition in habeas corpus, and the status of the case at bar is the same as though the prior proceedings had not occurred.

The other issues raised in the case at bar are substantially as follows: The petition makes no express or specific allegation touching the sanity or insanity of King, but sets out that he was illegally held in the McLean Asylum under an order issued by the chief justice of the supreme court of Rhode Island in 1866. It also sets out an order of admission from the visiting committee of the McLean Asylum, and alleges that this is invalid; but this order is not relied on, and it need not be further noticed. The return, moreover, does not rely on the order of the chief justice of Rhode Island, but on the alleged facts that, at the time King was received into the McLean Asylum, he was violently and dangerously insane, and that at the time of the return he was insane, and unable to care for himself, and, in the absence of restraint and proper care, would be dangerous to himself. It also alleges a committal July 31, 1866, in accordance with chapter 223 of the Statutes of Massachusetts of 1862, especially an application of his brother and the certificate of two physicians, alleged to be in the form required by that act. The return, however, fails to make any reference to the act of 1865 (chapter 268), essentially modifying the act of 1862. In reply to this return it is alleged that the committal did not comply with the statute forms, and that the act of 1862 did not apply to the petitioner, because he was not at the time of the committal a citizen or resident of Massachusetts, and never had been. There seems some basis for these propositions.

However, none of these matters need be particularly considered, because, if the petitioner is now sane, or is capable of caring for himself, and also needs no hospital treatment, he is entitled to be discharged, whatever may have been the form of the committal, and if he is in the condition described in the return the irregularities would be of no consequence. *Nishimura Ekiu v. U. S.*, 142 U. S. 651, 662, 12 Sup. Ct. 336. Whatever a state tribunal, having jurisdiction as *pars patriae*, might accomplish, especially in Massachusetts, where the statute authority given to judges of the higher courts touching the committing of insane persons to asylums would cover the case of a prior informal committal, and enable them to apply an immediate and practical remedy by a new one, the circuit courts have not the machinery to deal suitably with a person in the condition in which the petitioner is alleged in this return to be, and would therefore be prohibited, both by public policy and humanity, from merely discharging him from the custody in which he might be found. In such circumstances a court would be called on to exercise more than ordinary judicial powers, including those

possessed by the chancellor, as representative of the sovereign, or by virtue of his sign manual. But that these powers are not possessed by circuit courts sitting in equity was ruled in *Fontain v. Ravenel*, 17 How. 369, 384, already cited; and it follows, for even stronger reasons, that they do not possess them when sitting at common law. In *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, it was held that the circuit court might establish a debt against an intestate estate, but could not administer. This illustrates the limitation we put on the jurisdiction of the circuit court in cases like this at bar. *Fontain v. Ravenel* was cited, and impliedly affirmed, in *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. U. S.*, 136 U. S. 1, 10 Sup. Ct. 792. It was distinguished, but not doubted, in *Russell v. Allen*, 107 U. S. 163, 169, 2 Sup. Ct. 327. In any view, the essential issue on this record in the circuit court was the fundamental question of the mental and physical condition of the petitioner. On the coming in of the return, the petitioner's reply thereto was filed March 23, 1894. Thereupon, a motion for a guardian ad litem was made on the same day by the respondents; and an order was entered, setting out that the return alleged an advanced state of dementia, and that, while the answer to the return did not wholly admit this allegation, it did not fully deny unsoundness. The order proceeds that, without determining the character or extent of King's dementia, enough was found in the record to enable the court to determine that King was so far unsound as to render proper the appointment of a guardian to represent him, and to do all things necessary for the promotion and protection of his rights and interests in this regard. The following afterwards appears:

"Moreover, as the guardian may have the power to say whether this writ shall be further prosecuted,—a question upon which no opinion is now expressed,—I am," etc.

It next names a guardian, and proceeds as follows:

"And it is understood that he [the guardian] will examine into his [King's] rights and interests in this proceeding, and he will inquire particularly whether he is deprived of his liberty, or, in other words, whether his keeping and custody at the asylum is restraint."

Then the following appears:

"The guardian so appointed as the representative of an unsound person, being the responsible party petitioner, is expected to report whether he elects to treat the keeping and custody on the day on which the petition was filed, and now, as a matter of comfort and protection, in which King, through his guardian, acquiesces, or as forcible and offensive restraint. And the guardian is furthermore expected to elect whether this writ should be prosecuted further."

The closing sentence of the essential parts of this order is as follows:

"No evidence will be taken on any question in this proceeding until such report and election are made."

The report of the guardian was filed April 23, 1894. Meanwhile, the parties appeared before the court on several occasions touching

the time of the hearing. This was first set for March 27th, and this follows in the record:

"On the 27th day of March, 1894, upon the request of the petitioner, it is ordered that the hearing in said cause be postponed until April 2, 1894, at 2 p. m. On the 2d day of April, 1894, upon application of petitioner, counsel for respondent consenting thereto, it is ordered that the hearing in said cause be postponed until April 9, 1894, at 2 p. m. On the 9th day of April, 1894, it is ordered that the further hearing be postponed until April 23, 1894, at 2 p. m."

It is plain that "the request of the petitioner," found in these orders, had no reference to the guardian ad litem, and that in these proceedings the petitioner was recognized, through counsel of record, or through his next friend, as distinguished from the guardian. This shows that the order of March 23d was not intended to preclude the petitioner from further attendance on the court, through the next friend, or his counsel, or the court from taking such action as it might deem proper after receiving the guardian's report. The provision that the guardian was "expected to elect whether this writ should be prosecuted further" must be construed in the light of what elsewhere appears, and must yield to the statement that the court expressed no opinion whether he would have the power to say whether the writ should be further prosecuted, and to the implication contained in the direction that no evidence would be taken on any question until the coming in of the report. By these the court reserved the right to permit evidence to be taken after the report was made. It is, therefore, clear that the court did not, by the order in question, surrender the case to the guardian, but still held it under its own control. All that afterwards appears is very simple. The guardian apparently understood the order of the court as we understand it, made no election, in the strict sense of the word, touching the progress of the cause, and used only advisory language as follows:

"Unless it seems to the court worth the while to try this experiment [referring to a certain proposed dealing with the petitioner], the guardian ad litem is of the opinion that it is not advisable to further prosecute this writ."

Thereupon, the entire balance of the record is as follows:

"This cause is thereupon heard by the court, the Hon. Le Baron B. Colt, circuit judge, sitting, and the following decree entered: And now, to wit, April 23, 1894, this cause coming on to be heard by the court upon the report of John S. H. Frink, guardian ad litem, It is ordered and decreed, upon consideration thereof, that the writ of habeas corpus be discharged and that said King be remanded to the custody of the authorities of the McLean Asylum.

"By the Court:

Alex. H. Trowbridge, Clerk.

"From which decree an appeal is claimed by Edward Avery, Esq., on said twenty-third day of April, in open court."

This shows that the case was heard by the court on the report, and that "upon consideration thereof"—that is, of the report—the writ was discharged. The record, however, fails to show that the petitioner or the next friend, or the counsel for the petitioner or next friend, or any person, offered to submit to the court any proofs bearing on the issue to be tried by it, or that there was any evidence

which, if offered, would have had any tendency to sustain that issue in behalf of the petitioner. On all this matter the record is a blank, and for aught that appears the court neither had, nor was offered anything, on which it could act, except the report, and nobody objected to the court's acting on that. The objections to these proceedings, set out in the assignments of error, may be divided into four: First, that the order appointing a guardian ad litem was without warrant in law and void; second, that he was improperly vested with authority to take the future conduct of the petitioner's case, to the exclusion of the petitioner, his counsel or attorney; third, that the order of reference to the guardian conferred on him authority to determine the law and facts, on such evidence as he might choose to hear and consider, without opportunity on the part of the petitioner to meet the witnesses, or to present evidence on his own behalf; and, fourth, that the order directing the writ to be discharged, founded on the report of the guardian, without hearing evidence, was contrary to law and void. In so far as these assignments of error are based on the hypothesis that the powers given the guardian were of a final or conclusive character, they depart from the interpretation we have given the order of March 23d, and we need consider them no further.

Touching the first objection: The especial power of the court to supersede the next friend by a guardian ad litem is so well established that it requires no comment, except to say that it would be a reproach to the law if, in the case of a person unable, through weakness of intellect or age, to conduct his own litigation understandingly, the court had not the right to supersede a volunteer, when, in its just discretion, it finds it for the interests of the petitioner or plaintiff to do so. This is illustrated in *Sale v. Sale*, 1 Beay. 586, where the master of the rolls found that the next friend filed the bill to promote his own views, and said that he never had seen a more crafty attempt to defraud infants. We need make no distinction between infants and lunatics, with reference to the matters we are discussing, whatever the ancient law might have been. Story, Eq. Jur. §§ 1362, 1363. This power to make substitution is broad, and is necessarily exercised in a summary way; and there is no basis for the contention of the petitioner that it could not be done without notice to the next friend, or other formal proceedings. In the opinion filed in this case June 4th, we affirmed "the broad and flexible character of the rules of practice relating to next friends and guardians ad litem, and their adaptability to reach every case where they can be needed for the protection of those classes which they are intended to protect, or for effectuating natural justice." We agree with the conclusions involved in *King's Case*, 161 Mass. 46, 36 N. E. 685, already referred to, sustaining the right to supersede a next friend by a guardian ad litem, subject to the qualifications expressed in our prior opinion touching appeals under federal procedure. When any one sets on foot litigation by his own action, or when it appears that it is set on foot by a next friend because the petitioner or plaintiff is in close restraint, the proposition that his suit shall be put in

control of a guardian ad litem, on the ground that he is non compos mentis, may involve a fundamental right to be heard on a formal judicial issue. But we have no occasion to consider generally the power or duty of courts to appoint guardians ad litem, because in this case the petition was filed by a next friend without any allegation that the petitioner was subject to such close confinement that he was unable to represent himself in court; so that the only excuse for proceeding by a next friend which can be gathered from the record is of such a character as necessarily included the right of the circuit court to continue the same person as next friend, or to supersede him by a guardian ad litem.

As to the other propositions in the assignments of error, we are of the opinion that, according to the common rules governing courts of law, as well as courts of equity, after it appears or has been determined that the petitioner or plaintiff is so far unsound that he must proceed by a next friend or guardian, the matters covered by those propositions are ordinarily within the discretion of the court. Many authorities on which the petitioner relies relate to the rule that the inheritance of an infant cannot be lost by the admissions of an attorney, the next friend, guardian ad litem, or any one assuming to act in any representative character, or of the infant himself. This cannot be denied, but it affords no support to the other proposition,—that the court has no power, of its own motion, to stay a suit in behalf of an infant, or of a person of unsound mind, which it is satisfactorily advised is frivolous, or will involve the petitioner or the plaintiff or his estate in unnecessary expense, or perhaps jeopardize his rights. The next friend or the guardian ad litem is permitted to exercise a certain authority in determining these questions, but the court itself should be the ultimate authority; and it is inherent in the nature of the jurisdiction at common law over infants, idiots, and lunatics, that it should act with reference to them from its own conscience and on its own information, acquired in such way as it may deem it best to acquire it. The final determination whether the suit shall be prosecuted or discontinued must necessarily be made by the court or its appointee, or else by a mere volunteer in the form of a next friend; and, if by the latter, it must, of course, be made in a summary manner, without the possibility of any judicial issue or investigation. A just regard for the due protection of a person incapable of protecting his own interests would require that this action be taken by a responsible authority, as the court, and not by an irresponsible one. While sometimes the proceedings take on a formal character, yet this is not necessary, nor inherent in the subject-matter, because whether it is for the interest of a person of unsound mind or of an infant that a suit brought in his behalf shall be prosecuted, is a question as to which, ordinarily, there can be no parties litigant entitled to be heard. That the next friend is not such is stated in Daniell, Ch. Pr. (5th Ed.) \*71, \*72; and that none of the defendants are is clear, as a defendant ought not to be allowed, as of right, to intervene in this way in what may be for his own interest, as against what may be for the interest of an infant or a person of unsound mind. This

does not relate to the matter of an original appointment of a guardian ad litem, the absence of whom in some cases it may be the right of the defendant to plead, and his duty to do so if he wishes to avoid a reversal on error coram nobis. Story, Eq. Pl. § 725. In *Taner v. Ivie*, 2 Ves. Sr. 466, Lord Hardwicke, on page 468, said that the masters "cannot, upon such references to them [meaning references touching the matters which we are discussing], hear the other side, against whom the bill is brought, but only judge, on circumstances prima facie, whether it is reasonable to carry on such a suit for the infant." The absolute power of the chancellor in determining all matters of this character is made clear in *Reeve, Domestic Relations* (4th Ed.) 332, 334. Indeed, the privilege of suit by next friend in behalf of a person non compos mentis seems to be of modern growth, and is wholly the creation of the chancellor. 5 Bac. Abr. p. 47. Substantially, the whole practice touching this topic is given by Lord Chancellor Brougham in *Nalder v. Hawkins*, 2 Mylne & K. 243, with practically the same results as stated by us. The ordinary rule is laid down in Story, Eq. Pl. (10th Ed.) § 60, as follows:

"As some check upon the general license to institute a suit in behalf of an infant, if it be represented to the court of equity that the suit preferred in his name is not for his benefit, an inquiry into the facts will be directed to be made by one of the masters of the court; and, if he reports that the suit is not for the benefit of the infant, the court will stay the proceedings."

The rule is given in *Daniell, Ch. Pr.* (5th Ed.) \*70, to the same effect, although, in lieu of making the general proposition of a reference to a master, the author merely says, that the court will "direct an inquiry concerning the propriety of the suit." The entire freedom with which the court proceeds to ascertain for itself whether it is for the interest of the petitioner or plaintiff that the suit proceed is illustrated in *Sale v. Sale*, ubi supra, where Lord Langdale, whose experience and learning are sufficient authority for our purpose, listened to affidavits furnished by the defendant, and, without reference to a master, directed the suit to be dismissed, and the costs to be paid by the next friend. He closed with a general statement of the law, applicable in all courts, as follows:

"It matters little what the nature of the suit is. When a party comes here, using the privilege of acting on the behalf and as the next friend of infants, it is his bounden duty to show that he really acts for the benefit of the infants, and not to promote purposes of his own."

In *Walker v. Else*, 7 Sim. 234, Vice Chancellor Shadwell dismissed in even a more summary manner a suit by a next friend.

The substance of these propositions is recognized in equity rule 87, and such undoubtedly is the common law, although a due regard for a proper administration of justice will ordinarily induce the court to ascertain the facts by a reference to a master or an assessor, or by taking the proofs itself, with opportunity in either case for the next friend or the guardian ad litem, or whomsoever may assume to act for the petitioner or plaintiff, to examine the witnesses, produce proofs, and be otherwise heard. But the petitioner

relies on a provision of the Revised Statutes touching proceedings on habeas corpus, as follows:

"Sec. 761. The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

This provision of law, as it now stands, apparently governs all proceedings based on a petition conforming to section 754 of the Revised Statutes, of which the case at bar is assumed to be one. Originally, however, it related only to proceedings under Act Feb. 5, 1867, c. 28 (14 Stat. 385), and therefore was of a limited effect, and not a general rule of practice. For this reason alone, it might well be doubted whether this provision of the Revised Statutes was intended to reach a question of the class which we are now considering. It clearly relates to the facts touching the disposition of the petitioner; that is to say, to the merits of the proceeding. If construed as the petitioner claims, it would apparently compel the court in every case to proceed at once to the merits, without any opportunity for the investigation of preliminary questions, and would have a more drastic operation than it could reasonably be supposed congress intended. The sweeping construction claimed by the petitioner is not consistent with the discretion exercised in granting or refusing writs of habeas corpus in *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. 734, and in the line of cases following it, which are grouped in *Re Frederick*, 149 U. S. 70, 75-77, 13 Sup. Ct. 793. It can hardly be supposed that congress had in mind, in this enactment, every phase of the preliminary questions which might arise in proceedings of this character, and intended either to blot them out, or to lay down rules touching them before unknown to the law. Its fair construction is that it seeks to secure an efficient administration of justice, and nothing more. We must admit that no case has been cited to us in which this summary method of proceeding by a court to stay a suit at its discretion has been applied to one touching a writ of habeas corpus; and it may be that there is some ground of distinction between ordinary proceedings and this at bar, which has not been brought to our attention. But we need not pursue these topics further, nor determine the power and duty of this court concerning them, because the case at bar does not go to the extent supposed by the petitioner. As we have already seen, the order of March 23d did not direct a discontinuance of the suit, or give the guardian ad litem an absolute election so to discontinue, or conclude the court to act on his election. Even, therefore, if the order had been irregular in any particular, the most that could be said of it is that it was an irregularity in the course of summary proceedings, not necessarily prejudicial, and the consequences of which might have been fully met and obviated later in the cause. Ordinarily, such irregularities, especially in proceedings which are heard wholly by the court, and in no part in the presence of a jury, do not, of themselves, furnish the basis of an appeal. *Pennsylvania Co. v. Roy*, 102 U. S. 451; *Pollak v. Association*, 128 U. S. 446, 9 Sup. Ct. 119; *Ruckman v. Cory*, 129 U. S. 387, 390, 9 Sup. Ct. 316; *Railway Co. v. Volk*, 151 U. S. 73, 14

Sup. Ct. 239; *Hinds v. Keith*, 6 C. C. A. 231, 57 Fed. 10, 13. Especially is this proposition true in the present case, where it is apparent the court proceeded tentatively, carefully feeling its way, and expressly reserved to whomsoever might be interested the opportunity of being heard, after the report of the guardian came in, on the question whether the court would then receive testimony and arguments. This proposition does not contravene the general rule that on appeal the whole record may be examined for errors. *Ridings v. Johnson*, 128 U. S. 212, 218, 9 Sup. Ct. 72; *Trust Co. v. Seasongood*, 130 U. S. 482, 9 Sup. Ct. 575.

It is our opinion that the petitioner has not brought the record into form to raise in this court the questions which are sought to be raised, touching the orders of March 23d and April 23d. As we have already shown, according to the true effect of the order of March 23d, all parties who had any standing in court, or who could be heard by it, had opportunity, on the coming in of the report of the guardian, to present any question they desired to raise, including the question whether any one was entitled to offer testimony and arguments. The record fails to show that the petitioner availed himself of this opportunity. In his argument to this court, he has stated what he alleges he could have proved if he had been permitted to do so; but, so far as the record is concerned, there is an entire failure to show that he offered any proofs, or that he had any proofs to offer which would have been effective if offered. This court, therefore, is asked to reverse the judgment of the court below, without any evidence in the record that any party was prepared to present to that court any facts which ought to have influenced its conclusions. It is true that the record shows that the judgment of the court below was based on the report of the guardian, but, in the absence of any other matter offered to it, the court had a right to discharge the writ, and was required to do it; and it is unimportant whether it did it on the consideration of the report, or without consideration of it. The order discharging the writ, in the absence of proofs, would be made of course, and it cannot affect its correctness that reasons outside of the law were given for what was necessarily done. *Ridings v. Johnson*, 128 U. S. 218, 9 Sup. Ct. 72; *Sullivan v. Mining Co.*, 143 U. S. 431, 12 Sup. Ct. 555; *Spalding v. Castro*, 153 U. S. 38, 14 Sup. Ct. 768.

There can be no question that if this was an ordinary suit these suggestions would be conclusive against the petitioner on this appeal. This is a common-law suit, in which judgment must be entered as on a writ of error. *Cuddy, Petitioner*, 131 U. S. 280, 287, 9 Sup. Ct. 703. Yet, as it comes to us on appeal, all the strictness of ordinary common-law proceedings ought not to be required. Nevertheless, the proposition is fundamental, and is necessary to prevent an appellate court from exercising virtually original jurisdiction that the court below must have had an opportunity to pass on the questions raised on appeal, and that whether it had such opportunity must appear by the record or be fairly inferable from what does appear in it. In this case the requisite facts do not appear by the record, and they cannot be inferred from it, unless it can



be said that the appeal taken in open court on the same day the order of April 23d was entered—but, of course, after it was entered—raised this implication by reflected light. We are not aware of any practice or precedent which would justify this method of making good this omission, and *Warfield v. Chaffe*, 91 U. S. 690, and *Clark v. Com.*, 128 U. S. 395, 9 Sup. Ct. 2, 113, seem to the contrary. Indeed, for aught that appears, the petitioner—and in this connection we mean by this word “petitioner,” King, his next friend and the counsel of record—was content to rest the case on the proposition that the detention in the McLean Asylum was illegal merely because the commitment under the order of the chief justice of Rhode Island, or under the assent of the visiting committee of the asylum, did not conform to law. This proposition was urged on us in argument. It was not finally disposed of until this court passed on it, and until we determined, in the opinion filed June 4, 1894, that the committal was not in disregard of the provisions of the constitution and laws of the United States, and, in this opinion, that the formality of the papers of committal are of no consequence, so far as the circuit court was concerned. Therefore, so far from any implication appearing that the petitioner offered to the circuit court the proofs which he says he might have offered, if allowed, and that they were rejected, there is fully as much ground for inferring that he saw fit to rest his case on the question of law we have stated, or, at any rate, that that court was not advised on what ground he intended to rely. However, the record itself suggests no inference one way or the other. It does not show that the petitioner objected to the special duties imposed on the guardian ad litem, or to any part of the order of the court touching the same, or that after it came in he took any steps which required the circuit court to halt before entering the order of April 23d. The rule applicable we have stated, and it is also succinctly given by the court of appeals, in the Fourth circuit, in *Manufacturing Co. v. Joyce*, 4 C. C. A. 368, 54 Fed. 332, 333, as follows:

“The rule is well established that the appellate court will only permit those matters to be assigned for error that were brought to the attention of the court below during the progress of the trial, and then passed upon.”

Again, it was said by the court of appeals, in the Eighth circuit, in *Railway Co. v. Henson*, 7 C. C. A. 349, 58 Fed. 531, that “an appellate court can consider only such matters as are properly of record,” and that “a matter not appearing of record has no existence as a predicate for error.” These observations were intended to apply, and do apply, alike to appeals and writs of error. We refer also to *Fisher v. Perkins*, 122 U. S. 522, 527, 7 Sup. Ct. 1227. We are controlled by the fact that the record fails to put the petitioner in a position to assign for error any matter based on the claim that the circuit court was asked to hear proofs and arguments which it did not hear. In no event, therefore, can the petitioner object to the final judgment of the court below, whatever reasons were assigned in it for the ordering of it.

It is a satisfaction to know that if the petitioner, or any person assuming to act in his behalf, has, according to his judgment, failed

to obtain a full determination of the issues of fact which this case suggests, on formal proofs and arguments, the final conclusion of the case operates only as a discontinuance, without passing on the merits, and is no bar to a new application to any tribunal having jurisdiction, wherever the petitioner may be. Judgment of the circuit court affirmed, with costs of this appeal against Caleb Eaton.

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WEST PUB. CO. v. LAWYERS' CO-OPERATIVE PUB. CO.

(Circuit Court, N. D. New York. November 7, 1894.)

No. 6,106.

1. INFRINGEMENT OF COPYRIGHT—DIGEST OF LAW REPORTS.

The compiler of a digest may prepare notes, abstracts, and paragraphs from opinions of the courts, and from syllabi prepared by the courts, and may digest such opinions and syllabi from printed copies published in a copyrighted system of reports; but he is not at liberty to copy the original work of the reporter in such reports, or to use that work in any way, directly or indirectly, in order to derive suggestions therefrom, or for the purpose of lightening his labors.

2. SAME.

In such case he may use the copyrighted matter as a guide in the preparation of his work, in order to verify its accuracy, detect errors, omissions, or other faults, but in all other respects he must investigate for himself. He may take the original opinions, and prepare from them his own notes; but he cannot exclusively and evasively use the notes already collected and embodied by the skill, industry, and expenditures of another. *Banks v. McDivitt*, Fed. Cas. No. 961, 13 Blatchf. 163, followed.

3. SAME—SCOPE OF INJUNCTION.

Where the pirated paragraphs of a digest can be separated from the paragraphs not subject to criticism, the injunction should be restricted to the infringing paragraphs. The doctrine of "confusion of goods," which has sometimes been invoked to suppress an entire publication, is not applicable where the infringing portions can be pointed out, and separately condemned.

4. SAME—PROOF OF PIRACY.

A compiler digested, on an average, some 30 cases a day. Nine-tenths of these cases were digested from the reports of complainant. *Held*, that it could not be presumed that all the work of the compiler was piratical, where less than 1 per cent. of the whole output had been proved to be piratical.

5. SAME.

In such case the mere fact that it might consume a decade to examine the paragraphs of the digest, and compare them with the syllabi of the reports, will not relieve the complainant from the burden of proving his case, and the injunction will be limited to the paragraphs which have been shown to be piratical.

6. SAME—MALA FIDES.

*Mala fides* cannot be imputed to the defendant in such a case because, in making an annual digest, it used in part the reports which had been published by the complainant during the year. *Callaghan v. Myers*, 9 Sup. Ct. 177, 128 U. S. 617, distinguished.

This is an action in equity, upon final hearing, to restrain the infringement of 507 copyrights covering that number of pamphlets, published by the complainant, containing reports of decided causes in the state and federal courts. A motion for an injunction pendente lite having been made (53 Fed. 265) the question of infringe-

ment was referred to a master (W. S. Doolittle) who filed a report (May 22, 1893) finding infringement in 303 paragraphs. The master also filed the following opinion, which sufficiently states the facts in controversy:

"This is a reference to the master to hear and determine the issues raised on motion for injunction pendente lite in a copyright case and to report the portions of defendant's publication that infringe the copyright of complainant. There is practically no dispute on the facts alleged in regard to publication and copyright, the question of piracy being the real issue. The complainant, the West Publishing Company, assumes to report decisions of all the courts of last resort (and some of the intermediate courts) in this country in what is called the National Reporter System. The system is made up of various parts or reporters, the United States being divided territorially into convenient and appropriate districts for the purpose, about a dozen in number. Each reporter is published weekly in pamphlet form, and contains the current opinions of the courts of its respective district, preceded by headnotes and preliminary statements. These opinions are obtained by complainant from official sources at great expense, and with few exceptions are by far the earliest publication thereof. Ninety per cent. at least of the opinions published are published for the first time in complainant's system, and in some cases, as in this court, it is practically the only publication made. The original work of complainant in these weekly parts—that is, the headnotes and preliminary statements (excepting those prepared by the courts or foreign reporters)—and all other matter therein, except the opinions, are copyrighted. Taking the headnotes of these weekly parts as a basis, complainant constructs and publishes a digest in monthly parts, which monthly parts, with additions of selected cases and references to official reports, go to make up its Annual Digest—a single volume, called the 'American Annual Digest.' The volume for the year 1892 (with the monthly parts and reporters on which it is based) is the one in suit, the digest year being from September to September.

"The defendant, the Lawyers' Co-operative Publishing Company, publishes, among other publications, the General Digest of the United States, a work of the same purport as the American Annual Digest, and compiled in the main from parts which they publish semimonthly, the General Digest Annual for the year 1892 being the volume claimed by complainant to contain pirated matter in infringement of complainant's copyright. The defendant is a subscriber to the various reporters of complainant, and receives them in the usual weekly parts, and in these publications are found at least nine-tenths of the opinions used by them from which their digest paragraphs are claimed to be written. These weekly parts are distributed on their receipt among the defendant's several editors who from these pamphlets write the digest paragraphs which appear first in the semimonthly parts of the General Digest and thereafter in the Annual. From the testimony of the defendant it appears that its digest paragraph writer, when using the reporter, has before him in his work the syllabus and preliminary statement prepared by complainant, the same being directly followed by the opinion, and that without referring to the syllabus in any manner he constructs his digest paragraph from the opinion and that alone. Defendant's publication is principally the work of eight editors, who have each been sworn and given similar testimony to the effect that they had instructions never to consult the headnotes of other publications, unless the same were made by the court; that they never used in any way the headnotes of complainant's publication, and some of them that they never read the headnotes either before or after they had finished their work, even for comparison. One of the editors, however, Mr. Coffin, in his deposition stated that he invariably read the syllabi of complainant the first thing, but he made no use of them in his work; and Mr. Greenhoot that he sometimes did read them and sometimes not; but with two exceptions, where he could not find different expressions, he never made use of complainant's headnotes. Another, Mr. Hill, testified that after he had formulated his headnotes he sometimes compared his work with complainant's for curiosity merely. These editors, in reply to questions as

to the average amount of work they are capable of performing in a day in writing digest paragraphs from the opinions in complainant's publications, state variously, but it is between twenty and forty cases in a day's work: Mr. Greenhoot testifying that he averaged between eight and ten in an evening's work; Mr. Rich and Mr. Herrick that they averaged between thirty and forty in a day, and Mr. Haviland between twenty and thirty in a day. In reply to this line of testimony complainant produces as many editors of its own staff, who testify to the impossibility of doing in a day the amount of original paragraph writing claimed by defendant's editors. Their testimony shows that from their experience the average is between four and seven cases a day, but that in preparing paragraphs from the headnotes of their own reporters for use in the digest they could then do between thirty and forty cases in a day. Mr. Appleton, one of complainant's principal editors, testifies that defendant's editor Greenhoot, who testified that his capacity was eight to ten cases in an evening's work, when employed by complainant in 1889 and for several years prior, was unable to do more than three cases in a day's work of eight hours. The only witness produced not in some way connected with the parties was Mr. Sickels, the New York court of appeals reporter, who was called by complainant. In a number of respects he substantiated the testimony of complainant's editors. He testified mainly from his own extensive experience as a reporter, stating that he considered himself a rapid worker; that he averaged in reporting but little more than four cases a day; that if a digester had before him and utilized the headnotes of other writers it might be possible to do as many as twenty to thirty cases in a day's work; otherwise, he did not deem it possible to average more than from four to six cases in a day.

"With these facts set forth complainant introduces and points out to the master some five hundred paragraphs taken from defendant's General Digest with the corresponding paragraphs from complainant's reporters and digests from which it is claimed defendant's paragraphs are pirated. These represent, of course, but a small portion of the complete work, which consists of some thirty-eight thousand digest paragraphs, and complainant insists that many more can be presented, but that it is unable to do so within the time limited, and the examples furnished are sufficient to show for the purposes of this motion. The master has examined with much labor and care all the opinions from which these headnotes have been taken and made comparison with headnotes of the same cases wherever they have since been made by official reporters. The identity between the paragraphs of most of the examples on first inspection is, indeed, remarkable. When taken in connection with the opinions, however, some are found to be simply direct quotations therefrom; some in which a portion are quotations from the opinion and the original work is entirely different, and some expressing in similar terms and phrases quite different ideas. Such cases where there is nothing else indicating piracy the master has first endeavored to eliminate. The cases in which errors have been copied, of which there are a number, are, as a rule, sufficient unto themselves as a proof of piracy. The cases in which clearly original language and construction are followed—not phrases and modes of expression common to every digester, but such original language or construction that it does not seem that two reporters separately digesting the same opinion, could possibly use with such marked similarity—these there has been no hesitancy in reporting. In a number of cases it seems as though defendant's digester, after reading the headnote of the reporter, had gone through the opinion to see if the wording of the headnote was to be found therein. If it were found there, even in disconnected phrases, he used it also, making use of the original labor of selection and arrangement. If the language were not there in *haec verba*, he employed synonyms, and, if necessary, resorted to rearrangement and transposition. In many instances reported the paragraphs are practically verbatim copies, and it seems as though rearrangement has been resorted to to make the paragraphs comply with the different theories on which the two digests are based, complainant using the concrete method, endeavoring to express the actual point decided with reference to the actual facts, so as to distinguish a case from others, while defendant uses the abstract method, giving the principle of law decided and endeavoring to make it general.

That this case is an anomaly in copyright litigation is in some respects true, but the contention that consequently the case of *Nyers v. Callaghan* in no wise furnishes a precedent for its determination can hardly be sustained. In some respects the cases are analogous, and, in so far as they are, a precedent is certainly furnished. In both cases complainant's publications are used by defendant in editing or digesting; in both defendant's editors state their work to be independent; in both, in the majority of cases, there is the appearance of independent labor without regard to complainant's work, yet in both it is apparent that complainant's work has been used, and, in some instances, words and sentences copied without change; in others changed in form only. Judge Drummond, in his opinion (5 Fed. 726), afterwards concurred in by the supreme court (9 Sup. Ct. 177), says: "The conclusion is irresistible that, for a large portion of the work performed in behalf of the defendants, the editors did not resort to original sources of information, but obtained that information from the volumes of Mr. Freeman (the complainant). Undoubtedly it was competent for an editor to take the opinions of the supreme court, and possibly from the volumes of Mr. Freeman, and make an independent work; but it is always attended with great risk for a person to sit down, and with the copyright of a volume of law reports before him, undertake to make an independent report of a case. It is not difficult to do this, going to the original sources of information—to the decisions of the court, the briefs of counsel, the records on file in the clerk's office—without regard to the regular volumes of reports. Any one who has tried it can easily understand the difference between the headnotes of two persons, equally good lawyers, and equally critical in the examination of an opinion, where they are made up independent of each other; and, bearing in mind this fact, it seems to be beyond controversy that, although in many, and perhaps most, instances there is a very considerable difference between the headnotes of the defendant's volumes and those of the plaintiff, the latter have been used in the preparation of those of the former."

"The simple question for the master is, are these digest paragraphs presented the work of independent labor or not? There is little doubt but that in almost every instance defendant's digester read the opinion, and there is no testimony to the contrary, and it may be that defendant's digesters are more rapid workers than complainant's, or that one may construct more original digest paragraphs than syllabi in a given time; but that many of complainant's paragraphs have been more or less utilized by some of defendant's digesters cannot be gainsaid. Neither can it be said that both parties have gone to the same sources of information in the same sense that the expression is generally used. No fair-minded person can compare the headnotes in pamphlet No. 12, of volume 29, *Pacific Reporter* (and there are other like cases), with the digest paragraphs made by defendant's editor from the opinions in this number, and published in the *General Digest*, and doubt for a moment piracy, and particularly when the digester had before him headnotes already prepared, even when his testimony goes to show that no use has been made of the headnotes. It is claimed by defendant that its work is the result of independent labor, and that the resemblances are simply innocent coincidences. In some of the examples, perhaps, this is so; in others, certainly, it is not; and the master's report sets out in detail such cases that seem to be from themselves, in connection with the various opinions, clearly cases of piracy. In some cases where doubt has arisen as to the possibility of the work having been performed without reference to complainant's headnotes, this being a preliminary and not a final hearing, defendant has been given the benefit of the doubt. It is the duty of the master to report the facts and to identify such of the paragraphs presented to him as appear to have infringed the copyright. It does not seem to be within the province of the master to go further than this, though the briefs suggest it, and it seems that the report presented herewith fulfills all the requirements."

Rowland Cox, for complainant.

William F. Cogswell, for defendant.

COXE, District Judge. It must be regarded as settled law in the United States that an author has no exclusive property in a published work except under some act of congress, and then only when he complies with the provisions of the act. *Wheaton v. Peters*, 8 Pet. 593; *Banks v. Manchester*, 23 Fed. 143, affirmed 128 U. S. 244, 252, 9 Sup. Ct. 36. A reporter can have no copyright in the opinions delivered by the court or in the syllabi prepared by the judges. *Wheaton v. Peters* and *Banks v. Manchester*, supra; *Banks v. Publishing Co.*, 27 Fed. 50; *Nash v. Lathrop*, 142 Mass. 29, 6 N. E. 559. A reporter may acquire a valid copyright for the headnotes, footnotes, tables of cases, indexes, statements of fact and abstracts of the arguments of counsel, where these are prepared by him and are the result of his labor and research. So he may have a copyright for a digest or synopsis of judicial decisions and the selection and arrangement of cases relating to a particular branch of the law. The copyright protects only the original work of the reporter. *Myers v. Callaghan*, 5 Fed. 726, 10 Biss. 139; *Id.*, 20 Fed. 441, affirmed 128 U. S. 617, 9 Sup. Ct. 177; *Connecticut v. Gould*, 34 Fed. 319; *Gray v. Russell*, 1 Story, 11, Fed. Cas. No. 5,728; *Davidson v. Wheelock*, 27 Fed. 61; *Drone, Copyr.* 159, 160. The compiler of a digest has no monopoly of the opinions, decisions and syllabi prepared by the courts and judges, even though he has previously published them in copyrighted pamphlets. These opinions, decisions and syllabi are free alike to all digesters. But when notes suitable for use in a digest have been prepared from these common sources of information and properly secured by copyrights a subsequent compiler in the same field is not permitted to avail himself of this original work, and save time and labor for himself by copying from the property of others. He may use the copyrighted matter as a guide in the preparation of his own work to verify its accuracy, or detect errors, omissions or other faults, but in all other respects he must investigate for himself. He may take the original opinions and prepare from them his own notes, "but he cannot exclusively and evasively use those already collected and embodied by the skill and industry and expenditures of another." *Banks v. McDivitt*, 13 Blatchf. 163, Fed. Cas. No. 961, and cases cited; *Gray v. Russell*, supra; *Drone, Copyr. p.* 394.

Where the pirated portions can be separated from the portions not subject to criticism the injunction should go not against the entire work, but against the infringing portions. The doctrine of "confusion of goods" which has sometimes been invoked to suppress an entire publication is not applicable where the infringing portions can be pointed out and separately condemned. *Banks v. McDivitt*, supra; *Lawrence v. Dana*, 4 Cliff. 1, 84, 85, Fed. Cas. No. 8,136; *Mawman v. Tegg*, 2 Russ. 385; *Greene v. Bishop*, 1 Cliff. 186, 203, Fed. Cas. No. 5,763; *Little v. Gould*, 2 Blatchf. 165, 186, Fed. Cas. No. 8,394; *Story v. Holcombe*, 4 McLean, 306, Fed. Cas. No. 13,497; *Publishing Co. v. Keller*, 30 Fed. 772; *Farmer v. Elstner*, 33 Fed. 494; *Drone, Copyr. pp.* 527, 530.

Apply these principles to the case at bar. The complainant has

valid copyrights for the original work prepared by its editors and published in the various pamphlets composing its system of reports. The opinions of the judges and the syllabi prepared by them are not covered by the complainant's copyrights, and these the defendant, considering the matter from a purely legal point of view, had a perfect right to use. The defendant had a right to copy the opinions, decisions and syllabi prepared by the court from the complainant's publications, or from any other source, and use them precisely as other matter which is free to the public. The defendant could lawfully prepare notes, abstracts and paragraphs from these free sources of information, collect them and publish them in a digest of its own. In doing this its editors had no right to avail themselves of the complainant's original work. They were forbidden not only from copying the work of the complainant's editors, but also from using that work in any way to give them suggestions or to lighten their labors. In short, they were not at liberty to appropriate directly or indirectly the matter which the complainant has protected by copyrights.

The master to whom the question of infringement was referred has, with great diligence, compared the suspected paragraphs pointed out by the complainant with the alleged corresponding paragraphs in the copyrighted works, and has reported 303 instances of piracy. The court has examined the master's report sufficiently to be convinced that it is a conservative report, and, without reviewing his work in detail, accepts it as establishing the fact that the above number of paragraphs infringe. As the defendant's digest contains about 38,000 paragraphs the infringement thus established is considerably less than 1 per cent. At the trial, for the first time, complainant presented some 700 additional paragraphs which it asserted to be infringements. Assuming as to these that the same proportion of pirated paragraphs should be established as in those submitted to the master, still the infringing matter would amount to less than 3 per cent. In this connection it should be remembered that the complainant has had the defendant's book in its possession for two years. As the result of two years' examination, assuming that the court should find with the complainant upon every one of the paragraphs pointed out by it as infringing its copyrights, the total pirated matter would amount to less than 4 per cent. It must, of course, be conceded that a large part of the defendant's book, having been compiled from other publications and from syllabi prepared by the courts, is not covered by the complainant's copyrights.

The situation then is this: Matter proved to be piratical, about five-eighths of 1 per cent. Other designated matter, alleged to be piratical, between 1 and 2 per cent. Matter not affected by the complainant's copyrights, about 28 per cent. Regarding the remaining portions of the work,—about 70 per cent.,—no direct proof is offered. The defendant contends that this 70 per cent. must be presumed to be innocent until proved to be guilty. The complainant, on the contrary, insists that it must be presumed fraudulent from the

proof already adduced. The complainant argues that the defendant's editors had the copyrighted books before them when they prepared their digest paragraphs; that they are shown to have done five times more work than other editors engaged in like occupation; that they are proved to have pirated 303 paragraphs and the presumption is that the entire book is so tainted with fraud that it should be suppressed. The court is of the opinion that in a work like a digest, which has the general characteristics of a directory, an index or a road book, where each paragraph is separate and distinct from every other, and can be removed without in any way destroying the effect of the remaining paragraphs, it would be establishing a most dangerous precedent to condemn the entire work when less than 1 per cent. is proved to be piratical. This would be substituting conjecture for proof, and in a case, too, where the proof is accessible. Where infringement exists in copyright cases it is usually susceptible of proof. There are always some indications which disclose the presence of the pirate. The court does not understand that this is denied, but it is said that it will consume a decade to examine and compare all the remaining paragraphs and that the complainant should not be required to enter upon such a task. Bluntly stated the proposition is this: A party, upon whom the onus probandi rests, is entitled to a decree for the entire relief demanded if, instead of proving his case, he proves a part and convinces the court that it will be difficult to prove the rest. Were this the case of an ordinary book like a history or a novel, and the court were convinced that, though disguised, the plot and plan of the work had been appropriated and the characters reproduced, though under different names, there would be no hesitation in condemning the entire work. Here, on the other hand, there is no connection whatever between the pirated paragraphs and the paragraphs which are the result of original and honest labor. The former can be removed and the complainant's rights protected, and without depriving the defendant of the fruits of the work which is fairly its own. It is not a case where the doctrine of "confusion of goods" is applicable, because the complainant's goods can be separated from the defendant's; it will take time, but it can be done. If the complainant is given the sweeping decree asked for the defendant will be prevented from publishing even the 28 per cent. of matter to which the complainant does not pretend to lay claim. If the defendant should eliminate from its work every paragraph which the complainant has pointed out as infringing, the remaining 36,000 paragraphs could not be sold by the defendant. Indeed, should the defendant issue a new edition with every paragraph eliminated which has been designated as open to the slightest suspicion of piracy it would still be under the ban of such a decree. The court cannot believe that such a decree would be just. Though the defendant, through some of its editors, has been guilty of inequitable conduct in appropriating to its use the result of the complainant's labors, the punishment it should receive should not be out of all proportion to the offense. To charge the defend-



ant with 38,000 piracies because it is shown to be guilty of 303 is pushing the law of presumptive evidence far in advance of any reported case. Equity seems to demand that the defendant be permitted to use what is honestly its own and restrained from using what it has taken from the complainant. By such a decree the rights of all will be preserved.

The learned counsel for the complainant argues the cause as if the defendant was, in effect, reproducing the copyrighted pamphlets of the complainant and was endeavoring to supersede and supplant these publications. It is thought that such is not the case. The defendant does not publish reports, except of selected cases, and the bill does not charge that these infringe the complainant's copyrights. The book with which the defendant's digest actually competes is the complainant's digest. The defendant's digest in no way supplants the copyrighted reports. Indeed, by advertising them extensively, it would seem that it must assist in extending their sale. It appears to the court that this is an important distinction which should not be lost sight of. It is not a case where, as in Callaghan and Myers, the defendant's books were published in order that they might be substituted for the complainant's books; where the paging, order of cases, statements of facts, etc., were intended to be similar. In short, it is not a case where in every volume there are unmistakable indicia that the defendant worked from the copyrighted portions of the complainant's volume and intended to produce an almost identical book. In a case like Callaghan and Myers the fact that the infringer worked from the copyrighted books is, of course, a most important factor, but in the case of an index or a digest the compiler is not guilty of bad faith in using the book that he is digesting. He must use this book. Not only should a digest tell, in brief, what has been decided, but it should also inform the reader where the decision is to be found in full. This of necessity requires an examination of the reports. To prepare a digest without such an examination would be an impossibility. A digest prepared only from the manuscripts of the judges would be a ludicrous excrescence which would not be harbored in any library. It would be about as valuable as a city directory which contains the names of the citizens, but omits to mention where they reside. As the complainant, by reason of its large facilities, is able, as a rule, to place the decisions of the courts before the profession in advance of other publishers, it is obvious that any one who makes a true and useful digest of "the year's grist" must examine the complainant's publications. If the complainant's contention is correct, that a digester may not take a "copyrighted book in his hands," the making of digests is at an end. The court is unable to perceive how mala fides can be imputed to the defendant because, in making an annual digest, it uses the reports which have been published during the year.

Without pursuing the subject further it is thought that the complainant must be contented when it has maintained and vindicated its privileges under the law of copyright; that the defendant should be punished to the extent that it has been guilty of an infrac-

tion of that law, and held accountable for every infringement which can be fairly laid at its door. Beyond this the court cannot go; it cannot consider matters not embraced in the issues joined by the pleadings, or enter upon a course of speculation and presume wholesale piracy from the proof now before the court, or from the alleged unfair business methods of the defendant in its relations with the complainant. The court can discover nothing in the case of *Callaghan v. Myers*, which is at variance with these views.

As the complainant stated at the argument that it did not require the court to make any comparison of the additional paragraphs, before referred to, with complainant's publications, or any finding in relation thereto, it follows that the complainant is entitled to a decree for an injunction and an accounting, limited, however, to the paragraphs reported by the master, with costs.

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SHUTE v. MORLEY SEWING MACH. CO. et al.

(Circuit Court of Appeals, First Circuit. October 31, 1894.)

No. 108.

1. PATENTS—VALIDITY AFFIRMED.

Claims 2 and 13 of the Morley patent, No. 236,350, for a machine for sewing buttons on fabrics, sustained. Decree of the circuit court modified so as to be limited to these claims, and then affirmed. 62 Fed. 291.

2. SAME—DECREE BROADER THAN FINDINGS—COSTS ON APPEAL.

The decree in a patent cause, which is broader than the findings, will be corrected by the appellate court of its own motion, and no costs will be allowed to either party, since it is the duty of complainant's solicitor to draw out a proper decree.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit in equity by the Morley Sewing Machine Company and the Morley Button Sewing Machine Company against Benjamin A. Shute and Abbie J. Shute, copartners, trading as Benjamin A. Shute & Co., for the alleged infringement of letters patent No. 236,350, granted January 4, 1881, to James H. Morley, and to E. S. Fay and Henry E. Wilkins, assignees of said Morley. A decree was rendered for complainants (62 Fed. 291), and defendants appeal.

John L. S. Roberts (Chas. Levi Woodbury, of counsel), for appellants.

Frederick P. Fish, William K. Richardson, and Ambrose Eastman, for appellees.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

PER CURIAM. We agree fully with the reasoning and conclusion of the judge who sat in the circuit court in this case, but we will notice two matters not spoken of in his opinion. The appellant maintains that in *Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299, the supreme court construed the claims in

contest in this case as containing the element of a fabric-feeding mechanism. The alleged infringing machine in that case infringed these claims on either construction, and the supreme court had no occasion to consider the question involved in the case at bar, and does not specifically state that it had considered it. Our observations in the opinion passed down October 12, 1894, in *King v. McLean Asylum*, 64 Fed. 331, as to matters not necessarily considered by the court in reaching a result, disposes of this proposition of the appellant. The Dennis and Capron patent came into the case as an afterthought, and, though now strenuously urged, is so clearly lacking in point—as such afterthoughts are apt to be—that it needs no discussion, except to remark that in its operation the very first step is essentially unlike the automatic principle of the Morley machine, because the feeding of the hooks and eyes is done singly, by hand, instead of in mass.

The patent in suit contains 18 claims, and the prayers of the bill relate to the patent as a whole. The decree below directed that an injunction issue “according to the prayer of the bill,” although only claims 2 and 13 were in issue. It has been many times urged that the public has an incidental interest in patent litigation, which throws a duty on the court to notice certain matters of its own motion. This is one of them; and in a patent cause a decree should not go which is broader than the findings of the court. Heretofore we have been content merely to correct the decree below, but, as the duty of drawing out a proper decree rests on the solicitor for the complainant, we will hereafter endeavor to protect the court by a proper adjustment of costs. As the appellant assigned no error on this account, he is not entitled to costs in this behalf. The decree of the court below will be modified so as to be expressly limited to claims 2 and 13, and, as thus modified, is affirmed. Neither party will recover any costs of appeal.

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KIRKPATRICK v. POPE MANUF'G CO.

(Circuit Court, D. Connecticut. November 23, 1894.)

No. 398.

PATENTS—ROYALTIES—CONSTRUCTION OF CONTRACT.

K. assigned to P. certain patents for velocipede saddles, and P. agreed to manufacture, and place on the market, saddles containing the improvements, or some of them, described and claimed in the patents, and to use reasonable facilities to promote the sale of saddles of that class; to keep accounts of all of such saddles sold; to make return thereof on the first of each year; to pay to K., within 20 days after such return, 25 cents on each saddle sold by P. during the preceding year; and to pay to K. half the net receipts from licensees and infringers. After the royalties had been paid for two years, a narrow construction was put on the patents in a suit by P. against a third person for infringement. Thereupon, P.'s attorney suggested that returns should be made annually as before, but that payment should be deferred till determination of the case by the supreme court, when, if the patents were sustained broadly, settlement for infringements could be had at the same time. K. assented to this, and for several years, till the decision had been affirmed,

returns were made, including, without distinction, all saddles made by P., all of which were covered by the broad construction of the patents, though only part of them were covered by the narrow construction. All the saddles had been marked and advertised as covered by the K. patents. *Held*, that K. was entitled to the royalty on all the saddles, the contract having been made with the understanding that the patents covered them, and no modification of the contract having been made.

Action by Thomas J. Kirkpatrick against the Pope Manufacturing Company for royalty on patents. Judgment for plaintiff.

Kerr & Curtis (Paul A. Staley and Smith & Barker, of counsel), for plaintiff.

William A. Redding, for defendant.

TOWNSEND, District Judge. This is an action at law, tried to the court under a stipulation waiving a jury, to recover the amounts shown by certain royalty returns made by defendant. The defendant alleges that the returns are erroneous in part, and denies its liability as to such part. Upon the evidence introduced in this case, I find the following facts:

The plaintiff was a manufacturer of saddles for bicycles, and had obtained several patents for improvements therein. The defendant had for many years been extensively engaged in the manufacture of bicycles. On September 7, 1885, the parties executed the following agreement:

"Agreement.

"Whereas, Thomas J. Kirkpatrick, of Springfield, Ohio, has this day assigned to the Pope Manufacturing Company, a corporation of Hartford, Connecticut, four several letters patent of the United States, viz. No. 216,231, dated June 3rd, 1879; No. 278,560, dated May 29th, 1883; No. 289,272, dated 27th November, 1883; and No. 314,142, dated March 17th, 1885, for improvements in velocipede saddles, as well as all rights to recover for past infringements thereof. Whereas, both of said parties hereto are desirous of making said patents of value and profit to themselves, respectively: Now, in consideration of one dollar by the said Kirkpatrick to the said corporation paid, receipt whereof is hereby acknowledged, and of the stipulations herein, it is agreed by and between the parties hereto as follows, to wit: (1) The Pope Manufacturing Company agrees to manufacture and place upon the market, with reasonable promptness, velocipede saddles containing the improvements, or some of them, described and claimed in said letters patent, and to use its reasonable facilities and effort to extend the market for and promote the sale of saddles of that class; and, further, to use its reasonable efforts to prevent the manufacture, use, or sale of the inventions, or either of them, claimed in said letters patent, by other parties in the United States, except by purchase or license of the said corporation; and, further, to keep true and correct accounts, open to the reasonable inspection of the said Kirkpatrick, or his attorneys or representatives, of all saddles made and sold by said corporation, or under its license, containing said inventions, or either of them, and to make full and correct returns in writing to said Kirkpatrick, verified by oath if required by him, on or within twenty days of the first day of January in each year, during the term or terms of the said letters patent, beginning with the first day of January, 1886, said returns to be for sales of the preceding calendar year; and, further, to pay to said Kirkpatrick on or within twenty days of the first day of January in each year during the term or terms of said letters patent, beginning with the first day of January, 1886, the sum of twenty-five cents upon and for each and every saddle sold by said corporation or by its licensees or by infringers, from whom it has received or recovered payment of royalty or damages, during the preceding calendar year. (2) The said Kirk-

patrick agrees to transfer such orders, custom, correspondence, and other aid as may be valuable to the Pope Manufacturing Company in the prosecution of said business of making and selling such saddles, and such drawings, models, or suggestions as he has for the improvement thereof, and to disclose and apply for patents upon, as he may be requested, any modifications or improvements in said saddles which he may have made or begun to develop to this date, and to assign any patents that may be granted therefor to the said corporation, and generally to make any applications or sign or execute any papers for and at the expense of said corporation, which it may be advised are necessary or expedient to make said patents and improvements fully available to said corporation.

"Witness our hands and seals this seventh day of September, A. D. 1885.

"Thos. J. Kirkpatrick. [Seal.]

"The Pope Mfg. Co.,

"Albert A. Pope, Prest. [Seal.]"

On September 14, 1885, the parties executed a supplementary agreement, which is as follows:

"Memorandum.

"That whereas, an agreement was entered into between the parties hereto, dated the 7th day of September, 1885, relating to four several letters patent, and saddles to be made thereunder: Now, for sufficient consideration, it is agreed as follows: That the Pope Manufacturing Company may exercise its discretion as to the rates of royalty to be charged to its licensees under said patents, and as to suits against infringers, and is to keep account of its receipts from licensees and infringers, and of all reasonable expenses involved in the collection of royalties and damages, and to render statements of said accounts to said Kirkpatrick, and that in accounting with the said Kirkpatrick the said corporation shall deduct the amount of said expenses and the collections from said receipts, and shall pay over to the said Kirkpatrick one-half of the difference or net receipts so found, in place of the sum of twenty-five cents upon and for each and every saddle upon which it has received payment as stipulated at the end of the first section of said agreement. This agreement is to be taken as a part of said former agreement of said 7th of September, which is hereby confirmed in every respect, except as expressly herein modified.

"Witness our hands and seals this 14th day of September, A. D. 1885.

"Thos. J. Kirkpatrick.

"The Pope M'fg Co.,

"E. W. Pope, Sec'y."

Upon the execution of this agreement the plaintiff discontinued the manufacture of said saddles, and he afterwards made suggestions concerning the improvement thereof, as provided for in said agreement. Returns of sales of saddles were annually made by the defendant to the plaintiff from 1886 until 1891, and payments were made therefor for the years 1886 and 1887 in accordance with said agreement. No other payments have been made, and this suit is brought to recover the sums stated in said subsequent returns, which have not been paid. The defendant had been chiefly engaged in the manufacture of a bicycle having a large forward wheel and a small rear wheel, prior to June, 1888. About that time it commenced to sell the low-wheeled, rear-driving "safety bicycle," and used thereon a saddle differing in construction from those used on the older type of wheel. The saddles sold by the defendant during the years 1888, 1889, 1890, and 1891 were different from any saddles sold by either plaintiff or defendant at or prior to the time of making said contract, and from any saddles sold by defendant for more than

two years after said contract was made. The returns for saddles sold for 1888, 1889, 1890, and 1891 were rendered under the following circumstances: In April, 1887, the defendant brought suit in the United States circuit court for the Northern district of Illinois against the Gormully & Jeffery Company for alleged infringement of two of the patents covered by said agreement. The court, in its opinion, gave such a limited construction to such patents as relieved the defendant therein from the charge of infringement, and dismissed the bill. The broad construction of the claims of said patents therein contended for, by the defendant herein, covered hammock seats and flexible seats suspended, front and rear, upon independent springs. The narrow construction adopted by said circuit court limited said claims to saddles constructed with bifurcated springs at the forward ends. Shortly after this decision the plaintiff met Mr. Pratt, the attorney for the defendant company. Mr. Pratt expressed regret at the decision, and a firm conviction that upon appeal to the United States supreme court said patents would be broadly sustained. Thereupon, the plaintiff remarked that, while he was sorry at the result, he did not understand that it affected his right to receive the royalty. Mr. Pratt said that was a matter to which he had not given special attention, but suggested that, during the interim from that time on until the hearing should be had in the supreme court, the returns should be made as before, and payment should be deferred until the termination of the litigation, when, if the patents were sustained broadly, there would be a handsome return from infringers, which could be settled at the same time. The plaintiff assented to this arrangement. Early in 1889, the returns not having been forwarded, Paul A. Staley, the attorney for the plaintiff, wrote the following letter to said Pratt, the attorney for defendant:

"Springfield, O., February 12, 1889.

"Charles E. Pratt, Esq., Care Pope Mfg. Co., 79 Franklin Street, Boston, Mass.—Dear Sir: Referring again to the matter of the Gormully & Jeffery suit, and the Kirkpatrick saddle patent, Mr. Kirkpatrick desires me to say that your suggestion of Mr. Wetmore to act in connection with the other counsel in the case at the hearing in the supreme court meets with his approbation. I suppose that there is no probability or possibility of the case being heard for two or three years yet. I would suggest, however, if you think best, that you notify Mr. Wetmore of our intention at such time as you desire, and when there is a probability of the case being heard, that myself and Mr. Kirkpatrick will be glad to meet him, and go over the case with him, after he has looked the matter up to his satisfaction. Mr. Kirkpatrick also desires me to request that the Pope Company make their usual annual statement of the number of saddles during each year until these cases are finally disposed of. This seems to be no more than right, under the terms of the agreement. Of course, no other settlement will be expected, other than the statement, until the final disposition of the case is had. The annual statements, however, will furnish a basis of such settlement in case the patent shall be sustained, and enable Mr. Kirkpatrick to keep run of the business during the pendency of the suit.

"Very truly, yours,

Paul A. Staley."

This letter was authorized by the plaintiff, and was written after he had reported to said Staley, and had talked over with him the previous conversation with said Pratt. Mr. Wetmore argued the case on appeal. The supreme court approved the construction of

the Kirkpatrick patent adopted by the lower court, but did not pass upon the Shire patent. To the foregoing letter, Mr. Pratt replied as follows:

"14 March, 1889.

"Paul A. Staley, Esq., Springfield, Ohio—My Dear Sir: Your favor of 12th ult. came during my absence abroad. I note its contents now on returning, and have nudged our bookkeeper about sending statements of saddles sold, to Mr. Kirkpatrick. The number sold last year was, I believe, 5,112. The other matter is too remote still to admit of much answer now.

"Yours, very truly,

Charles E. Pratt."

And on May 11, 1889, he wrote the following letter:

"11 May, 1889.

"Paul A. Staley, Esq., Springfield, Ohio—Dear Sir: Replying to your favor of 9th, I have to say that I gave Mr. Kirkpatrick a statement of the number of saddles, as required, by letter; and the bookkeeper now says that, knowing that, he did not understand it necessary to make a separate return himself. I have now requested him to send a statement to Mr. K., signed by himself.

"Yours, truly,

Charles E. Pratt."

Except as may be inferred from these facts, there has been no modification of the original contract of September 7 and 14, 1885. Said contract was drawn by the attorney for defendant, and was signed by plaintiff without the advice of counsel. The broad construction of said patents would include all saddles accounted for in the returns made by defendants, namely, 34,652 saddles. The narrow construction would only include saddles not applied to safety bicycles, namely, 7,303 saddles. The defendant, in its agreement, promised to place upon the market "saddles containing the improvements or some of them, described and claimed in said letters patent, and to use its reasonable facilities and effort to extend the market for and promote the sale of saddles of that class," and to pay a royalty for each saddle sold by it containing the inventions, or either of them. The plaintiff claims that these words refer to the inventions actually described in said patents. The defendant claims that they refer only to those which might thereafter be adjudged to be valid. The ambiguity thus disclosed necessitates a further finding as to the situation of the parties, and the acts done by them showing their practical interpretation of said agreement. Upon this point I further find as follows: The plaintiff never demanded any royalty on any saddles sold by the defendant during the years 1888, 1889, 1890, and 1891, until July 1, 1892. The books of account kept by defendant never made any discrimination between classes of saddles adapted for the high-wheel and those adapted for the safety bicycle. All flexible saddles hung upon front and rear independent springs were treated in these accounts as coming under said agreement of September 7, 1885, and the returns for royalties were made in accordance with such accounts. From September 7, 1885, until after the last of the returns sued upon was rendered, there was never any difference made in the dealings of the defendant with the plaintiff, in its own books of account, in its catalogues or circulars, in its returns, or in any wise whatever, between said saddles, so far as their designation as Kirkpatrick saddles, and their inclusion in the re-

turns made under said contract, are concerned. Every saddle included in the returns sued upon was stamped as patented, with Mr. Kirkpatrick's name, and with the number and date of his patent,—No. 314,142, March 17, 1885. These saddles, when made for safeties as well as for high bicycles, were designated in the catalogues, circulars, and price lists of the defendant as the "Kirkpatrick Saddle," being there thus distinguished in order to secure the good will of his name. Said saddles commanded a higher price in the market than other types of saddles. The defendant never suggested to the plaintiff that it should claim any distinction, in the return for and payment of royalties, between the two kinds of saddles, until after the last of the returns in suit was made, nor until payment conformably to the returns in suit was demanded by the plaintiff. No notice of intention to refuse payment in case the scope of said patents should be limited by the courts was ever given to the plaintiff, and there was no mistake of fact made in the preparation and rendition of either of the four annual returns of saddles sold by the defendant for the years 1888 to 1891, inclusive. No returns of saddles for these four years, except those put in evidence, and showing 5,112 saddles sold and subject to royalty in 1888, 6,752 in 1889, 9,831 in 1890, and 12,957 in 1891, have ever been made by the defendant to the plaintiff.

The defendant contends that at the time of making said contract there was some doubt as to the legal interpretation and scope of said Shire and Kirkpatrick claims, and that said returns were made with the mutual understanding that it should be subsequently ascertained how many of the saddles sold would come within said claims, as they should be construed by the supreme court of the United States, and that, if said claims should not be broad enough to cover the safety saddles, they should not be paid for, but that, by a mistake as to the legal construction of said patents, all the saddles, both for high and safety bicycles, were included in said returns. The plaintiff contends that said contract was made upon the mutual understanding that said claims covered all adjustable hammock seats and flexible or treeless seats hung, front and rear, upon independent springs. He denies that said returns were made by mistake, or upon any such condition as is claimed by defendant, and claims that they constituted, in effect, when accepted, an account stated between the parties. Upon these points, I find as follows: The assignment of said patents, and the contract between the parties, were made with the understanding that the inventions and improvements claimed and described in said patents covered adjustable hammock seats and flexible seats hung, front and rear, upon independent springs. All the saddles sold by defendant during 1888, 1889, 1890, and 1891, and of which returns were made to plaintiff, contained said inventions and improvements, or some of them. It is not necessary, in this finding, to determine how far this agreement may have been understood to be dependent upon the legal construction to be thereafter put upon said patents, because the evidence as to the situation of the parties, their relations to each other, and as to the practical interpretation put by them upon said contract,



fails to show, in any event, any understanding other than that the royalties should be paid in case the patents should be sustained. It does not appear that the idea of a modification of the agreement by reason of a limited construction of said patents ever occurred to the parties until after the final decision of the suit against Gormully & Jeffery in the United States supreme court. If the defendant intended to be bound, and understood that it would be bound, only to pay royalties on such saddles as should be included under the claims of said patents, as they might be construed by the supreme court in the suit by the defendant against the Gormully & Jeffery Company, it was its duty to notify the plaintiff of such intention; and, having failed to do so, such undisclosed intention, not known or assented to by the plaintiff, lacks the essential element of a contract, and therefore no such contract, or modification of the original contract, can be held to exist between the parties.

Upon the foregoing facts, I hold, as matter of law, that the contract is to be construed as an agreement to pay royalties on all the said hammock or flexible saddles sold by defendant, and included in said returns. I therefore find that the defendant is indebted to the plaintiff in the sum of \$8,663, with interest thereon from the date when payment was demanded, namely July 1, 1892, to the date of the entry of the judgment.

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TRAVERS v. AMERICAN CORDAGE CO.

(Circuit Court, S. D. New York. April 24, 1894.)

PATENT—PLATE FOR SECURING ROPES—LACK OF INVENTION.

Patent to Taylor (No. 322,501) for an elongated metal plate, provided with three eyes in line, and two projections corrugated on their inner faces, for securing a rope firmly in place, involves no new principle, result, or function, and is not entitled to protection, since both the plate and the projections are old. *Sargent v. Covert*, 14 Sup. Ct. 676, 67 O. G. 403.

This was an action by Vincent P. Travers against the American Cordage Company for alleged infringement of certain letters patent, and is now before the court on final hearing.

Arthur v. Briesen, for complainant.

Frederic H. Betts and Samuel R. Betts, for defendant.

COXE, District Judge. This is an equity action for infringement of letters patent No. 322,501, granted July 21, 1885, to Theodore Taylor, for improvements in rope fasteners. The patent relates to that class of fasteners in which the rope is held by friction in jaws of suitable formation. The fastener is adapted to be used where it is desired to secure a rope firmly in place without knotting. It is an elongated metal plate having three eyes placed in a line. Between the middle eye and one of the end eyes there are two projections having corrugations on their inner faces, these form, what the patent calls, "jaws." These jaws hold the bight of rope between them and, in connection with the eyes adjacent thereto, through which the rope is passed, prevent it from

slipping. The claims, three in number, are designed to protect the fastener and all its features. The defenses are lack of novelty and invention, noninfringement and failure to mark the fasteners "Patented" pursuant to section 4900 of the Revised Statutes. It appears that plates precisely like the patented plate, minus the holding jaws, had long been used as rope fasteners. Holding jaws for ropes were also old. Did it involve invention to place the old holding jaws upon the old plate? No new principle is invoked, no new result is accomplished, no new function is performed by this simple device for obtaining more friction. A mechanic finding that a rope held by the Sier or Sawyer fastener slipped under certain conditions would know that greater frictional surface was needed. The complainant's expert suggests one thing that he might have done, but the thing which Taylor did do seems the more natural and obvious. Augmenting and decreasing friction according as the motion of the device in hand is to be retarded or accelerated is one of the oldest principles of mechanics. Taylor invented no new remedy, he simply gave a little larger dose of a very old remedy. It is thought that the defendant's expert is correct in saying:

"In other words, in laying the Newell jaws onto the back of the Sier rope fastener, Taylor not only did not secure any different result or any new mode of operation, but did not even produce a new combination of parts, for this same combination was both suggested by, and substantially embodied in, the Whiteman bale tie, the Johnson clothesline fastener and the Sherman fire escape."

In the recent case of *Sargent v. Covert*, 152 U. S. 516, 14 Sup. Ct. 676, the supreme court say of a device which, like the device of the patent, was a clasp or rope fastener:

"Each of these screws compresses the rope within the socket, but the Covert screw, being sharpened, penetrates further than the other. The change is in degree and not in function. \* \* \* We are of the opinion upon this record that the alleged improvement was such a one as would have occurred to any one practically interested in the subject, and that it did not involve such an exercise of the inventive faculty as entitled it to protection."

It is thought that this language is equally applicable to the patent in suit. The bill is dismissed.

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DALBY v. LYNES.

(Circuit Court, D. Massachusetts. July 12, 1894.)

No. 2,561.

1. PATENTS—DEFENSE OF PRIOR USE—EVIDENCE TO ESTABLISH.

Proof that certain articles anticipating the patent in every particular, and capable of practical use, were made for use as samples, *held* sufficient to establish the defense of prior use, although it was not shown that they ever became known to any others than the person who made them, his daughter, who helped finish them, and the person for whom they were made. *Egbert v. Lippmann*, 104 U. S. 333, followed.

## 2. SAME—DEFENSE OF PRIOR USE—BURDEN OF PROOF.

The burden of showing that a prior use set up by defendant was forgotten and abandoned before the invention made by the patentee, if competent, is upon the complainant.

## 3. SAME—INVENTION—KNIT GARMENTS.

There is no invention in applying to the making of undershirts a peculiar stitch and method of putting together, already well known in the making of Cardigan jackets.

## 4. SAME—LARGE SALES AS EVIDENCE OF INVENTION.

The fact that the patentee was the first to put upon the market articles made according to his specifications, and that they at once went into public favor, so that large quantities were sold, cannot be considered as evidence of patentable invention, except when the case is otherwise doubtful, nor unless enough is shown, in addition to the mere fact of extensive sales, to enable the court to judge whether they arose from the intrinsic nature of the alleged invention, or otherwise. *Watson v. Stevens*, 2 C. C. A. 500, 51 Fed. 757, followed.

## 5. SAME—PATENTABILITY.

The Dalby patent, No. 357,068, for improvements in undershirts or vests, *held* void as to the third claim because of prior use and for want of invention.

This was a suit in equity by Thomas Dalby against Alexander Lynes for alleged infringement of letters patent No. 357,068, issued February 1, 1887, to complainant, for "improvements in undershirts or vests." The invention is thus described in the specifications of the patent:

"This invention consists, primarily, in constructing undershirts or vests so that they shall be shaped or fashioned to the body without the employment of either a narrowing or a widening machine, or the cutting away of any portion of the fabric at the narrow portion of the body, or the cutting out of the shape. The body of the shirt or vest is knit so as to have the same ribbed structure throughout, except that the top and bottom portions are formed of half Cardigan, and the central or waist portion of Derby rib (or, as it is also termed, 'one-and-one rib'), whereby the requisite narrowing of the body is secured at the waist to conform to the shape of the body without necessitating the cutting away or cutting out of any portion of the fabric. Two connected parts thus formed, and constituting the back and front, respectively, of the shirt, are joined together by selvage edges. The invention further consists in forming the sleeves separately from the body, the wrist portion being formed of a Derby rib, while the arm portion is formed of half Cardigan, whereby the requisite width and elasticity is secured, the arm portion being secured to the body by stitching, without the intervention of gores or gussets, all as hereinafter described."

The third claim, which was mainly in issue, reads as follows:

"(3) An undershirt or vest having sleeves, the arm portions of which are formed of half Cardigan, and the wrist portions of Derby, or one-and-one, rib, the edges of each sleeve being united by a seam at x, and the arm portion stitched to the body of the garment, substantially as described."

The defenses mainly relied on were prior use and knowledge by others than the inventor, and want of invention. In respect to prior use and knowledge, there was testimony by one Charles Evans that in October, 1882, he made some children's shirts for Mr. William Carter, to be used as samples; that the cuffs of these shirts were made with a "one-and-one" stitch, and the sleeves with a "royal rib;" and that they were finished by his daughter, Mary A. Evans, who put some crochet work on the neck.

John L. S. Roberts, for complainant.  
Fish, Richardson & Storrow, for defendant.

PUTNAM, Circuit Judge. The answer admits infringement of the third claim of the complainant's patent in the event it is found to be valid. It denies infringement of any other claim, and none such is proven. Therefore, it is conceded that the third claim is alone in issue. The larger portion of the evidence in this cause is directed at alleged prior use and knowledge by others than the inventor. The last affirmation of the rule of evidence touching this defense is in *Morgan v. Daniels*, 153 U. S. 120, 123, 14 Sup. Ct. 772, where it is applied to the effect of a decision of the commissioner of patents in a case of interference. It is, in substance, that the burden of proof rests on whomsoever sets up this defense, and that every reasonable doubt should be resolved against him. The supreme court seem to have thus laid down a rule touching the weight of evidence not known in the common law in civil causes, with one or two extreme exceptions. A practical illustration of its application is found in *Coffin v. Ogden*, 18 Wall. 120. Conceding that the prior matter was not embryotic nor inchoate, did not raise any speculation or experiment, and had reached consummation, the court held that prior knowledge and use by a single person was sufficient. This was under the act of 1836; but, so far as it touches the case at bar, we are not aware of any change in the law. Even with reference to public use, with the consent of the inventor, for more than two years prior to his application, the court held, in the well-known case of *Egbert v. Lippmann*, 104 U. S. 333, that use by a single person was sufficient, if under such circumstances that the knowledge of the use might have been communicated to others without violating any restriction imposed by the inventor; and this court, in *Stitt v. Railroad Co.*, 22 Fed. 649, remarked (page 651) that it was not necessary that the prior matter should have been actually used for the purpose contemplated, although it must have been capable of such use. We are led to the conclusion that the manufacture of the samples by Evans for Carter meets clearly all the requirements of this defense, in the way in which they were practically understood in the cases referred to. One of the original samples is produced, and there cannot be the slightest doubt that they were made as early as October 31, 1882, and that they anticipated Dalby in every particular. Although they seem to have been used only as samples, and are not proven to have been known to others than Evans, who knit them, his daughter, who aided in finishing them, and Carter, for whom they were knit, yet they were capable of practical use, were complete in every particular, were in no sense experimental, except in the sense of being experimental because apparently they were not offered to the trade or accepted by it, and Carter was under no restriction whatever with reference to the sale, use, or other disposal of them. This defense seems to be fully maintained.

in *Converse v. Matthews*, 58 Fed. 246, this court said:

"There is no equity nor public policy which requires that one should be deprived of his just reward who revives a lost art, whether buried for ages or for only a few years, although with the latter there is, of course, more necessity for making sure that the revival was not suggested by the knowledge of what had apparently disappeared."

Although the statute, in legislating touching what was "not known or used by others in this country," contains no limitation of time, and might, so far as its letter is concerned, apply to what was known or used by others within any period whatever, yet it must yield to reason in this particular. Especially is this true with reference to the advance in mechanical arts, so rapid in this generation, as is illustrated by what we further said in *Converse v. Matthews*, *ubi supra*:

"With our rapid progress in mechanical improvements, what an ingenious man fails to accomplish to-day, with the appliances now at hand, another ingenious man may accomplish to-morrow, with the better appliances which he then finds; and, if the latter acts from his own resources, he is not to be deprived of the fruits of his ingenuity by reason of the prior failure of to-day, although, without taking into account the change in appliances, it may be difficult to understand why and wherein one failed and the other succeeded."

This question has been hinted at in the case at bar, but not so thoroughly presented as to enable the court to undertake to lay down any general rules touching it. It comes in answer to the defense of prior use or knowledge by others, and the burden to make out the circumstances supporting it rests on the inventor or complainant. So far as authorities go, the line of investigation in this direction is far from complete, and the authorities themselves are neither definite nor well sustained. In *Gayler v. Wilder*, 10 How. 477, relied on by the complainant, the instruction to the jury, which was sustained, was as follows:

"If Conner had not made his discovery public, but had used it simply for his own private purpose, and it had been finally forgotten or abandoned, such a discovery and use would be no obstacle to the taking out of a patent by Fitzgerald, or those claiming under him, if he be an original, though not the first, inventor or discoverer."

Even this expression was doubted in *Coffin v. Ogden*, *ubi supra*, 125. In *The Barbed-Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 450, and more particularly in *Edison Electric Light Co. v. Beacon Vacuum Pump & Electrical Co.*, 54 Fed. 678, this question might well have been suggested, if it involved a rule of very extensive application; yet it was not. We make these observations in order that it may be understood that we do not go beyond what the case at bar necessarily demands of us; and for that reason all we need say is that whatever may have been the facts when Carter or Evans gave their depositions, in 1890, the complainant has failed to show that, within the language of *Gayler v. Wilder*, *ubi supra*, what was done by Carter and Evans in October, 1882, had been "finally forgotten or abandoned" in April, 1884, when it is conceded that Dalby was making shirts described in his specifications and claims.

There is, however, a more fundamental difficulty in the complainant's case. A novelty involving a state of art so universal and com-

mon as the making and adjustment of clothing must be of a radical character, to overcome the presumption against its patentability. This is well illustrated by the expressions and conclusions of the court in *Burt v. Evory*, 133 U. S. 349, 10 Sup. Ct. 394, where the alleged invention was stated as follows:

"A novel mode of constructing shoes and gaiters, whereby the ordinary elastic goring at the sides and the tedious lacing up at the front are both dispensed with, while at the same time the tops will expand to receive the foot, and fit neatly and closely around the ankle when the shoe is on, being also water-tight to the extreme top of the shoe."

The relations to the prior art and the claimed advantages appearing in that case are singularly like those in the case at bar; and yet the patent was held void for want of patentable novelty. A similar result was reached in *Patent Clothing Co. v. Glover*, 141 U. S. 560, 12 Sup. Ct. 79,—a case of an alleged improvement in goring pantaloons, somewhat more simple in its character than the claimed invention at bar, yet in its relations to the domestic arts substantially the same. Another somewhat analogous case is *Cluett v. Clafin*, 140 U. S. 180, 11 Sup. Ct. 725, involving an alleged improvement in adjusting the bosom of a shirt, by which, as in complainant's patent, the raw edges and loose threads would be avoided, and the bosom would be rendered firmer, and less likely to rumple or break. Every person owes something to his art, trade, or other occupation, which seems to be often forgotten when the fancy, tickled by what is new, too frequently elevates it to the importance of invention. Applying the common knowledge and common judgment which, in a case presented on bill, answer, and proofs, the court is entitled to apply, as a jury may, we are unable to see anything in this patent except "the natural outgrowth of the development of mechanical skill, as distinguished from invention." *Burt v. Evory*, 133 U. S. 358, 10 Sup. Ct. 394. It appears that the various stitches referred to in the patent had been well known for a long time, and that the half Cardigan stitch named in it was a modification of the Cardigan stitch, also well known. The complainant testified, on cross-examination, that prior to 1884—the year in which he claimed to have made his invention—he had known Cardigan jackets in which the arm portion of the sleeves was knit in the Cardigan stitch, and the wrist portion in the same stitch which his specifications prescribe; that in these jackets the sleeves were knit in a flat piece, and sewed together on their edges, and sewed to the body of the jacket; that except in the fineness of the gauge, and that the Cardigan stitch was used in lieu of the half Cardigan, there was no difference between the Cardigan jackets and the undershirts shown by Fig. 3 of his patent; that in this way the requisite width and elasticity were secured in the sleeves of the Cardigan jackets, and the wrists were sufficiently narrow without any other fashioning; that the workman, while knitting the Cardigan sleeves, could have changed from the Cardigan stitch to the half Cardigan by merely changing the order of the courses which he was knitting, and with very little trouble; that the two stitches could be made on the same machine; and that it was within the skill of an ordinary knitter to knit these

two stitches on the same machine. This testimony was not noticed on the further examination of the complainant in his own behalf, and, while pressed on us by the defendant, has not been explained to us by the complainant. It seems to us to be a clear admission that all which the complainant did was to apply to an undershirt what was before well known in a Cardigan jacket,—an adaptation which was within the range of ordinary skill. The cases holding that there is no patentable novelty in this are too numerous and modern to require citation of them in this connection. On the whole, we can say no more than that the complainant's manufacture is one which shows taste and skill in his art, for which, however, he seems to have received the consequent reward by securing an extensive market for a number of years.

The complainant relies very strenuously on the claim that he was the first to put on the market shirts manufactured according to his specifications, and that they at once went into public favor, and that large quantities of them were sold. *Watson v. Stevens* 2 C. C. A. 500, 51 Fed. 757, gave effect to facts of this character; but the case was distinctly stated to be one "of doubt" and "closely balanced," and the improved machine there in question was accepted by manufacturers who had use for it, and who could judge understandingly of its value. Touching propositions of this character, the decisions of the supreme court of late have been so numerous that we need not refer to them specifically. It is sufficient to say that they do not admit facts of this character, except when the cases are otherwise doubtful, nor unless enough is shown, in addition to the mere fact of extensive sales, to enable the court to judge whether they arose from the intrinsic nature of the alleged invention or otherwise. The case at bar meets none of these conditions. Bill dismissed, with costs.

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ANTHONY et al. v. MURPHY.

(Circuit Court, D. New Jersey. September 25, 1894.)

1. PATENTS—PHOTOGRAPHIC APPARATUS—INFRINGEMENT.

The devices covered by patents to Cadett, No. 208,956, and Packard, No. 316,564, for improvements in photographic apparatus, are capable of joint use, and the patents are infringed by the "photographic shutters" sold by the defendant.

2. SAME—PRIORITY OF INVENTION—PROOF OF FRAUD.

Where defendant contends that plaintiff's grant of letters patent was obtained by fraud and dishonesty, the burden of proof is upon defendant to overcome the presumption arising from the grant in favor of plaintiff, and the defense fails unless the proof adduced be of the most conclusive nature.

This was a bill in equity by E. & H. T. Anthony and others against George Murphy for infringement of the letters patent for improved photographic shutter contrivances.

Edmund Wetmore, for complainants.  
E. S. Roos, for defendant.

GREEN, District Judge. The bill of complaint in this cause charges the infringement by the defendant of two certain patents owned by the complainants, one of which was granted to James W. T. Cadett, October 15, 1878, for "new and improved pneumatic arrangements for facilitating the uncapping or exposing and capping or shutting the lenses used in apparatus for depicting persons or objects by photographic means," and is numbered 208,956; the other was granted to Cullen C. Packard, April 28, 1885, for "new and useful improvements in photographic shutters," and is numbered 316,564. Both of these patents have been assigned to the complainants.

The defendant is a dealer in photographic supplies, resident in the state of New Jersey. The "photographic shutters" sold by him, and charged to be infringements, were actually manufactured by one George F. Green, in Kalamazoo, Mich., and he has virtually assumed the burthen of the defense. The answer filed by the defendant not only denies infringement, and that the two patents are capable of joint use, but, as well, that neither Cadett nor Packard was the first inventor of the peculiar mechanism and shutter shown and described in the respective letters patent, and asserts boldly that, in fact, the said George F. Green, the manufacturer of the alleged infringing mechanism and shutters, was the first inventor thereof, and that to him, and to him alone, belonged the right to claim the honor of the invention.

So far as the first two defenses are concerned, they may be readily dealt with. It seems quite certainly established by the proofs in the cause that the two inventions are capable of, and are fully adapted to, conjoint as well as separate use, and that they may be and are conjointly and beneficially used in connection with, and as parts of, one and the same photographic apparatus, and that, as a matter of fact, they are so conjointly made use of, and are to be found, in the "shutter mechanism" admittedly manufactured by Mr. Green, and sold by the defendant. And this fact disposes of the defense of non-infringement as well. For if the different mechanisms thus embodied in the defendant's shutter and appliances are, practically, the identical mechanisms of the Cadett and Packard letters patent, or the equivalent thereof,—and of this there seems to be no reasonable doubt,—of necessity the defendant is guilty of infringing: provided, always, Cadett and Packard are, in fact, the first and original inventors of those mechanisms. This proviso, however, raises the main issue in this cause: To which of the contending parties is the honor of "inventor" to be awarded,—to Cadett and to Packard, or to Green?

Upon the issue thus presented the contest has been most strenuously waged. It is one wholly of fact, and, to sustain their respective contentions, witness after witness has been produced, by the one party or the other, who have, under the solemn obligation of an oath, made statements touching these inventions, and the matters and events connected therewith, which are baldly contradictory and wholly irreconcilable. These witnesses, or many of them at least, are apparently disinterested and unprejudiced. Neces-



sarily their testimony obscures the issue, and renders a satisfactory and conclusive finding exceedingly difficult.

After a careful consideration of all the testimony in the cause, documentary as well as oral, and without lumbering up this opinion with citations therefrom, a fair presentation of which, if made at all, would demand the rescript of nearly all the evidence, and after weighing the conflicting statements of many of the witnesses as best could be done, the following conclusions have been reached:

First, as to the Cadett invention, it is established that it was novel and highly useful, and was the first of that character, in connection with photographic instruments, made in this country, at least. That Cadett in this respect appears to have preceded Green in any perfected similar invention which he may have made; and, if not strictly a pioneer, yet he seems to have been the first to bring into useful and workable combination the various elements of his mechanism, and is entitled to due credit therefor. That the alleged anticipating shutter and mechanism of Mr. Green, if they be admitted to have prior existence at all, amounted to nothing more than experiment, which failed to give satisfaction at their only practical test, and were admittedly never brought to a "state of completeness," but were abandoned. That the defendant's mechanism embodies the Cadett invention, and comes within the scope of the claim of the letters patent, even if that be restricted as strictly as contended for.

As to the Packard patent, the weight of testimony shows that as early as July, 1884, Packard had a photographic shutter of its peculiar type completed and in successful use; that, early in August of the same year, he made certain improvements upon this shutter mechanism, and produced the shutter as it now is in use; that he promptly applied for letters patent for his improved invention, which were granted to him in the following April. The presumption arising from this grant weighs heavily in his favor. The weight of the oral testimony seems to indicate him as the real and first inventor of these improved photographic shutter contrivances. The documentary evidence strongly supplements and strengthens the oral; and the conclusion seems inevitable that, as between Packard and Green, Packard was in fact the real inventor.

It is quite probable that this conclusion would have been reached had the testimony been more evenly balanced. To overcome the presumption arising in favor of Packard from the grant to him of letters patent, by allegations of fraud and dishonesty, proof of the most conclusive nature is demanded. A defense of this kind shifts, necessarily, the burden of proof, and casts it upon the defendant. That burden must be triumphantly borne. The preponderance of testimony, to sustain it, must be clearly apparent. If all reasonable doubt be not dissipated by it, the defense fails, for such doubt as remains must be resolved against it. Without making any special criticism upon the story of his alleged invention, as related by the defendant, it can hardly be contended that it is so consistent, so natural, as to dissipate all doubt. The very existence of some doubt is fatal to the cause of the defendant. There must be a decree for the complainants.

## COLUMBUS WATCH CO. et al. v. ROBBINS et al.

(Circuit Court of Appeals, Sixth Circuit. October 8, 1894.)

No. 46.

## 1. PATENTS—VALIDITY—INFRINGEMENT.

Reissued patent No. 10,631, granted to Duane H. Church, August 4, 1885, for improvement in stem-winding watches, *held valid*, and infringed by the defendants. 50 Fed. 545, affirmed.

## 2. SAME—PATENTABILITY OF COMBINATION.

The patentability of the combination is not affected by the fact that the elements severally were old. It involved patentable invention to see that their union would have a beneficial result.

## 3. SAME—CLAIMS FUNCTIONAL IN FORM.

Claims functional in form construed to be for the combination of devices by which the function is performed.

## 4. SAME—CONSTRUCTION.

Substitution of the expression "intermediate device" for "loose or sliding device" does not enlarge the scope of the patent, when properly construed.

## 5. SAME—CHANGES IN FORM TO AVOID INFRINGEMENT.

Changes in the form of the elements do not avoid infringement, where the principle of the invention is copied, and the substituted elements are mechanical equivalents of the elements for which they are substituted.

## 6. COURTS—APPEAL FROM INTERLOCUTORY DECREE—HEARING ON MERITS.

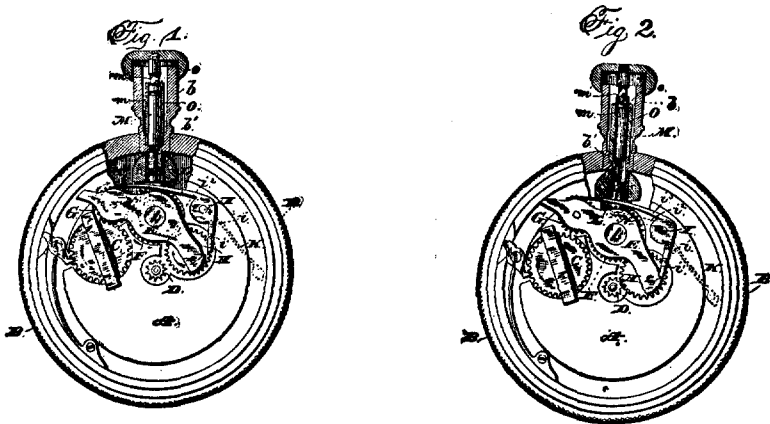
Although the appeal was taken, under the seventh section of the court of appeals act, from an interlocutory decree awarding an injunction, and the court had held that on such an appeal it could not hear and finally determine the merits of the controversy as to the validity of the patent and its infringement (52 Fed. 337, 3 C. C. A. 103, 6 U. S. App. 275), yet it found itself obliged to consider those questions in order to determine whether the court below exercised a proper discretion in granting the injunction appealed from.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

This was a suit by Royal E. Robbins and Thomas M. Avery against the Columbus Watch Company, David Green, and William J. Savage, for infringement of certain letters patent. A decree was rendered for complainants as to one of the patents, directing an injunction perpetual in form, and referring the cause to a master to take an account of damages and profits. 50 Fed. 545. From this interlocutory decree an appeal was taken, both parties uniting in an application requesting the circuit court of appeals to hear and finally determine the merits of the controversy. The court held, however, that under section 7 of the judiciary act of March 3, 1891, its power was limited to determining the question whether the injunction was improvidently granted in the exercise of a legal discretion, and as to the other questions the cause was certified to the supreme court. 3 C. C. A. 103, 52 Fed. 337. The supreme court dismissed the certificate upon the ground that it did not contain the expression of a desire for an instruction as to the proper decision of a specific question or questions requiring determination in the proper disposition of the particular case. 148 U. S. 266, 13 Sup. Ct. 594. The cause is now before the court upon the appeal from the decree of the circuit court, as originally presented.

This was an appeal from a decree of the circuit court enjoining the infringement of a patent for an improvement in stem-winding watches. The bill averred that the defendants were infringing two patents owned by the complainants; one of them, a patent granted to Duane H. Church, and the other issued to C. K. Colby. The circuit court held that the Colby patent was not infringed by the defendants, and dismissed the bill so far as it related to that patent. From this action in respect to the Colby patent no appeal was taken. The issues on this appeal were confined to the Church patent, which was a reissued patent, No. 10,631, dated August 4, 1885. The original patent, No. 280,719, was applied for September 16, 1882, and was granted July 3, 1883. The reissue was granted to Duane H. Church as assignor by mesne assignments to Royal E. Robbins and Thomas M. Avery, trustees for the American Waltham Watch Company and the Elgin National Watch Company, who were the complainants below and the appellees. The Columbus Watch Company was a corporation engaged in the manufacture of watch movements in Columbus, Ohio, and Dietrich Gruen and William J. Savage were its principal officers. The three were the defendants below and the appellants.

The Church invention, as shown in the specifications for the reissued patent, appears in the following drawings, which disclose the plan view of a watch containing the improvement; the dial being removed, and the pendant and a portion of the center band being in section. Figure 1 shows the position of the parts when the watch may be wound, and figure 2 when the watch may be set.



A represents the top plate of a watch movement contained within the center band, B, of a watch case, with the usual stem or pendant, b. O is a shaft, called the "stem arbor," fitting in the hollow of the stem, and having a milled head at its outer end, called a "crown." E is the yoke or train carrying at its center a toothed wheel, F, and at each end the wheels, G or H, in engagement with and driven by the wheel, F. A shifting of the yoke on its center will bring the wheel, G, into engagement with the wheel, C, the winding wheel, while a shifting of the yoke in the other direction will bring the wheel, H, into engagement with the dial wheel, D. Journalled in the plate, A, is an arbor, I, the end of which is seen in the drawing. Below the plate, A, this shaft or arbor has a lug, i, which engages with the spring, K, also below the plate, A, as shown by dotted lines in the drawing. From the end of the arbor, I, seen in the drawing, extends the arm, i<sup>1</sup>. When the spring, K, is allowed to act, uncontrolled, upon the lug, i, it turns the arbor, I, and the arm, i<sup>1</sup>, into the notch, c, near the dial-wheel end of the yoke, and carries the wheel, H, of the yoke into engagement with dial wheel, D, as seen in Fig. 2. In line with the stem, and adjacent to it, is a pinion, L, which meshes with the wheel, F.

It is provided with an axial opening adapted to receive the squared end of the stem arbor, M, which is journaled within the pendant or stem, and when rotating therein sets in motion the pinion, L, and the wheels on the yoke. From the side of the arbor, I, already referred to, and opposite to the lug, I, beneath the plate, A, is an arm, 12, shown by dotted lines which extend radially outward from the arbor, I, under and opposite to the opening in the center of the pinion, L. In this position a loose or sliding piece, N, within the hollow of the stem-winding arbor, as a continuation of the stem arbor, will rest upon the arm, 12, and when the stem arbor is thrust into the watch will turn the arbor, I, throwing the dog, 11, out of engagement with the notch, i, and pressing the spring arm of the arbor, I, marked in the figure 13, against the other end of the yoke, effecting its engagement with the winding wheel, the force of the spring, K, being overcome. When, however, the stem arbor is withdrawn, and the loose sliding piece, N, in the center of the winding arbor, does not press upon the arm, 12, the spring, K, shifts the yoke back again into engagement with the dial wheel. O is a spring retainer formed by partially splitting a tube lengthwise, and securing its whole end within the inner end of the axial recess, b<sup>1</sup>, of the pendant, b, and turning inward the ends of the split portion. The stem arbor has two peripheral grooves, m and m<sup>1</sup>, the first of which is engaged by the jaws, o, of the spring retainer when the stem arbor is at the inner limit of its motion, while the groove, m<sup>1</sup>, is engaged by the spring jaws when the stem arbor is at its outer limit of motion. The inward spring of the jaws, o, is sufficient to cause them to hold the stem arbor in either groove firmly enough to prevent accidental displacement, but not enough to prevent moving the arbor from one to the other when desired. When the stem arbor is drawn to the outer limits of its motion, its inner end projects into the pinion, L, only so far as to enable it to rotate said pinion for the purpose of setting the hands, and in such position offers no obstruction to the removal of the movement from the case or to its insertion in the case, and is ready for use as soon as a movement is in place.

The patentee, in his specifications, uses this language: "This invention relates to watches in which the winding and hand-setting train is operated entirely by means of a rotatable stem arbor that is adapted to be moved longitudinally for the purpose of causing said train to engage with the winding wheel or dial wheels. Heretofore, in watches of this class, said winding and hands-setting train has been normally in engagement with the winding wheel, and disconnected from the dial wheels, so that an outward movement of the said stem arbor has been necessary in order to change the engagement of said train, and adapt it for setting the hands. Such construction has required that there should be a positive connection between the stem arbor and the winding and hands-setting train, to enable said arbor, when drawn outward, to effect the necessary change in the engagement of said train, which positive connection has made said stem arbor virtually a part of the movement, and has prevented, or rendered very difficult and expensive, the changing of said movement from one case to another. The object of my invention is to render watch movements and cases readily interchangeable. \* \* \* Again he says: "While the mechanism between the stem arbor and the winding and dial wheels is preferably employed, my invention is not limited to these particular devices, as any of the well-known forms of intermediate mechanism may be used." In the specifications and claims, the patentee describes his stem arbor as having no positive connection with the winding and hands-setting train, by which he says he wishes to be understood "as meaning such construction as causes said arbor to be contained within the pendant of a watch case, and to form a part of such case, in contradistinction to an organization in which the stem arbor is journaled in the movement, and is so connected therewith as to be removed from the case with said movement."

The claims of the patent are as follows: (1) As an improvement in stem winding and setting watches, a winding and hands-setting train which is adapted to be placed in engagement with the winding wheel or the dial wheels by the longitudinal movement of a stem arbor that has no positive

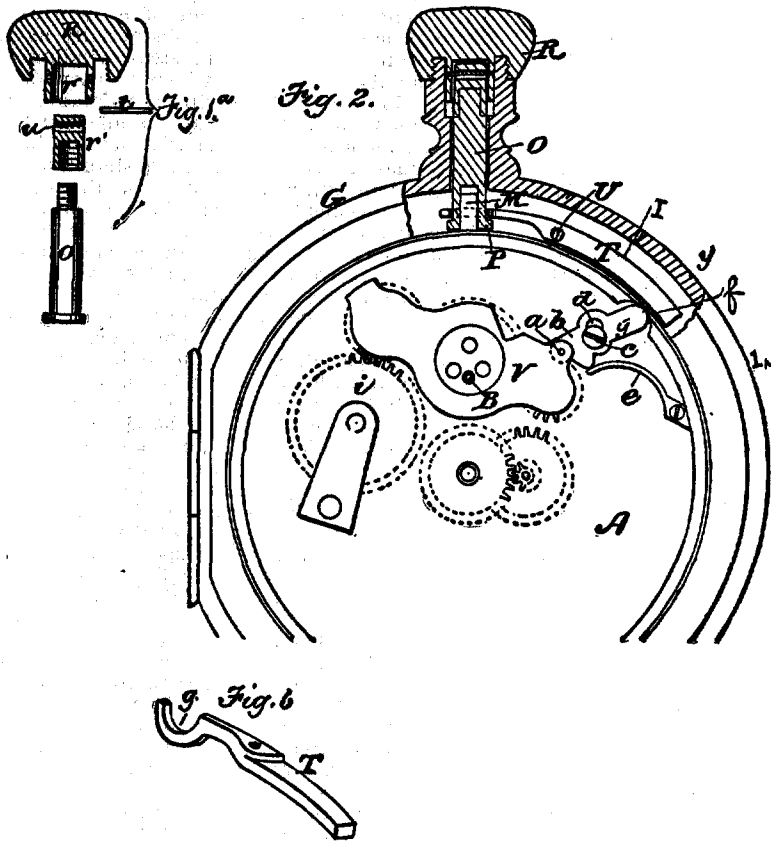
connection with said train, substantially as and for the purpose specified. (2) As an improvement in stem winding and setting watches, a winding and hands-setting train which is adapted to be placed in engagement with the winding wheel or the dial wheels, and is normally in engagement with said dial wheels, substantially as and for the purpose shown. (3) As an improvement in stem winding and setting watches, a winding and hands-setting train which is adapted to be placed in engagement with the winding wheel or the dial wheels by the longitudinal movement of a stem arbor, and is normally in engagement with said dial wheels, substantially as and for the purpose set forth. (4) As an improvement in stem winding and setting watches, a winding and hands-setting train which is normally in engagement with the dial wheels, in combination with a rotatable stem arbor that has no positive connection with said train, and is adapted to be moved longitudinally within the case stem to cause said winding and hands-setting train to engage with the winding wheel, and to be simultaneously disengaged from said dial wheels, substantially as and for the purpose shown and described. (5) As an improvement in stem winding and setting watches, a winding and hands-setting train which is normally in engagement with the dial wheels, in combination with a rotatable longitudinally movable stem arbor that has no positive connection with the watch movement, and, when moved longitudinally to the inner limit of its motion, will cause said winding and setting train to be disengaged from said dial wheels, and engaged with the winding wheel, and, when moved longitudinally to the outer limit of its motion, will permit said train to be disengaged from said winding wheel, and engaged with said dial wheels, substantially as and for the purpose specified. (6) As an improvement in stem winding and setting watches, the combination of a winding and hands-setting train which is normally in engagement with the dial wheels, a stem arbor having no positive connection with said train, and an intermediate device which is adapted to communicate the longitudinal inward movement of said stem arbor to said winding train, and cause the same to engage with the winding wheel, substantially as and for the purpose shown and described.

As already stated, this was a reissued patent. The specifications under the reissued patent and the drawings were substantially the same as those contained in the original. In the original patent a claim was made for the device by which the stem arbor was held in the stem, and moved within fixed limits from one groove to another by means of the jaw spring. On an application for the reissue, an interference was declared by the patent office between Church and one C. K. Colby in reference to the stem arbor device, and priority was awarded to Colby, who secured the patent. The Colby claims related solely to the mechanism within the stem for fixing the limits of the inward and outward movement of the stem arbor without interfering with its rotary motion. In the reissue to Church, therefore, no reference was permitted in the claims to the peculiar form of stem arbor employed. The claims of the original Church patent, which did not include the peculiar stem-arbor device, were the first and second, and they were as follows: (1) "In a pendant winding and setting watch, a movement having winding and setting mechanism adapted to be operated by the endwise movement of a winding bar or key, and normally in position to operate the hands, whereby a positive connection between the movement and winding bar is avoided, as set forth." (2) "In a pendant winding and setting watch, a movement having winding and setting mechanism normally in position to operate the hands, a winding bar or key having no positive connection with said mechanism, and a loose or sliding device adapted to communicate the inward end thrust of the winding bar to the device for engaging the winding portion of said mechanism with the main winding wheel as set forth."

The defenses were (1) that the patent was void for the want of novelty; (2) that the claims of the reissued patent were void because they were framed to obtain the exclusive right to functions or results, rather than the means or mechanism for accomplishing such results; (3) that the reissued patent was void because the original patent was not inoperative or defective by reason of inadvertence or mistake, and the reissued patent

was procured for the purpose of unduly enlarging the claims of the original patent; (4) that the device of the defendants is not an infringement of the patent.

It will be of assistance to give rather a full description of one of the prior patents which were claimed to anticipate the Church combination. It was that of Charles V. Woerd, which was applied for April 10, 1882. The drawing of the Woerd watch is given below:

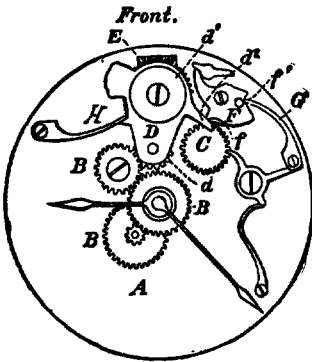
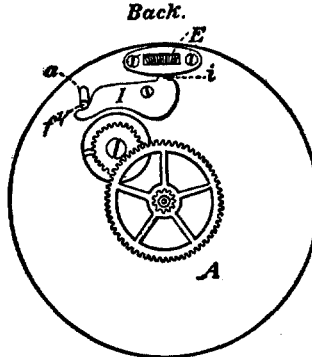
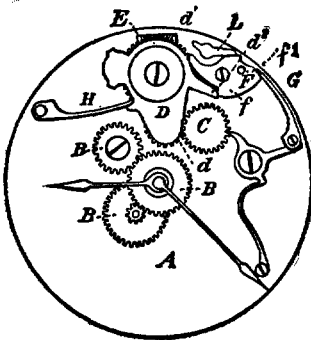
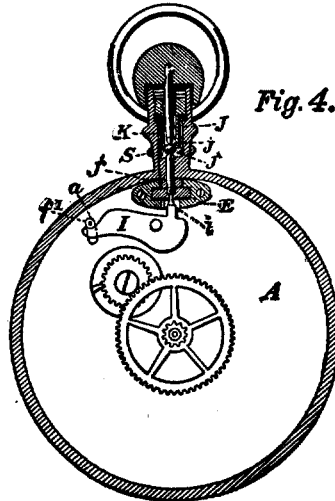


In this drawing, T represents a lever, pivoted at U to the inner side of the inwardly projecting flange, I, of the case, and lying, when in its normal position, entirely within the space formed by said flange, and outside the space occupied by the movement. M is the winding arbor, which fits into the stem arbor or pipe, O, and, extending down into the movement in a way not shown in the drawing, imparts the rotary motion of the stem arbor to a terminal pinion engaging with the wheel of the yoke, V. To the swinging yoke, V, which carries the pinions that impart motion from the winding arbor, respectively, to the winding wheel, I, and the hand-setting train, is pivoted, at a, a slide plate, b, secured to the plate, A, of the movement, by a screw, c, passing through a slot, d. The plate, b, is thus adapted to slide towards and from the center of the plate, A, and is pressed outwardly by a spring, e. At the outer end of the plate, b, is an arm, f, against which one end of the lever, T, bears. The opposite end of the lever, T, has a recess, g, which partially incloses the key or pipe, O. When said key or pipe is drawn outwardly, its flange, P, bears

against the lever, T, and turns the lever upon its pivot, thereby pressing its opposite end against the arm, f, pushing the plate, b, inwardly, and swinging the yoke, V, so that the hand-setting train is connected with the winding arbor, and the winding wheel, i, is disconnected therefrom. The key or pipe, O, being released, the spring, e, restores the plate, b, yoke, V, and lever, T, to their normal positions. The crown, R, is screwed onto the stem so that the pipe, O, can be withdrawn to operate the lever, T, only when its crown is unscrewed from the stem. It will be observed that the location of the lever, T, entirely outside of the space occupied by the movement enables the movement to be inserted and removed without interference with the lever.

There were other patents relied on as anticipations. Of these, the Colby and the Wheeler patents are referred to sufficiently in the opinion.

The following four figures show the defendants' watch movement, which was charged and found by the circuit court to be an infringement of the Church patent. Fig. 1 is the front of the movement when in setting engagement, Fig. 2 is the back of the same engagement, Fig. 3 is the front of the movement in winding engagement, and Fig. 4 is the back in the same engagement.

*Fig.1.**Fig.2.**Fig.3.**Fig.4.*

A represents the pillar plate of a watch; B, B, B, the dial wheels pivoted to said plate; C, the winding wheel connected with the mainspring; D, the swinging yoke plate, carrying at its free end the wheel, d, which may be swung into engagement either with the dial wheels, B, or the winding wheel, C. d<sup>1</sup> is the yoke wheel, which has its axis coincident with that on which the yoke plate swings, and engages the wheel, d, while it is itself engaged and driven by the hollow pinion, E, which is rotated by the stem arbor. F is the cam plate pivoted to the pillar plate, A, and provided with a projection, f, which bears upon a projection, d<sup>2</sup>, of the yoke plate, D. G is a spring which bears upon the cam plate, F, and, through said cam plate, normally swings the yoke and yoke train into engagement with the dial wheels. H is a weaker spring which bears upon the yoke plate, D, and tends to throw its wheel, d, into engagement with the winding wheel, C. I is a lever pivoted between its ends to the back of the pillar plate, A, and bearing at one end against a stud, f<sup>1</sup>, which projects from the cam plate, F, through a slot, a, in the pillar plate. i is a projection of lever, I, which slides within the initial wheel, E, of the winding and setting train, whereby the stem arbor may act upon the lever, I. J is the stem arbor provided with notches at j, j<sup>1</sup>, with which engage the free ends of springs, K, fixed in the stem, S, of the watch. The inner end, J<sup>1</sup>, of the stem arbor, is squared, and projects into the initial wheel, E, of the winding and setting train.

Watson, Burr & Livesey and M. D. Leggett, for appellants.

Prindle & Russell and Lysander Hill, for appellees.

Before TAFT and LURTON, Circuit Judges, and RICKS, District Judge.

TAFT, Circuit Judge (after stating the facts). It may be well, before discussing the questions raised upon this appeal to make a few general remarks concerning the subject-matter under examination. In stem-winding or keyless watches, the mainspring is wound and the hands are set by the rotation of the shaft or stem arbor which extends from the outside of the case, through the hollow stem, into the movement of the watch. The rotating force applied to the stem arbor by the action of the fingers of the operator upon its exterior head or crown is communicated to the winding wheel or to the setting wheel by an intermediate device of varying form in different patents, which is generally called the "winding and hand-setting train." It is usual, in all watch-movement patents, for the stem arbor to carry at its winding end a clutch or pinion which communicates the rotating motion of the stem arbor to the wheels of the winding and hand-setting train with which it engages. That the rotation of the stem arbor should at one time wind the mainspring, and at another set the hands, the train must be shifted so that its wheels shall at one time engage with the winding wheel, and at another with the hand-setting wheel, at the will of the operator of the watch.

There are three well-known forms of the winding and hand-setting train in the art: one is the yoke, another is the breguet key or clutch, and the third is the rising and falling pinion. Of these we have, in this case, to do only with the yoke form of train. That is a pivoted, edgewise swinging plate in the movement of the watch, carrying one wheel, centered upon the pivot of the plate, not varia-



ble in position, and constantly in gear with the pinion or clutch at the end of the stem arbor. The plate also carries one and sometimes two wheels constantly in gear with its center wheel, and shifting by a movement of the plate into and out of gear with the winding wheel or the setting wheel. By this means the rotating movement of the stem arbor is communicated, through its terminal pinion, to the center wheel of the yoke, and from that wheel to the terminal shifting wheel or wheels carried by the yoke, and from them to the winding wheel or the setting wheel as engagement is had with either. The mechanism by which the operator, at will, quickly and easily shifts the yoke from one engagement to the other, varies in different watches, and many patents have been issued for such devices. Generally, they may be divided into two classes, in one of which the yoke is shifted by the outward and inward movement of the arbor in the stem, while in the other the shifting is brought about by the outward and inward movement of a finger bar or piece which extends, not through the stem, but through the side of the case. Watches having a device of the former class are called "stem or pendant set watches." Those having a device of the latter class are called "lever-set watches."

It is obvious that when the watch is in the pocket the engagement of the train should be with the winding wheel, rather than with the setting wheel, because, if the engagement is with the setting wheel, any accidental rotation of the crown of the stem arbor would change the hands, and destroy the time-keeping qualities of the watch, whereas such accidental disturbance, resulting in a slight winding of the mainspring, would be of no injury whatever. It is also evident that the stem arbor is more likely to be disturbed accidentally when it is pulled out than when its crown is close to the outer end of the stem. For this reason, in watches which are stem or pendant set, the inward movement of the stem arbor is generally made to produce the engagement of the winding wheel, while the outward movement brings about the engagement with the setting or dial wheels. The usual method, before the Church invention, by which engagement with the dial wheels was produced through the outward movement of the stem arbor, was to fasten the stem arbor to the movement, so that the shifting could be effected by the direct pull of the arbor. The result of this arrangement was that the movement could not be removed from the case without also releasing the stem arbor. This was objectionable, because watch movements are made separately from their case, and it is of great trade advantage to have the movement capable of easy separation from the case, so that one movement may fit in a great number of cases, and a case be useful for any number of movements. The ready interchangeability of movements and cases is one of the well-known objects sought for by inventors in the watch-making field, and this, as he states in his patent, was the chief object of Church's invention.

To describe Church's patent in a general way, it has a stem arbor which reaches but a short distance into the movement, and is

not connected with the movement by hook or pin, or in any other way that prevents its quick and easy separation from the movement when that is to be taken from the case. The winding and hand-setting train or yoke is arranged in the movement with a spring, which, when uncontrolled by force applied through the stem arbor, keeps the yoke in constant engagement with the dial or setting wheels. The stem arbor is prolonged into the movement by a hollow winding arbor into which the square end of the stem arbor fits. The winding arbor ends in a pinion with a hollow center, through which, by means of a loosely-fitted and sliding stud moving in the hollow center, the pressure applied by the fingers to the stem arbor at its crown is communicated to a lever journaled in the movement of the watch, and thereby the train is shifted into engagement with the winding wheel, and the action of the spring tending to maintain the setting engagement is overcome. In this way, when the stem arbor is pressed into the movement of the watch, and held there as it is held by a jaw spring in the stem itself, the winding engagement is brought about; but when the stem arbor is pulled out the spring in the movement is allowed to have full force, and the engagement with the setting wheels is restored. This latter engagement is called by the inventor the "normal engagement," by which he means that it is the engagement produced by the automatic operation of the movement itself, when not affected by extraneous pressure through the stem arbor. With this arrangement the shifting function of the stem arbor is performed wholly by pressure in its in-thrust, and no pulling force is exerted through it. Thus, it is possible to dispense altogether with any positive connection between the stem arbor and the movement of the watch, while the intermediate device or movable stud makes it possible to have a short stem arbor, reaching but a little distance into the movement, and capable of being so withdrawn that the movement itself can be lifted out of the watch, or replaced in it, by a slight tilting.

It is contended on behalf of the appellants that the Church patent has no novelty in it whatever, because every feature of it is old. It is quite true that the stem arbor which is used in the Church patent was the invention of Colby. It is also true that the winding and hand-setting train used by Church was a common form, well known to the art. It is also true that in the Wheeler patent of March 1, 1881, the same winding and hand-setting train is shown in normal engagement with the dial wheels, and that the winding engagement in the Wheeler patent is brought about by extraneous force applied to the movement to overcome the effect of the spring, and thus produce the normal engagement with the setting wheels. It is also true that the intermediate loose or sliding device may have been suggested by the analogous use of such an intermediate device in the patent of J. D. Brez, of July 20, 1875, where it was used to communicate pressure from the stem arbor to the spring holding and releasing the hinged case of the watch. But notwithstanding the fact that all the parts are old, in the sense that each of them may

be found in previous patents, the combination of parts in the Church patent brings about a new result, and involves patentable invention. Colby, the inventor of the stem arbor, disclosed no method by which it could be used in a stem or pendant set watch. His specifications and drawings indicated that the stem arbor was to be used only to wind the wheels of the movement after the yoke or train has been shifted by some other agent than the stem arbor. The Wheeler patent, having the normal engagement of the train with the dial wheels, was a lever-set watch, in which the stem arbor played no part in shifting the yoke into either engagement. Except in a case where the stem arbor is to be the means of shifting the yoke or train, the normal engagement with the setting wheel has little or no significance. It is the normal engagement with the setting wheel that makes it possible to have a stem arbor disconnected from the train, and performing its only functions by pressure, and not by a pull. Church's object, as already stated, was to secure, in a watch in which the stem arbor imparted to the watch movement both the wheel-winding and the train-shifting motion, such a relation between the stem arbor and the movement as to make it possible easily to take the movement out of the case without disturbing the stem arbor. To do this, it is necessary to have a short stem arbor, and one disconnected from the movement. Church was the first to discover and utilize the fact that the normal setting engagement made possible a shifting stem arbor, having no positive connection with the movement. He was able to keep his arbor short by using the intermediate device, borrowed, it may be, from the Brez patent, and applied to a different use. We are very clear that the arrangement of all these elements to secure the object stated involved patentable invention of a high order. No patent, of all those which we have had occasion to examine, shows the combination of elements just recited. It is said that the Church patent is nothing but a combination of the Wheeler patent with the Colby stem arbor, which any mechanic of skill could have arranged for practical operation. Drawings and a model have been submitted, showing how easy it is to unite the Colby stem arbor with the Wheeler patent. In our view, this is but wisdom after the fact. We cannot concur in the view that, even if it were known that a combination of the Wheeler patent with the Colby stem arbor would have an advantageous result, mere mechanical skill would enable one to make the combination. The combination shown in the drawings and model submitted is a combination suggested by the Church patent, and which, but for the Church patent, would seem much more difficult than it now does. More than this, it involved patentable invention to see that a union of the elements of the Wheeler patent with those of the Colby patent would have a beneficial result.

The only patent disclosed in the record for a watch movement in which the winding and shifting are both done by the stem arbor, and in which the movement may be removed from the case without disturbing the stem arbor, is the patent granted to N. Woerd, February 6, 1883, a description and drawing of which appear in

the statement of the case. The Woerd patent accomplishes the same general result as that sought and accomplished by Church, but the result is not reached in the same way. In the Woerd patent, a lever which structurally is a part of the movement is removed from the movement, and fixed in the side of the case. One end of this lever is permanently connected with the stem arbor, while the other end, without any positive connection with the yoke, presses against an arm of the yoke, and shifts it into the setting engagement, against the operation of a spring, which, when the pressure of the lever is withdrawn, restores the winding engagement. The lever is moved by the outward pull of the stem arbor. There is therefore no normal engagement with the setting wheels in this patent, as in the Church patent. Another difference is in the awkward construction, by which a piece which is structurally part of the movement is pivoted in the side of the case, permanently connected with the stem arbor, and separated from the movement. It can be seen at a glance that the manufacture of a case with such a lever in the side of it would be much less simple and easy than where it has nothing but the short stem arbor. It is a clumsy arrangement, and is not an anticipation of, or a suggestion of, the novel features of Church's patent, already alluded to. Church did not discover the fact that a stem arbor having no positive connection with the train or movement in a stem-set watch would greatly facilitate the interchangeability of movements and cases, and the easy removal of a movement from the case. That was self-evident, and was not patentable. Woerd tried one method by which the stem arbor should not be connected with the movement, and yet have at the same time a shifting and a winding function. Church devised another and different and a better way of reaching the same result. For these reasons, we are of the opinion that Church's invention was not anticipated by any of the patents disclosed in the record, and that the combination of old elements involved patentable invention, for which he was, under the law, entitled to the monopoly.

The strongest evidence that the Church invention is a useful one is the fact that to-day considerably more than half of all the watches that are manufactured in the United States with open faces are made under it, and embody the combination of elements which is set forth in its specifications. This fact is said to lose significance because the owners of the Church patent, the Waltham and Elgin Watch Companies, are able to control the business of watch-case making and watch making to such an extent, by their enormous output, as to foist upon the public, and compel the purchase of, a poor device. We must assume that the two companies referred to, with the large resources at their command in purchasing patents and using them, would exercise ordinary business discretion, and would be guided by the demands of the public for the best watch movement, and must hold that, no matter how large the control or business of the two companies which own this patent is, that its very extensive use is strong evidential weight of its useful character.

There has been much discussion on the briefs and in the arguments as to whether it was not a useful feature of the Church patent that the setting engagement was made by the operation of the spring gently, and with no danger of injuring the delicate dial wheels, instead of by a direct pull of the stem arbor, said to be likely to break the points of the wheels in a faulty intermeshing. We do not find it necessary to consider this question, because, in our opinion, without respect to the possible benefit from this arrangement, the Church patent has not been anticipated by any other, in the ease and simplicity with which is accomplished by it the chief object of the inventor, namely, the ready interchangeability of movements and cases. This is a sufficient ground for sustaining the patent, and we need look for no other.

But it is said that the claims of the reissued Church patent are void because they seek to appropriate results or functions, rather than means or devices for accomplishing results. Unless the claims are to be restricted by construction, this criticism is a just one. The inventor, in his first claim, seeks to monopolize a train "adapted" to be placed in engagement with the winding or setting wheels by the longitudinal movement of a stem arbor having no positive connection with the train. Is this to be construed to claim for the patentee the right to keep all others from using a train which is in any way adapted to engage with the winding or setting wheels by the in and out movement of a stem arbor not having positive connection with the train? We think not. The only adaptation capable of appropriation by the inventor is that which is shown in the specifications and drawings of his patent, and this is the necessary limiting effect of the words, "substantially as and for the purpose specified." In this way the court may sustain the validity of the claims, as it is its duty to do when possible. In the *Corn-Planter Case*, 23 Wall. 181, 225, 226, one of the claims was as follows:

"What I claim under this patent is a seed-planting machine wherein the seed-dropping mechanism is operated by hand or by an attendant, in contradistinction from mechanical dropping, the mounting of said attendant upon the machine in such a position that he may readily see the previously made marks upon the ground, and operate the dropping mechanism to conform thereto, substantially as herein set forth."

Referring to this claim, Mr. Justice Bradley, speaking for the court, says:

"The first of these claims, if construed simply as claiming the placing of the seed dropper on the machine, would probably be void, as claiming a mere result, irrespective of the means by which it is accomplished. But, if construed as claiming the accomplishment of the result by substantially the means described in the specification, it is free from that objection; and we ought to give a favorable construction, so as to sustain the patent, if it can fairly be done. By reading the claim in connection with the final qualifying clause, thus, 'the mounting of said attendant upon the machine,' etc., 'substantially as herein set forth,' the fair construction would seem to include the means and manner of placing him upon the machine."

Construing the claims in the Church patent in the light of the *Corn-Planter Decision*, it is evident that they must be limited to

the particular mechanism set forth in the specifications for accomplishing the result or securing the adaptation referred to in the claim.

The objection that the reissued patent is void for unduly enlarging the claims of the original patent cannot be sustained. The sixth claim of the reissue is quite the same as the second claim of the original. They are both for a combination of the following elements: (1) The winding and hand-setting train normally in engagement with the setting wheels, as set forth. (2) The stem arbor or key, having no positive connection with the train, as set forth. (3) The intermediate loose or sliding device for communicating the force of the in-thrust of the arbor to the train, by which the train is shifted into the winding engagement, as set forth. The change in the reissue from the words "loose or sliding device" to "intermediate" device is not to be construed as widening the scope of the claim. If, in any alleged infringement, that which communicates the stem arbor's in-thrust to the train is not a loose or sliding device, or its manifest and well-known mechanical equivalent, it certainly is not an intermediate device, "substantially as and for the purpose set forth" in the specifications and drawings of the patent. It is not necessary to examine closely the other claims of the reissued patent, to see whether they unduly expand the scope of the monopoly of the reissued patent beyond that of the original, because a construction of them in the light of the specifications and drawings, and the history of the art, requires either that they should be rejected as invalid, or treated as combination claims with the same elements as those contained in the sixth claim given above.

We come now to the question whether the defendants' watch movement is an infringement of the Church patent. A description and a drawing of the defendants' watch movement appear in the statement of the case. It is a movement in which the stem arbor to be used discharges the double function of winding the wheels of the movement, and of shifting the engagement from the setting to the winding wheels. It is a movement in which the normal engagement is with the dial wheels. This is denied by counsel for the appellants, but it certainly is true that whenever the pressure of the stem arbor is removed the force of a spring in the movement itself will produce engagement of the yoke or train with the dial wheels. That is the normal engagement, in the sense of the Church patent. The winding and hand-setting train in the defendants' movement is somewhat different from that of the Church patent; but Church, in his specifications, expressly states that the intermediate device for shifting the engagement may be in all the well-known forms of intermediate mechanism, and that his invention is not limited to the particular device shown. It is conceded that the yoke of the defendants' movement is a very old form, and may be found in the English patent of Nicole of 1844. The device by which the pressure of the short stem arbor is continued into the movement, and made to effect the shifting of the yoke, differs somewhat, in the defendants' movement, from that of the Church patent. The loose or sliding stud

of the Church movement, by which the pressure of the stem arbor is communicated to the lever shifting the yoke, is present in the defendants' movement. It slides within the hollow center of the terminal pinion of the winding arbor far enough to permit the short stem arbor to act upon it, and differs only from the stud in the Church movement in the fact that its lower end is fixed to the lever upon which the pressure of the stem arbor is to be exerted. This difference does not in any way change the operation of the stud, either in mode or result. In the Church device, the lever, acted upon by the stem arbor through the sliding stud, directly shifts the yoke. In the defendants' movement, the lever moves a pin that shifts a cam lever which locks out the spring holding the yoke in engagement with the setting wheels, and thus allows a weaker spring to shift the yoke into winding engagement. We do not think that the interposition of a cam lever and a spring between the lever upon which the stem arbor directly acts and the yoke to be shifted changes in any way the elements of the combination present in the Church patent which are also found in the defendants' movement. The use of two springs, one weaker than the other, to produce alternately the two engagements by locking out the stronger spring, was old. It is shown in the Wheeler patent, and others prior to the Church patent. It was therefore one of the mechanical equivalents that Church intended his patent should cover, and he used language in his specifications apt for the purpose. The stem arbor having no positive connection with the movement, the normal engagement of the winding and hand-setting train with the dial wheels, the intermediate device working in and through the hollow center of the winding arbor and its terminal pinion, by which pressure upon the short stem arbor is enabled to bring about the shifting of the yoke, are all present in the defendants' movement, operating in the same way, and accomplishing the same result as in the Church movement. Element for element, the combinations are the same, and the infringement is manifest.

The conclusion we have reached with reference to the validity of the Church patent, and the infringement by the defendants, is fully sustained by the decision of the circuit court of appeals for the Seventh circuit in the case of Watch Co. v. Robbins, 3 C. C. A. 42, 52 Fed. 215.

The decree below awarded a perpetual injunction against the infringement by the defendants, and referred the case to the master to determine the damages. That decree was appealed from, under the seventh section of the court of appeals act, as an interlocutory order granting an injunction; and the point was mooted whether we should examine the record as upon an appeal from a final decree, or only examine the question whether the court below had exercised proper discretion in the issuing of an interlocutory injunction. It was decided that we could not hear and finally determine the merits of the controversy as to the validity of the patent and its infringement. 6 U. S. App. 275, 3 C. C. A. 103, 52 Fed. 337. In looking into the record, however, to determine whether the discretion of the cir-

cuit court was properly exercised, we have found ourselves obliged to consider the validity of the patent, and its infringement, with the conclusion above stated. As the patent is valid, and it was infringed by the defendants, the court necessarily exercised proper discretion in granting the injunction appealed from, and its decree is affirmed.

DEVLIN et al. v. PAYNTER et al.

(Circuit Court of Appeals, Third Circuit. November 16, 1894.)

No. 8.

1. PATENTS—STEAM-PIPE UNION—NOVELTY.

A union for steam pipes, consisting of one member with an internal seat of soft metal having a concave face, and an opposing member with a convex face, thus forming a perfect connection without an accurate alignment of the pipes, constitutes a patentable invention. 63 Fed. 122, affirmed.

2. SAME—INFRINGEMENT.

A union for steam pipes, consisting of a head member having a seat of soft metal with a concave face, and a tail member having a convex face, is infringed by a union that differs only in the facts that the convex face is on the head member and the concave face is on the tail member, and that the soft metal is on the convex face instead of on the concave face.

3. SAME.

The Paynter patent, No. 367,725, for union for steam pipes, *held* valid and infringed. 63 Fed. 122, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

In Equity. Bill by Edward P. Paynter and John K. Moore against Thomas Devlin and others, trading as Thomas Devlin & Co., for infringement of a patent. Complainants had decree (63 Fed. 122), and defendants appeal.

Hector T. Fenton, for appellants.

Connolly Bros., for appellees.

Before ACHESON and DALLAS, Circuit Judges, and WALES, District Judge.

ACHESON, Circuit Judge. The appellants, who were the defendants below, complain of the decree of the circuit court, sustaining as valid, and adjudging them to have infringed, the first claim of letters patent No. 367,725, for improvements in unions for steam pipes, etc., granted on August 2, 1887, to Edward P. Paynter, Jr., the inventor, and John K. Moore, his assignee of a part interest. The claim in question is in these words:

"(1) A union for steam pipes, comprising a threaded ring or nut, a member having a seat of soft metal with a concave face, and an opposing member with a rounded or convex end, substantially as shown and described."

The declared object of the invention is to provide a construction whereby the joint of the union of steam and other pipes will be



made more tight than heretofore, and in which the danger of injury by indentation to the soft-metal seat of such union will be avoided. The specification states:

"The concavo-convex character of the joint prevents the seat from being indented, even if the two members of the coupling should not be exactly aligned, thereby avoiding the difficulty hitherto encountered with the flat, soft-metal seats and straight ends of unions as heretofore constructed."

The specification describes and shows a union, one of the members of which is provided with an internal seat of soft metal, the face of which is made concave, and the opposing part of the union formed with a convex end, so as to conform to the concavity of the seat, against which it rests, thus making a perfectly tight joint therewith. A pipe union is a complete and independent contrivance made and sold by itself, consisting of head and tail members, and a fastening ring or nut drawing the two members closely together. The purpose of the device is to join together the adjacent ends of two sections of pipe through which steam or water or other liquids or gases flow. Such unions are not designed to be fixed and permanent couplings, but they are used where the pipes are to be repeatedly disconnected and again joined, and thus it is intended that the unions shall be taken apart and put together again and again. It is of supreme importance that the union should form and constantly maintain a perfectly tight joint, and it is also very desirable that it should be so constructed as to provide for the nonalignment of the pipes which it connects. These ends are attained by the device of the patent in suit. The patented improvement consists in having one of the two opposing members of the union formed with a concave abutting face, and the other with a convex abutting face, one of these meeting faces being composed of soft metal. The evidence is convincing that this improvement effectively overcomes difficulties incident to and inseparable from all the expedients of this general character previously in use. It meets the practical difficulty arising from want of exact axial alignment of the two pipes which are to be connected; and it not only secures complete contact between the meeting faces of the head and tail members, when they are first put together, but permits, without impairing the efficiency of the joint, the repeated use of the same union as the pipes are disconnected and again united. We have attentively examined all the earlier patents, and the exhibits illustrative of the prior state of the art, in evidence. To discuss these at length, and point out the distinctions between them, respectively, and the Paynter-Moore device, we deem unnecessary. It is enough to declare that in our judgment they do not, taken singly or considered together, anticipate the invention in question. They fail to show a union made in accordance with the patent in suit, or possessing its peculiar advantages. We are entirely satisfied with the conclusion of the court below that the first claim of the patent in suit covers a union patentably new and useful.

The differences between the union shown by the patent in suit and the appellants' union are these: In the latter the convex face is

on the head member, and the concave face is on the tail member, reversing the arrangement of the patent; and in the appellants' union the convex face is composed of soft metal, whereas in the union described in the patent it is the concave face which is of soft metal. The appellants have transposed the position of the soft-metal face. Do they escape infringement by the transposition of parts? We think not. The essence of the invention embodied in the first claim of the patent is a union in which one of the two opposing members has a concave abutting face, and the other a convex abutting face, one of these faces being of soft metal. The appellants, therefore, have appropriated the gist of the invention. The changes found in their device do not at all affect either the principle of operation or the result. There is a substantial identity between the two unions. Now, in the sense of the patent law, the substantial equivalent of a thing is the same as the thing itself. *Winans v. Denmead*, 15 How. 330, 342; *Machine Co. v. Murphy*, 97 U. S. 120. The changes which the appellants have made are immaterial, and, indeed, are but a subterfuge. Made, evidently, for the mere purpose of evading the wording of the claim, they are unavailing. *Hoyt v. Horne*, 145 U. S. 302, 308, 12 Sup. Ct. 922.

Nor do we find anything in the proceedings in the patent office requiring us to read the first claim of the patent as subject to the limitation upon which the appellants insist. The reasons urged by the appellees' solicitors before the patent-office officials in favor of the grant of the patent, if entitled to consideration here at all, do not, we think, regarded as a whole, support the contention that the patentees, when in the patent office, placed such a narrow construction upon the claim as would exclude from its scope the appellants' device. We do not see that they take here any position inconsistent with their position when in the patent office. There is nothing to bring this case within the rule that, where a patentee has modified his claim in obedience to the requirements of the patent office, he cannot have for it an extended construction which has been rejected by the office. The only amendment of the first claim ever made was the introduction of the "threaded ring or nut" as an element of the combination, and that addition does not affect the question now before us. We are of the opinion that the decree of the circuit court was right, and accordingly it is affirmed.

## LEHIGH MIN. &amp; MANUF'G CO. v. KELLY et al.

(Circuit Court, W. D. Virginia. May 30, 1894.)

## JURISDICTION—COLLUSIVE ORGANIZATION OF CORPORATION.

The organization by the individual stockholders and officers of a corporation existing under the laws of one state of a corporation under the laws of another state for the express purpose of bringing a suit in a federal court to try the title to a tract of land claimed by the former corporation, and conveyed to the latter after its organization and before suit brought, will not enable the grantee to maintain a suit in ejectment in such court.

This was an action of ejectment, brought by the Lehigh Mining & Manufacturing Company against J. J. Kelly, Jr., and others. The case was heard on defendants' pleas to the jurisdiction.

J. F. Bullitt, Jr., and J. A. Buchanan, for plaintiff.  
Morrison & Duncan and F. S. Blair, for defendants.

PAUL, District Judge. This is an action of ejectment, brought by the plaintiff, a corporation under the laws of Pennsylvania, against J. J. Kelly, Jr., and others, citizens of the state of Virginia. The defendants file two pleas in abatement, which are as follows:

"Plea No. 1. And for plea in this behalf said defendants say: That the Virginia Coal & Iron Company is a corporation organized and existing under the laws of Virginia; that as such it has been for the last ten years claiming title to the lands of the defendants, J. J. Kelly, Jun., described in the declaration in this case; and said defendants say that for the purpose of fraudulently imposing on the jurisdiction of this court said Virginia Coal & Iron Company has, during the year 1893, attempted to organize, form, and create under the laws of the state of Pennsylvania a corporation out of its (the Virginia Coal & Iron Company's) own stockholders and officers, to whom it has fraudulently and collusively conveyed the land in the declaration mentioned for the purpose of enabling this plaintiff to institute this suit in this United States court. And said defendants say that said Lehigh Mining & Manufacturing Co. is simply another name for the Virginia Coal & Iron Co., composed of the same parties, and organized alone for the purpose of providing jurisdiction of this case in this court. Wherefore defendants say that this suit is in fraud of the jurisdiction of this court, and should be abated. And this they are ready to verify," etc.

"Plea No. 2. And for further plea in this behalf the said defendants come and say that said plaintiffs should not further have or maintain said suit against them, because, they say, there was no such legally organized corporation as the plaintiff company at the date of the institution of this suit, and they say that the real and substantial plaintiff in this suit is the Virginia Coal & Iron Company, which is a corporation organized and existing under the laws of Virginia, and a citizen of Virginia. And said defendants further say that said Virginia Coal & Iron Company, for the purpose and with the view of instituting and prosecuting this suit in the United States court, and of conferring an apparent jurisdiction on said court, did by prearrangement, fraud, and collusion attempt to organize said Lehigh Mining and Manufacturing Company as a corporation of a foreign state, to take and hold the land in the declaration mentioned for the purpose of giving this court jurisdiction of said suit. Whereupon defendants say that the said plaintiff has wrongfully and fraudulently imposed itself on the jurisdiction of this court, has abused its process, and wrongfully impleaded these defendants in this court; whereupon they pray judgment," etc., "that this suit be abated and dismissed as brought in fraud of this court's jurisdiction. And this they are ready to verify," etc.

The plaintiff and the defendants have agreed to submit the questions of law arising on these pleas to the court for decision, the submission being on the following agreed statement of facts:

Agreement.

Circuit Court of the United States for the Western District of Virginia.

Lehigh Mining and Manufacturing Co. v. J. J. Kelly, Jr., and others.

It is hereby agreed between the parties to this action as follows, to wit:

(1) That the land in controversy in this case was, prior to March 1, 1893, claimed by the Virginia Coal and Iron Company, and had been claimed by said last-named company for some twelve years prior to said date.

(2) That said Virginia Coal and Iron Company is a corporation organized and existing under the laws of the state of Virginia, and is a citizen of Virginia.

(3) That on March 1, 1893, said Virginia Coal and Iron Company executed and delivered a deed of bargain and sale to said Lehigh Mining and Manufacturing Company, by which it conveyed all its right, title, and interest in and to the land in controversy to said last-named company in fee simple.

(4) That said Lehigh Mining and Manufacturing Company is a corporation duly organized and existing under the laws of the state of Pennsylvania; that it was organized in February, 1893, prior to said conveyance, and is, and was at the date of the commencement of this action, a citizen of the state of Pennsylvania; and that it was organized by the individual stockholders and officers of the Virginia Coal and Iron Company.

(5) That the purpose in organizing said Lehigh Mining and Manufacturing Company, and in making to it said conveyance, was to give this court jurisdiction in this case, but that said conveyance passed to said Lehigh Mining and Manufacturing Company all of the right, title, and interest of said Virginia Coal and Iron Company in and to said land, and that since said conveyance said Virginia Coal and Iron Company has had no interest in said land, and has not, and never has had, any interest in this suit, and that it owns none of the stock of said Lehigh Mining and Manufacturing Company, and has no interest therein whatever.

(6) That the two pleas in writing filed by the defendants in this cause at the May term, 1893, of this court shall be tried by the court without a jury upon the foregoing statement of facts, but that any party may object to any of such statements on the ground of irrelevancy or incompetency.

Plaintiff filed the following exception to the foregoing agreement:

"The plaintiff, by counsel, objects and excepts to the statement in the first part of the fifth paragraph of the foregoing agreed facts, viz.: "That the purpose of organizing the Lehigh Mining and Manufacturing Co., and in making to it said conveyance, was to give to this court jurisdiction in this case," because the same is irrelevant and immaterial.

The substance of these pleas is that the plaintiff has, by collusion between itself and the said Virginia Coal & Iron Company, been made a party to this suit in order to give this court jurisdiction of this case. This question is mainly to be determined by the fourth and fifth paragraphs of the agreement of facts, which are as follows:

"(4) That said Lehigh Mining and Manufacturing Company is a corporation duly organized and existing under the laws of the state of Pennsylvania; that it was organized in February, 1893, prior to said conveyance, and is, and was at the date of the commencement of this action, a citizen of the state of Pennsylvania; and that it was organized by the individual stockholders and officers of the Virginia Coal and Iron Company.

"(5) That the purpose in organizing said Lehigh Mining and Manufacturing Company, and in making to it said conveyance, was to give this court jurisdiction in this case, but that said conveyance passed to said Lehigh Mining and Manufacturing Company all of the right, title, and interest of said

Virginia Coal and Iron Company in and to said land; and that since said conveyance said Virginia Coal and Iron Company has had no interest in said land, and has not, and never has had, any interest in this suit, and that it owns none of the stock of said Lehigh Mining and Manufacturing Company, and has no interest therein whatever."

Counsel for the defendants contend that the following admitted facts in these paragraphs show that this is a collusive suit, and a fraud on the jurisdiction of the court: That the plaintiff company was organized a short time before the conveyance of the land in controversy was made, and before the bringing of this suit; that it was organized by the individual stockholders and officers of the Virginia Coal & Iron Company; that the purpose, and the only declared purpose, in organizing the Lehigh Mining & Manufacturing Company, and in making the deed of conveyance to it by the Virginia Coal & Iron Company, was to give the federal court jurisdiction of this action, brought to try the title to the land in controversy. Counsel for plaintiff contend that, although these facts are admitted, and are true, yet, as the Virginia Coal & Iron Company has no interest in this suit, and owns none of the stock in the Lehigh Mining & Manufacturing Company, and has no interest therein, and although it conveyed the land to the plaintiff to enable it to maintain an action in this court, motives are immaterial, and cannot be inquired into. They cite *Jackson v. Clark*, 1 Pet. 628; *Jones v. League*, 18 How. 76; *Barney v. Baltimore City*, 6 Wall. 280; *Smith v. Kernochen*, 7 How. 198-215 (not examined). These cases, in the opinion of the court, do not sustain the position of counsel, and the exception filed by counsel for the plaintiff to part of the fifth paragraph, which states "that the purpose of organizing the Lehigh Mining & Manufacturing Company, and in making to it said conveyance was to give this court jurisdiction in this case," because the same is irrelevant and immaterial, is not well taken. The motive—the object—of parties in putting themselves or others in a position to invoke the jurisdiction of the federal courts is a subject of inquiry running through all the cases on this subject. And since the statute of 1875 it is said:

"If from any source the court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties, or in any other way, it may at once, of its own motion, cause the necessary inquiry to be made, either by having a proper issue joined and tried, or by some other appropriate form of proceeding, and act as justice may require for its own protection against fraud or imposition." *Hartog v. Memory*, 116 U. S. 588, 6 Sup. Ct. 521.

To preclude the court from inquiring into the motives, objects, intentions, aims, and purposes of parties, and confine it alone to a consideration of their actions, would be to render it in many instances helpless in its investigation of frauds on its jurisdiction. Section 5 of the statute of 1875 provides:

"That if in any suit commenced in a circuit court or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court,

or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require," etc. 18 Stat. 470.

In *Greenwalt v. Tucker*, 10 Fed. 884, it was held that:

"The transfer by a blank deed *mala fide*, without consideration, of the title to land in one state to a citizen of another state, for the purpose of bringing suit in a federal court, will not enable the grantee to maintain a suit in ejectment in such court."

The consideration of the deed from the Virginia Coal & Iron Company to the plaintiff is not given in the agreement of facts. It is termed "a deed of bargain and sale." If the consideration was given, the case just cited might be an authority in this case, or it might not be applicable. But noting the principle in that case, and in other cases referred to in argument, and applying it to the case at bar, we might express the court's conclusion as follows:

The organization by the individual stockholders and officers of a corporation existing under the laws of one state of a corporation under the laws of another state for the express purpose of bringing a suit in a federal court to try the title to a tract of land claimed by the former corporation, and conveyed to the latter after its organization and before suit brought, will not enable the grantee to maintain a suit in ejectment in such court. The claims of the plaintiff that the Virginia Coal & Iron Company has no interest in this suit, that it has no stock in the plaintiff company, and that by the conveyance of the tract of land in controversy it conveyed all its right, title, and interest to the plaintiff, may be technically correct; but it is to the average mind, as a matter of fact, difficult to conceive how the individual stockholders and officers of one corporation can organize another corporation for the express purpose of bringing suit to try the title to a tract of land belonging to them as individual stockholders and officers of the first corporation, can have said tract of land conveyed to the second corporation, of which they are also individual stockholders and officers, and then bring suit to recover said tract of land, and yet have no interest in the suit. The difficulty to understand this is increased where the facts show that the only tract of land held by the second corporation is that conveyed to it by the first corporation, for the purpose of bringing suit to try the title to the land. This court cannot give its sanction to such a device to invoke its jurisdiction. To approve such a scheme would be equivalent to transferring the litigation of all land titles where a Virginia corporation claims title to land against an individual citizen of Virginia into the federal courts. All that would be necessary to accomplish this would be for "the individual stockholders and officers" of a Virginia corporation to organize in another state a corporation for the purpose of bringing suit in a federal court to try the title to the tract of land in dispute, and then take a conveyance of the tract of land from the Virginia corporation to the foreign corporation. The device might be carried still further. An individual citizen, finding himself in a controversy with

his neighbor concerning a tract of land, and desiring to have the question tried in a federal court, could very readily organize a corporation in another state for the purpose of bringing a suit in the federal court, then convey whatever interest he claims in the land to the foreign corporation of his own creation, and in which he is the only stockholder, and the courts of the United States would be open to him to litigate in a federal court a question that the laws of the land, state and federal, contemplate shall be litigated in the courts of the state of which both parties are citizens. The court is clearly of opinion that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court; that the plaintiff has been collusively made a party to it for the purpose of making a case cognizable in a federal court; and this case must be dismissed.

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SECURITY CO. v. PRATT.

(Circuit Court, D. Connecticut. November 26, 1894.)

No. 796.

1. REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—NOMINAL AND REAL PARTIES.

An administrator with the will annexed, a citizen of Connecticut, filed a bill in the state court for the construction of the will, against two beneficiaries, citizens, respectively, of Connecticut and New York,—the former claiming that certain personal property, bequeathed to her for life, with power of sale and appropriation of proceeds, should be delivered to her as her own; and the latter claiming that such life beneficiary should give bonds, under a statute of Connecticut, for the safe-keeping of such property. *Held*, that the cause was not removable, the administrator being, under the law of Connecticut, not a nominal, but a real, party in interest, and one of the defendants being a citizen of the same state.

2. SAME—SEPARABLE CONTROVERSY.

There was no separable controversy, in the sense of the statute (Act Cong. Aug. 13, 1888), between the New York beneficiary and either the administrator or the Connecticut beneficiary.

This was a suit by the Security Company, as administrator de bonis non with the will annexed of Nancie Wells Hall, against Mary Ann Pratt, and Josiah J. White, as administrator of the estate of Eliza T. White, for the construction of the will of Nancie W. Hall. The suit was brought in a court of the state of Connecticut, and was removed by defendant J. J. White to this court. Complainant moves to remand to the state court.

Chas. E. Gross, for orator.

Roger Foster, for defendant White.

J. Halsey, for defendant Pratt.

WHEELER, District Judge. The orator, a corporation of Connecticut, is administrator de bonis non in that state of the estate of Nancie Wells Hall, with her will annexed, by which she gave the use, income, and improvement of real and personal estate to Mary Ann Pratt, a citizen of Connecticut, her sister, during life, with

power of sale and conveyance, and of appropriation of avails of sale to her own use, with remainder over to her niece, Eliza Trowbridge White, wife of Josiah J. White, a citizen of New York, of whose estate he is now administrator, and her heirs, forever, of one of whom he is now guardian. The statutes of Connecticut provide that when a life estate in personalty is given by will with remainder over without a trustee, the probate court may order the executor to deliver the estate to the holder for life upon the giving of a proper bond for its safe-keeping and delivery to the reversioner. Gen. St. p. 138, § 559. Mary Ann Pratt has demanded the estate as her own, without giving bond. This bill was brought in the state court for a construction of these provisions of the will. The defendant White filed a petition and bond, which was approved in the state court, for the removal of the cause to this court, and entered it here. It has now been heard on a motion to remand. If the suit is of such nature as to be removable at all, it could not be removed under the acts of congress now in force, unless all the parties in interest on one side of it, or of some separable controversy in it, are citizens of one state, and those on the other side are citizens of another state. 25 Stat. 433. As a suit in the interest of the orator against the defendants, it is not removable, because one of the defendants (Mary Ann Pratt) is a citizen of the same state (Connecticut) with the orator. The suit to get a construction of the will in advance for the safety of the administrator seems to be one which, in the jurisprudence of the state, no one but the administrator can maintain. *Belfield v. Booth*, 63 Conn. 309, 27 Atl. 585. The relief sought is this advance construction, without more, for the benefit of the orator as a real party, in its own interest, and not as a merely nominal party without interest, as has been argued. Without the orator as a real party, nothing would remain of the suit. A separable controversy in a cause, about which parties may be arranged, within the meaning of this statute, must be something more than a mere collateral or incidental dispute or question of fact or of law, and amount to a substantial controversy in respect to relief sought, which can be granted or denied, according to the rights of the parties as they may be ascertained. *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726. The defendant White is not on one side, with the orator and the defendant Pratt, or either of them, on the other, of any such controversy in this cause. He could not maintain any such suit as this, brought by himself against them, or either of them, for such relief, and this suit includes no such controversy that he can maintain. Upon these considerations the suit does not appear to have been, in whole or in any part, removable. Motion granted.

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DAVIS & RANKIN BLDG. & MANUF'G CO. v. DIX et al.

(Circuit Court, Central Division, W. D. Missouri. October 16, 1894.)

1. ESTOPPEL IN PAIS.

A contract for the sale and construction of a creamery was signed by the purchasers at the solicitation of the seller's agent. The purchasers failing to provide land on which to construct the creamery, the seller, as



permitted by the contract, procured land and erected the creamery in compliance with such contract, in the view of such purchasers. Soon after the contract was executed, and at various times afterwards, the latter sought to be released from, and refused to comply with, the contract for various reasons, which did not include any claimed alteration of it. Held, that the purchasers could not, in an equitable action by the seller to enforce such contract, set up an unauthorized alteration, of which the seller was ignorant, made by the agent after part of them signed it.

**2. ALTERATION OF INSTRUMENTS—WHAT CONSTITUTES.**

Where a contract signed "D. & R., The First Party, per B., Special Agent," shows on its face that the "first party" is "D. & R. Bldg. & Manufg. Co.," such agent may, after the contract is signed by the "second parties," without their knowledge, and before he delivers it to the principal, add, opposite the names "D. & R.," the words "Bldg. & Manufg. Co."

**3. FOREIGN CORPORATION—ACT REQUIRING PUBLIC OFFICE TO BE KEPT WITHIN THE STATE—WHEN APPLIES.**

Act Mo. April, 1891 (Laws 1891, p. 75), requiring foreign corporations, before being allowed to do business in the state, to keep public offices therein for the transaction of business, to file with the secretary of state copies of their charter, forbidding the incumbrance of their property in the state, etc., and providing that the act shall not apply to travelling salesmen soliciting business in the state for foreign corporations which are entirely nonresident, applies only to such corporations as conduct their business in the state in such manner as to give them a status there, and not to foreign corporations which merely sell their wares in the state through travelling salesmen.

**4. CONSTITUTIONAL LAW—INTERSTATE COMMERCE.**

If such act applies to foreign corporations who send travelling agents into the state to make contracts for the sale of goods and machinery kept and manufactured without the state, it is void as an interference with interstate commerce.

Bill by the Davis & Rankin Building & Manufacturing Company against L. V. Dix and others to recover the contract price of a creamery, and foreclose an equitable lien on land on which it was erected. Decree for complainant.

Silver & Brown, for plaintiff.

Edwards & Davison and W. S. Pope, for defendants.

**PHILIPS**, District Judge. This is a bill in equity filed by the complainant, an Illinois corporation, against the respondents, numbering about 45 persons. It is predicated of a contract for the sale and construction of a creamery, which is like that found in the case of *Davis v. Shafer*, 50 Fed. 765. The creamery was to be erected, as stated on the face of the contract, "at or near Jefferson City, or on Dix's farm." The respondents having failed to procure the lot of ground, with a supply of water, for the erection of the creamery, the complainant, pursuant to the provisions of the contract, proceeded to select the ground at or near Jefferson City, and to dig a well for water; and, as the title to this property was taken in the name of the complainant, this bill in equity is filed, alleging compliance with and performance of the contract on the part of the complainant, and asks a decree against respondents for the contract price, and for a foreclosure of the equitable right of the respondents in said land, and for the enforcement of the decree against the same, with judgment over against them for the residue. A part of the respondents answer

separately, interposing the plea of non est factum, while the other respondents, in their answer, inter alia, set up the fact of the alleged alteration of the contract relied upon by the first-named respondents, and allege this alteration was made before they signed the contract, and that they would not have executed the same had they known the same had been altered after the other respondents had so executed it. The plea of non est factum is predicated of the contention that the contract, as signed by the first-named parties, described the location for the creamery plant "at or near Jefferson City, on L. V. Dix's farm," and the alleged alteration consists in interpolating the word "or" just before the word "on," so as to make the prescription read "at or near Jefferson City, or on L. V. Dix's farm." There is a sharp conflict of evidence between the complainant and the respondents on the question of fact whether this word "or" was in the contract before it was signed by any of the parties. Blanchard, who was the soliciting agent who obtained the signatures of respondents to the contract, testifies that this word "or" was inserted in the contract at the instance and request of the respondent Dix, the first signer of the contract. On the other hand, the respondents' testimony tends to show that the word "or" was interpolated after some of the parties had signed. It is, however, quite impracticable, from the respondents' testimony, to determine with reliable accuracy after what particular signature to the contract this word was inserted. Accepting the testimony of Mr. F. W. Roer, county clerk of Cole county, it would appear that this alteration was not made later than the signature of respondent Thomas B. Mahan. Taking the evidence on the part of the respondents as true, it would appear that this word "or" was inserted to meet the objection of some of the subscribers to confining the location to the Dix farm; and Roer testifies that he heard the conversation between Mahan and Blanchard in which Mahan suggested that this change be made. How Mr. Mahan can be heard to complain of this alteration, when made at his suggestion, is not apparent. If it be conceded that this alteration was made, and that the effect in law would be to release those who signed the contract prior to the change, and that it ought likewise to operate in favor of the subsequent signers, on the ground that they executed the instrument in reliance upon its being obligatory upon all the predecessors, the important question arises, in view of all the facts and circumstances attending this transaction, ought the respondents to escape liability on the contract? This strife is a repetition of the facility and credulity exhibited by the average man in entering into such joint contracts, under the persuasive influence of canvassing solicitors, and a vague notion of either large profits that are in some way to accrue to them or the community by such projects. Too late discovering the responsibility assumed by them in signing such contract, and the probability that such enterprise will end only in disaster, they begin to cast about for some loophole of escape. The evidence in this case shows that, after this contract was executed and returned by the agent to the company at Chicago, the subscribers, in general and in particular, raised all manner of objections and reasons why they should not be held thereto. Among the groundless conten-

tions of some of the respondents, made in the testimony, but not distinctly raised by the pleadings, is that they simply signed a piece of paper with no form of contract attached thereto, and that it was a mere subscription paper. This is wholly incredible. In the first place, it is apparent that the solicitor, Blanchard, is correct in his testimony that the papers were a unit,—the two forms and the subscription were attached together. Aside from this, many of these respondents testify that when they signed the paper they saw the contract thereto, and over half allege in their answer that they examined its contents, and signed it after Blanchard had stated to them that they would only be held to the extent of their subscription. And what is still more glaringly contradictory is the fact that some of these parties, while testifying that no form of contract was attached, at the same time attempt the defense in their testimony that when they attached their names to the contract it was only signed "Davis and Rankin, The First Party, per Chas. Blanchard, Special Agent," and that Blanchard afterwards added, opposite the words "Davis and Rankin," the words "Bldg. & Manfg. Co." The paper shows on its face that the name "Davis and Rankin" was affixed at the bottom of the contract; so it was impossible for the parties to have seen that signature without seeing that it was attached to a contract. If they gave no heed to what they were signing, with the paper before their eyes, they must realize the force and virtue of the maxim of the law, "*Vigilantibus et non dormientibus jura subveniunt.*" But suppose, as a matter of fact, that Blanchard did add the words "Bldg. & Manfg. Co." after "Davis and Rankin"; how does that affect the obligation? With conspicuous capitals, the contract, on its face, over and over again shows that the "Davis and Rankin Building and Manufacturing Company" is the party of the first part, with whom the subscribers, as "party of the second part," were contracting. The agent, if he neglected to add the full corporate name in signing the contract, could do that at any time before it was delivered, for it was not completely executed by the company until duly signed by the agent. About the time of the completion of the subscription list, mutterings of discontent, fomented mainly by the respondent Dix, arose among the subscribers, and some of them wrote to Blanchard to be released. Dix and Creedon wrote letters to the company manifesting dissatisfaction in a general way, whereat Mr. Woodbury, secretary of the company, was sent out from Chicago to Jefferson City to investigate the causes of discontent, and, if possible, to harmoniously adjust matters. On his arrival at Jefferson City he met subscribers in convention at the Monroe House, and saw others afterwards in detail, and particularly those interposing this plea of non est factum, when the whole grounds of grievance were canvassed and discussed. Not one of these respondents, in any letter ever written by them, or at any meeting, or in private conversation with Woodbury, suggested one word about the alleged alteration made in the contract as a reason for their unwillingness to proceed. Their whole ground of complaint, both in said letters and interviews, was predicated of other matters. They also made suggestions of compromise.

The contract contained the following provisions:

"The parties of the second part hereby agree to select and furnish suitable lands for said building, together with well, spring, or reservoir on said lot for the use of the business; and it is further understood that, in case the said second party shall fail to furnish said land and water within ten days after the execution of this contract, then the Davis and Rankin Building and Manufacturing Company, at its option, may select and furnish land and water in behalf and at the expense of the subscribers."

As the respondents had not made the selection nor offered the ground, Woodbury informed them at that interview that as the company, under the contract, could not compel payment without performance on its part, he would proceed, under the right conferred by the contract, to select and purchase the ground and furnish the water for the plant, and complete the works. More than that, he gave them notice in writing, which recited the contract in question by reference, and the provision just above quoted, advising them that he would proceed to acquire the land, etc. He proceeded thereafter in execution of the contract, bought and paid for the land, and put up and completed the creamery. Not one of the respondents at said meeting, or in said interviews, or in response to said notice, gave Woodbury or the company a word of warning about the alleged alteration in the contract, but, placing their complaints on other grounds, they stood by and suffered the company, in ignorance of the imputation that Blanchard had altered the contract before he returned it to the company, to go ahead with the manufacture of the material and machinery in their house at Chicago, and put it up on the ground at Jefferson City in view of the respondents. Shall they now be heard, in the forum of conscience, to interpose the alleged alteration against the demand of the company for its pay? It is a wholesome, because a reasonable and just, maxim of law, especially applicable in the administration of equity jurisprudence, that "he who did not speak when he should have spoken shall not be heard now that he should be silent." *State v. Potter*, 63 Mo. 226; *Quinlan v. Keiser*, 66 Mo. 605. This equitable rule has been succinctly stated by the supreme court of this state in *Chouteau v. Goddin*, 39 Mo. 229, as follows:

"When a party, by his acts or words, causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous condition, he will be concluded from averring anything to the contrary against the party so altering his condition."

And the supreme court of the United States, in *Bank v. Morgan*, 117 U. S. 108, 6 Sup. Ct. 657, citing with approval the language of *Folger, J.*, in *Continental Nat. Bank v. National Bank of Com.*, 50 N. Y. 583, held it not to be—

"always necessary to such an estoppel that there should be an intention, on the part of the person making a declaration or doing an act, to mislead the one who is induced to rely upon it. Indeed, it would limit the rule much within the reason of it if it were restricted to cases where there was an element of fraudulent purpose. In very many of the cases in which the rule has been applied, there was no more than negligence on the part of him who was estopped."

This case further maintains the proposition that if, in the transaction in dispute, the one party has led the other into a belief of a

certain state of facts, he cannot be heard afterwards, as against the first, to show that the state of facts did not exist. And, following this principle to its logical result, it has become axiomatic that "silence, when it is the duty of the party to speak, is equivalent to concealment." 7 Am. & Eng. Enc. Law, p. 12. So, it is held by the supreme court of Wisconsin, in *Meincke v. Falk*, 61 Wis. 623, 21 N. W. 785, that one who refuses to carry out a contract on the ground that it is illegal is estopped from afterwards raising the objection that the other party has not complied; and the reverse of the statement would be true,—that one who refuses to carry out a contract on the ground of specified misrepresentation would be estopped from afterwards raising the objection that the contract had been altered. It was but following up this sound rule of commercial honesty that the supreme court, in *Railway Co. v. McCarthy*, 96 U. S. 258, held that:

"When a party gives a reason for his conduct and decision touching anything involved in a controversy, he is estopped, after litigation has begun, from changing his ground, and putting his conduct upon another and different consideration."

Applying this rule to the facts of this case, the respondents who set up this plea of non est factum are estopped; and of consequence the second class of respondents, who ask to be discharged on the ground that those of the first class are released by reason of the alteration, are also estopped. Take, as an illustration, the conduct and attitude of the respondent Dix, who has been the leader in this resistance. In his letter of April 1, 1892, written long after he had signed the contract, he notified the company that he would not be responsible for the five shares of the subscription for the erection of the creamery, "for the reason that my name to said subscription, and amount subscribed, was obtained from me by false and fraudulent representations by the said Chas. Blanchard, who represented that he was the agent of the firm of Davis & Rankin, of Chicago." He specified wherein the alleged misrepresentation was false, to wit, that Blanchard represented himself as the agent of Davis & Rankin. He does not, even in his answer, allege this flimsy excuse as a defense. These respondents having placed their refusal to proceed on other grounds, and standing mute as to any claimed interpolation in the contract, the company had, in effect, their assurance that it might proceed in construction of the plant, subject only to loss in case any of the objections then interposed by them, and afterwards pleaded, should prove to be true in fact and valid in law. This is clear equity, as it is natural justice.

It then only remains to be seen what other defenses any of these respondents have set up than the one just disposed of. First, it is pleaded that the complainant cannot maintain this suit because it is a foreign corporation, and had failed to comply with the act of the legislature of Missouri approved April 21, 1891 (*Laws Mo. 1891*, p. 75). This act, in effect, requires every nonresident corporation for pecuniary profit, before it shall be authorized to transact or do any business in this state, to maintain a public office or place in the state for

the transaction of its business, where legal service may be obtained upon it, and where proper books shall be kept to enable such corporation to comply with the law governing such corporations, and subject to all the liabilities, restrictions, and duties imposed upon corporations of like character organized under the laws of the state, and forbidding it from mortgaging, pledging, or otherwise incumbering its real or personal property situated in this state, also requiring such nonresident corporation to file with the secretary of state a copy of its charter or articles of incorporation; and that the principal officer or agent in Missouri shall furnish the secretary of state a sworn statement of the proportion of the capital stock of said corporation represented by its property located, and business transacted, in this state. The act subjects such corporation, for a failure to comply therewith, to a fine of not less than \$1,000, and in addition thereto denies to such corporation the right to maintain any suit or action in any court of the state upon any demand, whether arising out of a contract or tort, but with the proviso that the act shall not apply to "drummers," or traveling salesmen, soliciting business in the state for foreign corporations which are entirely nonresident. Independent of any consideration of whether or not this statute is violative of the interstate clause of the federal constitution, it is quite apparent, from a consideration of all of its provisions, that it was intended to apply only to such nonresident corporations as were conducting their business operations in the state in such manner as to give it a status here. It must be doing and conducting a business here, as it would be said of a resident citizen or corporation doing business in the community. The only evidence pertaining to the manner of making this contract and the conducting of complainant's business is the testimony of Mr. Woodbury, secretary of the company, who testified:

"We manufacture everything that pertains to the plant, and this is done in Chicago, and by ourselves. The contract for the building is done by agents who canvass the territory for us, under blank contracts furnished them. After this contract appears to them to be satisfactory, it is forwarded to us for ratification or rejection. If accepted by us, the agents are paid for the work, and their connection with it ceases. The machinery is made here in Chicago. We sell that to the contracting parties, and to other established creameries in the country."

Confessedly, the state legislature cannot deny to a nonresident citizen the right to send a canvassing agent here to solicit, by sample or otherwise, contracts for the sale of goods or machinery to be manufactured without the state, and shipped into and delivered in the state by the merchant or manufacturer. A corporation stands upon the same footing in this respect as an individual. *Paul v. Virginia*, 8 Wall. 168. Similar statutes in other states have been held ineffectual to prevent the operation, or to obstruct the contracts, of foreign corporations whose method is to send a solicitor into other states to make contracts for goods to be manufactured at the domicile of the corporation, and shipped to and delivered to the customer in the state, for the reason that such transactions are parts and promotive of interstate commerce, and not subject to state regulation. *Gunn v. Machine Co.* (Ark.) 20 S. W. 591; *Bateman v. Milling Co.*

(Tex. Civ. App.) Id. 931; Lyons-Thomas Hardware Co. v. Reading Hardware Co. (Tex. Civ. App.) 21 S. W. 300. If this act of the state legislature applies to this case, it would also apply to the instance of a manufacturer of mowers and reapers, like that of McCormick, who should send a traveling salesman into Missouri, soliciting from a farmer a contract for the sale of a reaper, to be manufactured at Chicago, and delivered at the farm in Missouri, with the usual stipulation that the company's agent should put it together and start it in running order. So of a manufacturer of furnaces for houses, who should send a soliciting agent into the state to make a contract with the owner of a building for a furnace, to be manufactured at the company's shops outside of the state, and by it shipped into the state, accompanied by an agent who was to put it up in working order. Carried to its logical conclusion, the state legislature could reach the case of every nonresident incorporated mercantile concern which manufactures and sells its wares through the medium of a traveling agent, who takes orders in this state for goods to be manufactured in another, of a particular character, and shipped into the state, and delivered by an agent of the shipper to the local merchant, under a stipulation that the agent should remain a few days and assist the purchaser in properly arranging the goods, and explaining to him their quality and the like. While according to the state the fullest recognition of its power to exclude from its territory every nonresident corporation from obtaining a footing—a situs—within its territory to transact business, the federal constitution interposes an insuperable barrier to its interference with the necessary operations of interstate commerce.

The next defense set up in the answer is that notwithstanding the clause in the contract which declares that the company will not be responsible "for any pledges or promises made by its agents or representatives that do not appear in this contract, and made a part thereof either in print or in writing," yet the agent, Blanchard, assured them that they would not be held on their subscription for a greater sum than the amount representing the shares subscribed for, and that the company promised in writing to make good any assurances of said Blanchard. The contract, on its face, is clear and explicit, and by its terms it is a joint and several contract, each subscriber being responsible for the whole sum of the contract price. *Davis v. Shafer*, supra. Waiving any discussion of the fact that the proof, even on the part of the respondents, shows that any such statement by Blanchard was made to only a few of them, it is to be kept in mind that it is not averred in the answer that this alleged statement by Blanchard was fraudulently and deceitfully made, or that respondents executed the contract in reliance upon the truth of such representations. The case presented, therefore, by the respondents, is a naked attempt to vary, change, and control the plain provisions of a written contract, by contemporaneous verbal statements and understanding. This precise question was decided adversely to this contention by this court in *Davis v. Shafer*, supra; and so say all the authorities. But, say respondents, the complainant afterwards promised in writing to make good any promise made by Blanchard.

Even conceding that a post promise by the complainant could be availed of by respondents, its extent would be defined and limited by the written promise. It could be no broader in its obligation than the expression. The basis for this allegation is predicated of three letters written to three of the respondents by the company after the contract was executed by the parties and delivered to the company. The promise, therefore, could only avail the three respondents, to wit, Clark, Creedon, and Davis. It does not appear affirmatively that any one except Creedon wrote to the company. In his letter he made no specification of any representations made him by Blanchard, but only stated, in general terms, that a number of the subscribers were dissatisfied, and that Blanchard was not a good man, and begged to be let off, "as I have other business to look after." In reply to this, the company wrote him as follows:

"Your favor of Apr. 5th received, and contents carefully noted. We are very sorry that any misunderstanding has arisen among your people, and we assure you that we will fulfill all promises made by our agent Chas. Blanchard; and, as he has full charge of this matter, we must refer you to him in reference to the request you make in your communication."

As to Clark and Davis it seems that their complaints were not made in letters to the company, but that they had complained to Blanchard; and to each of them the company wrote as follows:

"We are informed through our agent Mr. Chas. Blanchard that there is some misunderstanding and trouble brought on by one L. V. Dix. We are sorry that any misunderstanding should arise, and we assure you that we will fulfill all promises made by Mr. Chas. Blanchard, and will do all in our power to make your creamery a success."

The promise is to be understood as having been employed by the writer in its ordinary legal significance or common acceptance, which Black, in his Law Dictionary, defines to be:

"A declaration, verbal or written, made by one person to another, for a good or valuable consideration, in the nature of a covenant, by which the promisor binds himself to do or forbear some act and gives to the promisee a legal right to demand and enforce a fulfillment."

That is to say, if Blanchard had made such a declaration, based on a good or valuable consideration, to do for respondents some future act, the company would carry it out. No reasonable conclusion can arise, from the language of these letters, that it had any possible reference to the present claim of respondents that Blanchard had made them assurances that the plain terms of their written promise to pay should not be complied with, but rather, that if Blanchard had made them some independent promise respecting something to be done by him for them outside of the terms of the written compact, based, of course, upon a consideration, the company would keep and perform it. But even a written promise made by the company, after the execution and delivery of the contract, without some new consideration therefor, would be a mere nudum pactum; and especially so where, as in this case, the respondents had thereafter done no act in reliance thereon, so as to alter their previous condition. Davis v. Shafer, 50 Fed. 772.

The only other defense interposed by the answer is that no deed



to the property has ever been tendered; that the title was bad; the creamery was not completed in time, and did not come up to the requirements of the contract. It is sufficient to say there is no evidence to support this contention. The respondent Dix claims, in his testimony, that he had a contract with Blanchard by which it seems Blanchard promised to allow him \$300 for his services in assisting him to obtain subscribers to the contract. It is enough to say of this that Dix sets up no such matter in his answer, but contents himself simply with the plea of non est factum. He was necessarily, in his pleading, driven to this attitude, because it would hardly be consistent with his claim that the contract had been varied and was fraudulent, while he himself was going around with Blanchard persuading others to sign it. It results that the issues are found for the complainant. Decree accordingly.

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GREGORY v. PIKE et al.

(Circuit Court of Appeals, First Circuit. September 26, 1894.)

No. 98.

1. TRANSCRIPT OF RECORD ON CROSS APPEALS — CROSS BILL DISMISSED BY FINAL DECREE.

One not originally made a defendant in a bill in equity was brought in as such by subsequent proceedings, and allowed to file a cross bill. On his own motion, he was dismissed as defendant in the original bill. The final decree in terms dismissed his cross bill, and he was allowed an appeal, but he was not named as appellee in an appeal from the decree taken by the complainant. *Held*, that the transcript of the record for use on both appeals should include the cross bill and the proceedings and proofs thereon.

2. SAME—ORDER TO FILE FULL TRANSCRIPT.

From the transcript filed in such case, at the request of the complainant as appellant, the cross bill and the proceedings under it were omitted. *Held* that, as speedy action was needed, the court, in the exercise of its inherent power to dismiss unless a proper transcript is filed, would require the complainant to file a complete transcript on peril of dismissal of his appeal, instead of awaiting the usual and less expeditious remedy by certiorari.

3. SAME.

*Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 9 C. C. A. 468, 61 Fed. 237, applied.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit by Charles A. Gregory against Frederick A. Pike and others to compel the surrender of certain notes, brought in the supreme judicial court of Massachusetts, and removed therefrom to the United States circuit court. In that court George W. Butterfield and John C. Kemp Van Ee were brought in as defendants, and given leave by the court to file (29 Fed. 588), and did file, cross bills in the case. In a supplemental bill filed by complainant additional parties were made defendants, and, by amendment thereto, after the decease of the defendant Frederick A. Pike, his executrix, Mary H. Pike, was made a defendant. By the final decree the cross bill filed by Butterfield was dismissed. Complainant appealed from the decree, but did not make Butterfield a party appellee to his appeal; and at complainant's request the clerk of the circuit court omitted from the transcript of the rec-

ord on the appeal the cross bill of Butterfield and the proceedings under it. An appeal from the decree was also allowed to Butterfield, and was duly perfected by him. He filed in this court a motion for leave to enter an appearance in the appeal of complainant, and a petition to docket his own appeal, both which were granted; and he also filed a petition claiming that the transcript of record filed at the request of complainant was defective.

George D. Noyes, for petitioner Butterfield.

Francis A. Brooks, for Charles A. Gregory.

John Lowell and Thomas H. Talbot, for Mary H. Pike.

A. Lawrence Lowell, for John C. Kemp Van Ee.

Thomas H. Talbot, pro se.

Before PUTNAM, Circuit Judge, and CARPENTER, District Judge.

PUTNAM, Circuit Judge. By a petition filed under a cross appeal, Butterfield, the appellant therein, claims that the transcript of the record in this case is defective. The method of the proceeding may be irregular, but no objection on that score was pressed on the court, and all parties desire the case put in position for prompt hearing.

The facts needed to be referred to in this preliminary matter are few. Gregory, the appellant, was sole plaintiff in the original bill in the circuit court. Butterfield was not originally made a defendant in that bill, but by force of subsequent proceedings was recognized by the court as brought in as such by amendment, and was allowed to file a cross bill. The final decree below in terms dismissed this cross bill, and Butterfield was allowed an appeal, whether from the dismissal of the cross bill or from other parts of the final decree it is not important to consider at present. The appeal thus allowed him is the cross appeal already referred to. Butterfield was, on his own motion, at one stage of the case below, apparently dismissed as a defendant in the original bill. He was not named as a party appellee in Gregory's appeal, and it is claimed that he has no standing in this case. Whether it is so, or whether the omission to name him as an appellee was an irregularity, we need not now consider. It is enough for all present purposes that his cross bill was recognized in the final decree below, and that we cannot determine the effect or propriety of that recognition unless we have the cross bill before us.

The clerk below, at the request of appellant, omitted from the transcript in this case the cross bill and the proceedings under it; and he was probably justified in so doing by our expressions in *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 9 C. C. A. 468, 61 Fed. 237. But this action of the clerk was, of course, in all respects subject to revision by this court. The original bill and the cross bill in the court below constituted, of course, but one suit (*Ex Parte Railroad Co.*, 95 U. S. 221, 225), and by immemorial usage was so docketed in that court. But separate and distinct appeals, whether there is or not any cross bill, are, by long usage, separately docketed, though in substance, under usual circumstances, only one case, and usually required to be argued as such. Sup. Ct. Rule 22, and our Rule 25. For this reason section 1013 of the Revised Statutes was able to provide that one transcript of the record filed by either appellant might be used in both appeals.

It is, however, claimed by Gregory, and by the appellees other than Butterfield, that the proceedings in the court below touching Butterfield have left him no standing as defendant in the original bill, and that the merits of that bill can be disposed of without consideration of the cross bill. There sometimes are cases where the appellate tribunal easily perceives that a partial transcript is sufficient, and can safely hear an appeal on that. But clearly this matter is too involved to permit the court to assume to foresee what its phases are, and the reference to the cross bill in the final decree, already referred to, enforces this proposition. We cannot proceed unless some one brings the whole record before us. As it is apparent this case needs speedy action, we avail ourselves of the privilege given by *Railroad Co. v. Schulte*, 100 U. S. 644, cited in *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, *ubi supra*, of announcing in advance a purpose to dismiss unless a full transcript is filed, rather than await the usual and less expeditious remedy by certiorari.

The question remains, to whom shall we first apply whatever order we may make? We have no power to compel any party to bring up a record by a direct order to that effect, unless the issue of a writ of certiorari can be construed as the exercise of such power. We have, however, an inherent power to dismiss unless a proper transcript is filed, which may be exercised under the rules or specially. But both Gregory and Butterfield are appellants, and in what order of priority as between them shall this power be exercised? Gregory was the complainant in the original bill, and so set the litigation in motion; and when such a complainant becomes appellant the usage is to look first to him for the record. If he elects not to file it, and his appeal is dismissed in consequence thereof, it will be in season to consider the fate of other appeals, in case the appellants therein make like default when their appeals are called for argument, if no earlier occasion for such consideration arises.

Ordered, that appellant Gregory file as soon as practicable a transcript of all parts of the record in the circuit court, including the cross bill of Butterfield, and all proceedings and proofs thereon, not included in the transcript already filed, and cause the same to be forthwith thereafter printed under the rule, on peril of this appeal being dismissed.

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EELLS et al. v. ROSS.

(Circuit Court of Appeals, Ninth Circuit. October 10, 1894.)

No. 143.

**INDIANS — PUYALLUP RESERVATION — ALLOTMENT OF LAND IN SEVERALTY — MAKING INDIANS CITIZENS—EFFECT.**

A treaty with the Indians of the Puyallup reservation allotted the lands in severalty, and provided that the privilege of allotment could only be availed of by persons who would "locate on the same as a permanent home," and authorized the president to prescribe such rules as would insure to the family, in case of the death of its head, possession of such home; to issue a patent to such person or family; and to cancel it, if issued, if such person or family "rove from place to place," etc. Each patent issued prohibited alienation. Act Cong. Feb. 8, 1887 (24 Stat. c. v.64f.no.4—27

119), conferred citizenship on such Indians, and provided for leasing the lands on certain contingencies, under regulations of the secretary of the interior, and contemplated that agents shall be in charge of reservations; and the practice of the department was to maintain such agents. *Held*, that the allotment of such lands in severalty, and making the Indians citizens, did not revoke the reservation.

Appeal from the Circuit Court of the United States for the District of Washington, Northern Division.

Bill by Frank C. Ross against Edwin Eells, Indian agent, and others, officers of the United States army, for an injunction restraining defendants from interfering with the building of a railroad across lands within the Puyallup Indian reservation which have been allotted to Indians in severalty. From a judgment and decree for complainant, defendants appeal. Reversed.

For prior report, see 56 Fed. 855.

This is an appeal from a judgment and decree of the circuit court of the United States for the district of Washington, Northern division, granting a perpetual injunction against the defendants to prevent them from restraining plaintiffs from grading and building a railroad over certain lands claimed to be within the limits of the Puyallup Indian reservation, and allotted in severalty to certain Indians named in the bill.

The case is presented for our consideration upon the pleadings and an agreed statement of facts. The facts as agreed to are as follows:

(1) That John Cook and Susie Cook, who are named in the bill of complaint, and each of them, are of Indian birth, and were formerly of the Puyallup tribe of Indians, living in the Puyallup valley and neighborhood, which is now embraced within the boundaries of the state of Washington.

(2) That they are the same John Cook and Susie Cook named in a patent dated the 30th day of January, 1886, signed by Grover Cleveland, president of the United States, a copy of which patent, marked "Exhibit A," is attached to and made a part of this stipulation, and were, at and prior to the date of said patent, husband and wife.

(3) That under and by virtue of the sixth section of an act of congress entitled, "An act to provide for the allotment of lands in severalty to Indians of the various reservations and to extend equal protection of the laws of the United States and the territories over the Indians, and for other purposes," approved February 8, 1887, being chapter 119 of volume 24 of the Statutes at Large, the said John Cook and Susie Cook, his wife, were made citizens of the United States, and are now citizens thereof.

(4) That said John Cook and Susie Cook executed and delivered to the plaintiff, Frank C. Ross, prior to the filing of the complaint in this cause, an instrument in writing in words and figures following, to wit:

"Permission is hereby given to Frank C. Ross to go upon and occupy any portion of lot one in section 21, township 21 north, range east W. M., King county, state of Washington, with his tents, camps, etc., for the period of six months from the date hereof, in consideration of the sum of one dollar per month.

"[Signed]

his  
John X Cook.  
mark.  
her  
"Susie X Cook.  
mark.

"Dated April 15, 1893.

"Witness:

"P. C. Stanup.

"A. Kautz."

(5) That at and prior to the filing of said complaint, and prior to the time it is therein averred that defendants ordered the plaintiff to vacate the prem-

ises described in said writing, and threatened to compel him so to do if he refused, the said plaintiff, under the permission therein contained, had gone upon said premises, and was occupying the same with tents, camps, etc., thereon.

(6) That on the 4th day of March, 1893, the plaintiff and the said John Cook and Susie Cook, his wife, entered into the written and printed contract, a copy whereof is hereunto attached, marked "Exhibit B," and made a part of this stipulation.

(7) That thereafter, and prior to the filing of the complaint in this action, and prior to the orders and threats made by the defendants as in the complaint stated, the plaintiff had, under claims of right so to do as granted in said contract, Exhibit B, gone upon said premises, and was by the aid of his engineers and divers laborers, the latter being of Indian birth, and former members of said Puyallup tribe, engaged in locating and clearing the right of way for a railroad upon, over, and across said premises.

(8) That on the 15th day of May, 1893, and prior to the hour at which the restraining order in this cause was granted, and prior to the filing of the complaint in said cause, the defendants Edwin Eells and G. A. Carpenter, with a force of armed men, went upon said premises described in the said contract for right of way, to wit, lot 1 in section 21, township 21 N., range 3 E. W. M., in King county, state of Washington, and by force and arms endeavored to compel the said laborers and engineers to quit said premises, and to desist from establishing and preparing said right of way for grading and the grade of said line of railroad.

(9) That the defendant Edwin Eells is an agent of the United States in charge of certain Indian reservations in the state of Washington; but whether he has any rights to act as such in reference to the Indians constituting what was formerly the Puyallup tribe is not conceded or denied by this stipulation, but is left to be decided by the court, upon the facts that may be proved in relation thereto, and the law applicable thereto, as the same shall be found by the court.

(10) That the other defendants are commissioned officers in the United States army, and the men who were under their control and constituted the force heretofore stated are noncommissioned officers and privates of the United States army, and all were acting under orders of the president of the United States.

(Section 11 erased.)

(12) That the said Indians, including the said John Cook, are assessed and taxed as other citizens of the state on all property owned by them, except their said lands, which as yet have never been assessed for taxation.

(13) By act of congress approved March 3, 1893, the congress has undertaken to provide a method for the sale of these lands.

William H. Brinker, for appellants.

F. Campbell, for appellee.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

McKENNA, Circuit Judge (after stating the facts as above). We do not consider it necessary to consider or decide all the propositions argued. If the land was an Indian reservation, the agents had a right to remove all persons found there contrary to law. Rev. St. § 2147. See, also, Rev. St. §§ 2118, 2149. It is not disputed that the lands are a part of those set apart as the Puyallup reservation, and that the reservation has not been directly revoked; but it is contended that the allotment of the lands in severalty, and afterwards making the Indians citizens, necessarily had the effect to revoke the reservation. There is plausibility in the argument, and it needs to be carefully considered. It is clear that the allotment alone could not have

this effect (*The Kansas Indians*, 5 Wall. 737), and citizenship can only have it if citizenship is inconsistent with the existence of a reservation. It is not necessarily so. Some of the restraints of a reservation may be inconsistent with the rights of citizens. The advantages of a reservation are not; and if, to secure the latter to the Indians, others not Indians are excluded, it is not clear what right they have to complain. The act of 1887, which confers citizenship, clearly does not emancipate the Indians from all control, or abolish the reservations. Section 3 provides for leasing lands under certain contingencies, under the regulations of the secretary of the interior, and the proviso of the section contemplates agents in charge of the reservations. Besides, the practice of the department has been and is to maintain them, and this practice is respectable evidence of a correct interpretation of the statute by officers who may have suggested the policy and written the provisions of the statute. *Railroad Co. v. Whitney*, 132 U. S. 357, 366, 10 Sup. Ct. 112; *Sturr v. Beck*, 133 U. S. 548, 10 Sup. Ct. 350. That the abolition of reservations and of the guardianship of the Indians is the ultimate hope of the policy, there can be no doubt; but it will not be soonest realized by attributing fanciful qualities to the Indians, or by supposing that their natures can be changed by legislative enactment. But the appellees claim contracts with the Indians, and a right to occupy the land, and the circuit court held that the government, by making the Indian proprietors citizens, lost the power "to coerce such Indians into making or annulling contracts, or of molesting persons upon their premises by their license, when not interfering with the operations of the government, or violating any national law." And the court further held that by the issuance of the patent "the government lost entirely the right to control the use of the land." The patent has clear words of prohibition against alienation, and, even if it had omitted them, the treaties and law imposed them. *Taylor v. Brown (Dak.)* 40 N. W. 527.

The power of the government to impose the restraints is not questioned, and its purpose is certainly not ambiguous. The treaties with the Indians; the allotment of the land in severalty,—all had their purpose of fixing them in permanent homes. By article 6 of the treaty, the privilege of allotment can only be availed of by those who will "locate on the same as a permanent home," and the purpose is so careful, insistent, and dominant that the president is given power to—"Prescribe such rules and regulations as will insure to the family in the case of the death of the head thereof the possession and enjoyment of such permanent home and he may issue a patent only to such person or family who has made a location for a permanent home and if issued may cancel it if such person or family 'rove from place to place,' and the tract may be declared abandoned and thereafter assigned to some other person or family."

From its relations to the title, and from the terms of the treaty, we think the government had the power to make such conditions, and that they were not destroyed by making the Indians citizens. Such effect cannot be deduced from the act of 1887, for, if congress could do so, congress did explicitly clog the title with a condition of nonalienation for 25 years, and absolutely nullified all contracts made, touching the same, before the expiration of such time.

In *Smythe v. Henry*, 41 Fed. 705, a statute which granted land to the Cherokee chief Junaluska, with restraint upon its alienation, and also made him a citizen of the United States, was considered, and it was held that a restraint against alienation was not inconsistent with the grant of citizenship. The court said:

"It is insisted that the restriction imposed upon the rights of alienation by the second section of the act is inconsistent with the spirit and purpose of the first section, which conferred upon Junaluska all the rights, privileges, and immunities of citizenship. When a state conveys land as a bounty, it can impose any restriction deemed proper upon the grantee. When we consider the condition of that new citizen, we may well conclude that the restriction was not unreasonable, but was, rather, just, wise, and beneficent."

And it was held in *Re Coombs*, 127 Mass. 278, that it was competent for the legislature to continue the guardianship of Indians by the state after they had been made citizens.

It follows, therefore, that the contracts of complainant with the Indians were void, and that he was properly removed from the reservation. We have not distinguished between the lease and the contract to convey, as we deem them parts of one transaction. If it is for the interest of the Indians or of commerce to remove the restraints on alienation, congress will no doubt do so, if applied to, and in the latter case it will be enabled to provide for the interests of the Indians better than they have seemed to have provided for themselves in the contract with appellee. Judgment reversed, and cause remanded, with directions to dismiss the bill.

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PACIFIC GAS IMP. CO. v. ELLERT, Mayor, et al

(Circuit Court, N. D. California. October 15, 1894.)

1. NAVIGABLE WATERS—OBSTRUCTION.

The provision in the act of admission of California into the Union, that all the navigable waters in the state should be common highways, and forever free, without tax therefor, does not refer to physical obstructions, but to political regulations. *Bridge Co. v. Hatch*, 8 S. Ct. 811, 125 U. S. 1, followed.

2. CIRCUIT COURTS—JURISDICTION—FEDERAL QUESTION.

Under Act Aug. 13, 1888, giving circuit courts original jurisdiction of suits "arising under the constitution or laws of the United States," plaintiff's statement of his cause of action must show that he relies on some right under such constitution or laws, and a suggestion in his bill that defendant will claim that acts relied on by plaintiff violate the constitution of the United States cannot give jurisdiction. *Tennessee v. Union & Planters Bank*, 14 S. Ct. 654, 152 U. S. 454, followed.

3. SAME—TAKING PROPERTY WITHOUT PROCESS.

Const. 14th Amend., prohibiting a state from depriving a person of property without due process of law, applies to an act of any person by virtue of public position under a state government.

4. TIDE LANDS—DISPOSITION BY STATE—RIPARIAN RIGHTS.

A state, if its laws permit, may dispose of its tide lands free from any easement of the upland owner.

5. SAME.

The laws of California, as decided by its supreme court, allow it to make such disposition.

## 6. SAME—DEDICATION FOR STREETS.

Acts Cal. March 11, 1853, and April 25, 1862, confirming an ordinance which adopted a plat laying out streets over tide waters, and declaring streets so laid out to be public streets, constitute a dedication by the state.

## 7. SAME.

Const. Cal. art. 15, § 2, providing that no individual, partnership, or corporation claiming or possessing tidal lands of any navigable water shall be permitted to destroy or obstruct the free navigation of the water, does not prevent the state from establishing harbor lines, and authorizing the filling in of the space between such lines and the shore.

## In Equity.

Suit by the Pacific Gas Improvement Company against L. R. Ellert, mayor of the city and county of San Francisco, and others, for injunction. Order to show cause why injunction should not be continued, discharged.

E. S. Pillsbury, John B. Mhoon, and Robert Y. Hayne, for complainant.

Garret W. McEnerney and W. S. Goodfellow, for respondents.

**McKENNA**, Circuit Judge. The bill alleges the incorporation of plaintiff, and the official character of defendant Ellert, mayor, and the other defendants, supervisors, and contains substantially the following allegations, omitting repetitions:

That the Central Gaslight Company is the owner in fee simple of block 330 in the city and county of San Francisco, having for its northern boundary the shore of the Bay of San Francisco, excepting a certain piece of land from said block, not necessary to describe.

That prior to the 31st of October, 1893, the said company was in possession of said property, using the same for gas works and appurtenances thereto, and leased the same to United Gas Improvement Company, of Pennsylvania, and the latter on the 16th of January, 1885, leased the same to plaintiff, and latter has been ever since, and is, in possession thereof.

That the land to the north of said block is owned by the state of California, and is continuously submerged at all stages of the tide, and navigable for vessels, boats, and water craft, and has always been a common and open public highway for the purposes of navigation, commerce, and traffic.

That said submerged land formerly belonged to Mexico, and was ceded to the United States by the latter, by treaty of Guadalupe Hidalgo; and by the admission of the state of California into the Union the title to the same passed to the state, upon condition that "all the navigable waters within said state shall be common highways and forever free as well to the inhabitants of said state as to the citizens of the United States, without any tax, import or duty therefor," and ever since said act the title has continued in the state in trust as aforesaid.

That ever since said 16th of January, 1885, plaintiff has actively fulfilled the purposes of its incorporation, and has established and carries on a large and profitable business, and has used and uses the said land properly for the purpose of its business, and that the same is necessary and advantageous.

That it has a landing place thereon for vessels and boats, and by them brought the materials necessary for its business to said property, and that there is no other way in which they can be transmitted to said property than over said waters.

That on the 15th of September, 1893, the board of supervisors of San Francisco, assuming to act under an act of the legislature entitled "An act to provide work upon streets, lanes, alleys, courts, places and sidewalks, and for the construction of sewers within municipalities," approved March 18, 1885, and the acts amendatory and supplementary thereof, passed and



posted a resolution of intention to improve a pretended street, designated as "Lewis Street," and afterwards passed a resolution ordering work to be done, and invited proposals in the manner and form required by law, and on the 25th of September, 1893, awarded a contract to a firm called "Warren & Malley," which was duly approved, is being posted and published as required by law, and that the posting and publishing will be complete on the 8th of October, 1893, unless restrained by injunction, and that defendant Ackerson will enter into a contract for the work with Warren & Malley or others, and said Warren & Malley or others immediately enter upon the construction of such improvements, and thereby destroy the said navigable waters and public highway, and destroy the said property and right of plaintiff.

That the district described in said resolution of intention lies immediately to the north of and in front of said property, and comprises the whole of the basin, inlet, or arm of the Bay of San Francisco, situated between what is known as the "Presidio Reservation," on the west of said basin, and what is known as the "Government Reservation," at Black Point, or the "Fort Mason Reserve," on the east, and is of triangular shape, and nearly a mile wide along the line of the proposed work to the furthest point of the shore.

That said district includes a portion of San Francisco Bay equal to about 100 acres, and which area has been from time immemorial navigable for vessels, boats, and water craft, and has constituted from time immemorial an open, common, public highway for navigation and commerce; and the water along the line of said street is 23 feet in depth at the lowest stage of the tide.

That said work will cut off the whole of said basin, including the part in front of plaintiff's property, from access to or communication with the other parts of the Bay of San Francisco, and will destroy the whole of said basin as a highway for vessels, boats, or water craft of any kind, and will cause your orator to transport its materials from distant places, for which plaintiff will have to pay large sums of money, which will absorb its profits; and no adequate compensation can be recovered at law, and the injury would be continuous, causing a multiplicity of actions; and that the navigability of said basin can never be restored; and that it is protected from the winds, and affords a haven and resting place and anchorage for vessels, etc., and renders the landing places along said basin, especially plaintiff's, of great value.

That said work is but part of the work contemplated by the board of supervisors to make solid ground of said basin, and to open and lay out over the same streets and highways, and that in so doing and intending the defendants, and each of them, claim and pretend that no part of the soil of said basin is, or for many years has been, owned or held by the state of California in trust for the purpose of commerce or navigation, or owned or held by said state for any purpose or in any way, but that nearly all of it is private property of one James G. Fair and others, and, being within the limits of the city and county of San Francisco, the board of supervisors has jurisdiction, under the said street law of San Francisco, to cause the same to be improved, graded, and filled up, and cause streets to be opened and laid out through the same.

That the city and county of San Francisco, since 1856, has been a municipal corporation, and one of the agencies of the state for local government, and that its officers, in all matters pertaining to streets and the matters above set forth, derive their authority from, and proceed under what is known as, the "Street Law," hereinbefore mentioned, and certain acts amendatory thereof [which the bill enumerates], and that by section 14, art. 1, of the constitution of the state, it is provided that "private property shall not be taken or damaged for public use without just compensation having first been made to or paid into court for the owner," and that the acts set forth constitute a taking as well as damaging plaintiff's property for an alleged public use.

That no kind of legal proceedings by or against anybody has ever been instituted for the purpose of opening or laying out said basin as a public

street or streets, or to condemn or acquire any of the property rights of your orator, and no compensation has been provided for, paid, or tendered; and the property is intended to be taken without due process of law, which is in violation of the constitution of the United States, upon which plaintiff relies; and "that the said defendants, and each of them, deny that said provisions of the constitution of the United States afford to your orator any protection whatever."

That the defendants claim and pretend that the whole of said basin is private property, over which the board of supervisors has jurisdiction, and the claims of defendants as to the manner in which Fair and others acquired the title are as follows, to wit: In the year 1864 the legislature of the state authorized the sale to the North San Francisco Homestead & Railway Association of certain overflowed lands in the city and county of San Francisco. The act was approved April 4, 1864 (pages 482-483, St. 1863-64). That it was provided by said act that the commissioners of swamp and overflowed lands should appraise certain lands covered by the waters of the bay, extending to a depth not exceeding six feet at lowest stage of the tide, and that upon the payment by said association of the sum appraised a patent from the state should issue to said association. And it was expressly provided in said act that in no case should the water front of the adjoining property be interfered with, and that said association, nor its employes, agents, successors, or assigns, should have a right to levy or collect any tolls, dockages, or wharfages, and that the said association or its assigns shall not have the power to make any use of said lands, or any part thereof, which shall interfere with the navigation of the Bay of San Francisco. And defendants further claim that a patent was duly issued, and recorded in the recorder's office of the city and county of San Francisco, and that Fair and other private persons succeeded to the interest of said association. And plaintiff avers that the interest which it is claimed said association derived as aforesaid consists of all of said basin which lies south of a pretended street called "Tonquin Street," which is south of Lewis street, and runs across said basin parallel with Lewis street, and the basin, between the shore and said Tonquin street, is immediately in front of plaintiff's said property. And plaintiff avers that the greater portion of the soil of the basin, which defendants claim was acquired under said act of 1864, extends far beyond the depth of six feet of water at lowest stage of the tide, and for that reason, if no other, said conveyances under said act were invalid, and that the only title which said persons have is derived through the said association. And plaintiff alleges that neither at the time of the passage of the act, nor the issuance of the said conveyances to said association, was any water-front line established or existing for any part of the city and county of San Francisco, which fronts on said basin, or has ever existed or now exists, and that said act is void for many reasons, viz.: It was and is in contravention of the act of congress admitting the state into the Union. It is in violation of the trust upon which the state held the land covered by navigable waters. That the subject of the act is not expressed in its title. It contains no definite description of the quantity of land, but attempts to delegate the determination to the discretion of the officers who are to appraise the land, and it contains no designation of the character of the land, and, being void, the proceedings under it were void; and the conveyances were void for the additional reason that no water-front line existed or exists, and that none of the land was authorized to be conveyed. And plaintiff further avers, if title did pass, it is held in the same trusts as the state of California held it, and that none of the defendants, nor said other persons, ever had or has, under said act of 1864 or otherwise, any right to destroy or obstruct the navigability of said basin.

And plaintiff avers, on information and belief, that the portion of the basin which lies north of Tonquin street, and between the same and the northern line of Lewis street, the defendants claim, is the private property of Fair and a few others, and that the board of supervisors has jurisdiction thereof under the street law, and that its pretended title is as follows: In the year 1868 the legislature of the state of California passed an act entitled "An act to survey and dispose of certain salt marsh and tide lands belonging to the state of California," approved on March 30, 1868, which act is published in the

Laws of 1867-68, at pages 716 to 722, inclusive, to which act reference is hereby made. That in and by the said act it was provided that a board of tide-land commissioners should be appointed in the manner pointed out in the said act, and that it was by said act further provided that the said "commissioners shall take possession of all the salt marsh and tide lands, and lands lying under water, to the point that may be established as the water front, situate along the Bay of San Francisco, and situate in the city and county of San Francisco, belonging to the state of California, and have the same surveyed to a point not beyond twenty-four feet water at the lowest stage of the tide, and cause to be prepared two maps of the same, showing the quantity and extent of the property situated as aforesaid;" and that said tide-land commissioners, in conjunction with the governor of California, the mayor of San Francisco, and the president of the Chamber of Commerce of San Francisco, should meet, and, by a two-thirds vote, establish the water-front line of San Francisco, where it had not been previously established by the act of March 26, 1851, and that after the establishment of such water-front line, and after compliance with the provisions of section 4 of said act, said commissioners should proceed to sell at public auction, to the highest bidder, all the right, title, and interest of said state of California in and to the lands of which they were to take possession as hereinabove stated, as the whole will more fully appear from the provisions of said last-mentioned act, to which reference is hereby made. And your orator avers and charges that the defendants claim and pretend that the said act is a valid act of the legislature, and that under and in pursuance of its provisions the said tide-land commissioners did take possession of said lands lying under water, to a depth not exceeding twenty-four feet of water at the lowest stage of the tide, and that said commissioners did cause the same to be surveyed, and that said commissioners afterwards, in conjunction with the governor of the state and the mayor of San Francisco, and the president of the Chamber of Commerce, met together, and, by a two-thirds vote, established the water-front line of said San Francisco. But your orator avers and charges that said act of March 30, 1868, was and is invalid and void and of no effect, for the following, among other, reasons, viz.: It was and is in contravention of the said act of congress of September 9, 1850, admitting the state of California into the Union; it is in violation of the trust upon which the state of California held all the land covered by navigable waters, as hereinabove set forth; it attempts to delegate to others the power to establish a water-front line for the city of San Francisco, such power not being subject to any confirmation or power of rejection by the legislature itself, and to give to such others the power of sale of all lands up to such undefined line; it attempts to deprive the owners along the shore of their rights of access to their property, without any compensation made or to be made, and without due process of law; and finally for the reason that neither the subject nor the object of the act is expressed in its title. And your orator avers that, inasmuch as the act itself was and is void, whatever proceedings were had under it were and are equally void.

And plaintiff avers that defendants claim that conveyances were made, under the provisions of said act of 1868, to said North San Francisco Homestead & Railway Association, but that the conveyances are void for the additional reasons that the commission did not take possession of the lands, nor cause them to be surveyed, and the water-front line never was established; that the act of the legislature of 1870 (St. 1869-70, pp. 541, 542) abolished the said board of commissioners, and created a new board, and defined the lands to be, over which it has jurisdiction, as "all the salt marsh and tide lands lying under water belonging to the state of California and situate in the city and county of San Francisco," and that these lands are not of the same character as the lands described in the act of 1868, and that no conveyances of any of said lands north of Tonquin street were made to said association, or to any one, prior to the time said act of 1870 took effect, and all the conveyances were and are void; that by section 365 of the Political Code, which took effect 1st of January, 1873, it was provided that the "governor, surveyor general, and controller, constitute the state board of tide-land commissioners," and by section 998 of same Code the powers and duties of

the tide-land commissioners are provided by the act of 1868 and 1870 aforesaid; but that there was the same defect in section 698 as in the act of 1868, and no greater virtue in section 698 than in the act of 1870; that by an act approved March 30, 1874 (St. 1873-74, p. 858), the act of 1868 was repealed in toto, and the act of 1870 repealed so far as it provided for a board of tide-land commissioners, and that the state board of tide-land commissioners was invested with all the powers and duties vested by the act of 1870 in the board of tide-land commissioners, and that the act of 1874 and said sections of the Political Code were repealed by an act approved February 4, 1876, and that no conveyance of the land north of Tonquin street was made prior to the said act of 1874, and that all conveyances thereof are void, and, if any title vested, it was subject to the same trusts upon which the lands were held by the state; that by an amendment to section 2532 of the Political Code made by the legislature of 1876 the board of state harbor commissioners were authorized to survey, and, in connection with certain officers, locate, a new harbor front and sea-wall line for the city of San Francisco, and that the said harbor commissioners, in conjunction with said officers, did locate a new line which extended across the mouth of said basin and up to what is known as the "Presidio Reservation," but that the legislature (St. 1877-78, p. 263) confirmed only so much thereof as extended easterly from Taylor street to the boundary of San Mateo county, and annulled that portion which extended across the said basin as aforesaid; and that there never has been any water-front line extending across said basin. And plaintiff avers defendants claim that said act of the legislature impairs the obligation of a contract or contracts to the pretended conveyances aforesaid, and that said act of 1878 and said amendment of the Political Code are in violation of the constitution of the United States, and are void, and that plaintiff relies on said act and amendment, and claims that neither impairs the obligation of any contract, and that neither is in conflict with any provision of the constitution, and is not void.

And plaintiff further avers that the constitution of the state of California adopted May 7, 1879, contains the following provisions (article 15): .

"Sec. 2. No individual, partnership or corporation, claiming or possessing the frontage or tidal lands of a harbor bay, inlet, estuary, or other navigable water in this state, shall be permitted to exclude the right to such water, whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this state shall be always attainable for the people thereof.

"Sec. 3. All tide lands within two miles of any incorporated city or town in this state and fronting on the waters of any harbor, estuary, bay or inlet, used for the purpose of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations."

And avers that, if any title vested in said association or private persons, it was annulled by said provisions. And defendants claim that they impair the obligation of the conveyances aforesaid, and are in violation of the provisions of the constitution of the United States, in violation of the power of the state to impair the obligation of a contract, and deprive said private persons of their property without due process of law. But plaintiff relies on said provision of the constitution of the state.

That by an act of congress passed August 11, 1888 (25 Stat. 400-425), it was enacted as follows:

"Sec. 12. Where it is made manifest to the secretary of war that the establishment of harbor lines is essential to the preservation and protection of harbors, he may and is hereby authorized to cause such lines to be established beyond which no piers or wharves shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him."

That in pursuance of said section the secretary of war ran a line through said basin, outside of Lewis street, on the 24th of March, 1890; and defendants claim and pretend that said line and act authorize the filling in of so much of said bay which lies south of said line. But plaintiff controverts

the claim, and claims, besides, it is void because it is the result of a declaration of power to an executive officer.

Plaintiff avers that no part of said basin is private property, and that the board of supervisors has no jurisdiction; that defendants are conspiring to injure, and will injure, plaintiff, by the acts aforesaid, and that they will constitute a taking as well as a damaging, and in violation of the provisions of the constitution of the United States, and are contrary to equity and good conscience, and the act admitting California into the Union; that plaintiff's estate is of the value of \$10,000 and upwards, and that said value will be more than one-half destroyed by the acts aforesaid; and that the right of access to said navigable waters for the remainder of the term is worth upwards of \$5,000, and plaintiff will therefore suffer damages in a sum exceeding \$15,000.

The prayer is in accordance with the allegations.

Upon filing the bill an order restraining defendants was made, and plaintiff moves that it be continued. Upon this motion the defendants have filed affidavits denying many of the allegations of the bill, and also object to the jurisdiction of the court.

The plaintiff relies on three grounds of jurisdiction:

(1) That their property will be cut off from access to navigable waters by the proposed work, and therefore taken without due process of law.

(2) The act of admission of the state of California, which provides:

"All the navigable waters within said state shall be common highways and forever free, as well to the inhabitants of said state as to the citizens of the United States, without any tax, impost or duty therefor."

(3) That defendants claim that certain acts of the legislature and of congress, which plaintiff relies on, including the second and third sections of article 15 of the constitution of the state of California, and the action of the secretary of war in fixing a harbor line, impair the obligation of contracts, and hence are a violation of the constitution of the United States.

The two latter grounds may be easily disposed of. The second ground, though having prominence in both the original and amended bills, has not been urged in argument. It is clearly untenable, under the decision of the supreme court in *Bridge Co. v. Hatch*, 125 U. S. 1, 8 Sup. Ct. 811. In the decision, a clause in the act admitting Oregon into the Union, similar to the clause in the act admitting California, was considered; and it was held that it did not refer to physical obstructions of navigable waters, but to political regulations which would hamper the freedom of commerce. See, also, *Cardwell v. Bridge Co.*, 113 U. S. 205, 5 Sup. Ct. 423, and *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312, 13 Sup. Ct. 622.

The third ground is also disposed of by the case of *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654. Justice Gray, speaking for the court, reviewed three cases, two of which were originally brought in the circuit court of the United States, and one was removed to such court from one of the state courts of Tennessee. All of them were brought to recover taxes alleged to be due to the state and county for the years 1887-91. The charters of the defendant banks provided "that said company shall pay to the state of Tennessee an annual tax of one-half of one per cent. on each share of stock subscribed, which shall be in lieu of all taxes." The bill in

the two cases brought in the circuit court set out the provision of the charters, and the general tax act of the state, and alleged that the defendants claimed, by virtue of the terms of the charter, the tax act was void, because in violation of the clause of the constitution of the United States which forbids the state to pass any law impairing the obligation of a contract. In the removal case these allegations were contained in the defendant Banks' petition for removal. In the first two cases the bills were ordered dismissed, and the third case was remanded to the state court. The court held that "under the act of Aug. 13, 1888, c. 866, the circuit court of the United States has no jurisdiction, either original or by removal from a state court, of a suit, as one arising under the constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement of his own claim." It will be observed that the case at bar, like the two cases passed on, is an original suit in the circuit court, and the plaintiff's allegations of defendants' claims and pretensions are like the allegation of plaintiffs in those cases of the claims and pretensions of the defendants therein. The cases seem identical with the case at bar, but counsel claims a distinction, inasmuch as the acts of the legislature which, it is averred in the case at bar, defendants rely on, are general ones, and necessarily arise, whether set up by the defendants or not, while the bank charters in the main cases were necessary to be averred and proved, and cites *Illinois v. Illinois Cent. Ry. Co.*, 33 Fed. 726. Counsel say on page 22 of their reply brief, and I quote at length, so as to give a full statement of the contention:

"The last proposition of the learned counsel relates to our claim of jurisdiction founded upon the claims and pretenses of defendants. And they cite, as conclusive, the case of *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654. We think that the learned counsel are mistaken in their view of that case. The principle which it lays down is this: That federal jurisdiction cannot arise from a defense which the defendant may or may not set up. That principle is undoubtedly correct in the abstract, and also as applied to the facts of the particular case, which rested upon the charter of the bank, which was a private matter, and could not arise in the case unless set up by the defendant. Manifestly, the principle does not apply to a general act of the legislature, of which the court takes notice, and which necessarily arises, whether set up by the defendant or not. We do not want any better illustration of the distinction than is afforded by the decision of Mr. Justice Harlan in the *Chicago Water-Front Case*, 33 Fed. 726. That case was commenced by the state of Illinois in one of her own courts. It was removed to the federal court, on petition of the defendant, under the act of 1887. The federal jurisdiction depended upon the validity of a repealing act, which it was claimed would be drawn in question. It was denied that it would be set up; but the court held that the question of the validity of the act necessarily arose whether it was relied on or not, and that, therefore, the court had jurisdiction. And Mr. Justice Harlan said: 'It is quite sufficient upon this point to say that the court is bound to take judicial notice of that statute, and must give effect to it, unless at the hearing it be adjudged to be unconstitutional and void. The disclaimer of the attorney general cannot work a repeal of the act of 1873, nor close the eye of the court to the fact that the state—if it could be constitutionally done—has repealed the act of 1869. \* \* \* Even if the attorney general had stipulated with the company that he would not, in this proceeding, claim anything for the state under the latter act, the court would feel obliged to disregard such stipulation. Whether the repealing act had such effect is a

question which the company proposes to raise at the proper time, and in proper form for judicial determination. Upon that question mainly depends the result of this litigation. The presence in the cause of such an issue makes this a case arising under the constitution of the United States." *Illinois v. Illinois Cent. Ry. Co.*, 33 Fed. 726.

It is not very clear why a defense which may depend on the notice which the court may or must take should have a different jurisdictional effect from a defense which can be proved by a defendant; but I am not called upon to reconcile Justice Harlan's views, as quoted, with the views of the supreme court. They are not antagonistic. He concurred in the opinion of the court dismissing the bill in the first two cases passed on, and to which we have seen the case at bar is similar; that is, the two cases which were brought in the circuit court. The views he expressed in *Illinois v. Illinois Cent. Ry. Co.* were of the third case, to wit, one brought in a state court, and removed on petition of defendant on the ground that the defense depended upon, or would be defeated by, one or other construction of the constitution. To give the circuit court original jurisdiction, therefore, it is necessary that the plaintiff's statement of his cause of action show that he relies on some right under the constitution or laws of the United States; and it follows that the third ground of jurisdiction relied on by plaintiff, to wit, the claims and pretenses of defendants, is not sufficient.

This leaves for consideration the first ground of jurisdiction claimed.

Chief Justice Waite, speaking for the court in *Starin v. City of New York*, 115 U. S. 248, 6 Sup. Ct. 28, said:

"The character of a case is determined by the questions involved. *Osborn v. Bank*, 9 Wheat. 738, 824. If, from the questions, it appears that some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the constitution of a law of the United States, or sustained by the opposite construction, the case will be one 'arising under the constitution or laws of the United States,' within the meaning of that term as used in the act of 1875; otherwise, not. Such is the effect of the decisions on this subject. *Cohens v. Virginia*, 6 Wheat. 264, 379; *Osborn v. Bank*, 9 Wheat. 738, 824; *Mayor, etc., v. Cooper*, 6 Wall. 247, 252; *Water Co. v. Keyes*, 96 U. S. 199, 201; *Tennessee v. Davis*, 100 U. S. 257, 264; *Railroad Co. v. Mississippi*, 102 U. S. 135, 140; *Ames v. Kansas*, 111 U. S. 449, 462, 4 Sup. Ct. 437; *Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co.*, 112 U. S. 414, 416, 5 Sup. Ct. 208; *Society v. Ford*, 114 U. S. 635, 641, 5 Sup. Ct. 1104; *Pacific Railroad Removal Cases*, 115 U. S. 1, 11, 5 Sup. Ct. 1113."

The questions involved are the right of the plaintiff as riparian proprietor; the character and legality of the acts of board of supervisors, as infringing that provision of the fourteenth amendment of the constitution of the United States which prohibits a state from depriving a person of property without due process of law. The bill alleges that the board of supervisors is claiming to proceed under the street law, but the street law only authorizes the board to proceed if Lewis street is open or dedicated to public use,—not to take any one's property, but to improve property already acquired. *Spaulding v. Bradley*, 79 Cal. 449, 22 Pac. 47; *Spaulding v. Wesson*, 84 Cal. 142, 24 Pac. 377; *Cook v. Sudden*, 94 Cal. 443, 29 Pac. 949.

The defendants claim the dedication or grant of the street by the legislature of the state, exercising its sovereignty over and ownership of tide lands. If the legislature have such power, the plaintiff has no riparian rights,—in other words, none of its property was taken,—and the case of *Kaukauna Water-Power Co. v. Green Bay & M. Canal Co.*, 142 U. S. 269, 12 Sup. Ct. 173, applies. In that case the court said (Justice Brewer delivering the opinion):

"The only question involved in this case, proper for us to consider, is whether the act of the legislature of Wisconsin of August 8, 1848, reserving to the state the water power created by the erection of the dam over the Fox river, as construed by the supreme court of the state, and the proceedings thereunder, operated to deprive the plaintiffs in error of their property without due process of law. Notwithstanding the inhibition of the constitution is not distinctly put in issue by the pleadings, nor directly passed upon in the opinion of the court, it is evident that the court could not have reached a conclusion adverse to the defendant company without holding, either that none of the property had been taken, or that it was not entitled to compensation therefor, which is equivalent to saying that it had not been deprived of its property without due process of law."

The defendants, however, urge that the fourteenth amendment is only directed against state action by the legislature, or, if it is prohibitive of executive acts, only of authorized executive acts, and that in the case at bar there is no act of the legislature under which plaintiff's property is sought to be taken, and that if Lewis street is not open, or has not been dedicated, the board of supervisors is proceeding without authority, and its acts cannot be attributable to the state. Both contentions appear to be opposed to *Ex parte Virginia*, 100 U. S. 346. In this case, Justice Strong, rendering the opinion of the majority of the court, said:

"They [meaning the provisions of the amendment] have reference to the actions of the political body denominated a 'state,' by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or the constitutional prohibition has no meaning. Then the state has clothed one of its agents with power to annul or evade it."

In *Virginia v. Rives*, 100 U. S. 313-338, the same learned justice said (page 318):

"The provisions of the fourteenth amendment of the constitution we have quoted, all have reference to state action exclusively, and not to any action of private individuals. \* \* \* It is doubtless true that a state may act through different agencies,—either by its legislative, its executive, or its judicial authorities,—and the prohibition of the amendment extends to all action of the state denying equal protection of the laws, whether it be by action by one of these agencies or by another."

This language is made unmistakable by the dissenting opinion of Justices Field and Clifford.



There was a series of cases involving the rights of the colored race, all of which were based on the same reasoning by the court and by those learned justices. In *Virginia v. Rives* and *Ex parte Virginia*, the action was by judicial officers unauthorized by a state statute. The instance under consideration was the omission to put colored citizens on the jury list. The state statute made no discrimination. Justices Field and Clifford therefore contended, among other things,—but unavailingly contended,—that the action of the officers was not the action of the state. Justice Field said in *Virginia v. Rives* (page 333), referring to the fourteenth amendment:

"Its language is that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' As the state, in the administration of its government, acts through its executive, legislative, and judicial departments, the inhibition applies to them. But the executive and judicial departments only construe and enforce the laws of the state. The inhibition, therefore, is, in effect, against the passing and enforcing any laws which are designed to accomplish the ends forbidden. If an executive or judicial officer exercises power with which he is not invested by law, and does unauthorized acts, the state is not responsible for them. The action of the judicial officer in such a case, where the rights of a citizen under the laws of the United States are disregarded, may be reviewed and corrected or reversed by this court. It cannot be imputed to the state, so as to make it evidence that she, in her sovereign or legislative capacity, denies the rights invaded, or refuses to allow their enforcement. It is merely the ordinary case of an erroneous ruling of an inferior tribunal. Nor can the unauthorized action of an executive officer, imposing upon the rights of the citizen, be taken as evidence of her intention or policy, so as to charge upon her a denial of such rights."

This court, therefore, has jurisdiction, and it will be necessary to consider the other issues.

A consideration of these has been, since the oral argument, simplified by the decision of the supreme court in *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548. Mr. Justice Gray, speaking for the court, after reviewing all the cases, laid down, among others, the following proposition:

"The title and rights of riparian or littoral proprietors in the soil below high-water mark are governed by the laws of the several states, subject to the rights granted to the United States by the constitution."

The power of the state could not be more strongly emphasized than by that case. *Shiveley* was the owner of the upland. *Bowlby* was the grantee of the state of Oregon of the tide lands in front of *Shiveley's* property, and the grant was sustained; the court holding, following the law of Oregon, "that the state had a right to dispose of its tide lands free from any easement of the upland owner." Our inquiry, therefore, must be, what is the law of California? For whether the plaintiff has the right contended for depends on that law.

It is part of the history of the state that the legislature, commencing at the first session after the admission of the state into the Union, made grants of the tide lands to municipalities under conditions which contemplated their being conveyed to and held in pri-

vate ownership. Among these was the act of March 26, 1851, known as the "Beach and Water Lot Act." It was entitled "An act to provide for the disposition of certain property of the state of California." Section 1 provided that "all the lots of land situated within the following boundaries according to the survey of the city of San Francisco and the map or plat of the same now on record in the office of recorder of the county of San Francisco are known and designated in this act as the S. F. Beach and Water Lots; that is to say, beginning at the point," etc. Then follows a description by streets, which includes a portion of the bay. Section 2 grants the use and occupation of the land for 99 years, and confirms grants of lands sold by authority of the ayuntamiento, or town or city council, or by any alcalde of said town or city; and section 4 makes the boundary line described in the first section a permanent water front of the city. These acts came up for consideration, and the character of the title conveyed was defined, in *Smith v. Morse*, 2 Cal. 524; *Eldridge v. Cowell*, 4 Cal. 87; *Chapin v. Bourne*, 8 Cal. 294; *Hyman v. Read*, 13 Cal. 445; *Holladay v. Frisbie*, 15 Cal. 635; *Wheeler v. Miller*, 16 Cal. 125; and *City and County of San Francisco v. Straut*, 84 Cal. 124, 24 Pac. 814. The cases are undoubtedly familiar, but the importance of the present action will justify their review.

In *Smith v. Morse*, a sale of a water lot for a debt of the city was sanctioned.

In *Eldridge v. Cowell*, the complaint alleged that the plaintiff was the owner of the 50-vara lot known on the map of San Francisco as "1,492;" that the defendant was obstructing the navigation to the lot by mooring and anchoring storeships and making embankments in front of it, and prayed for an injunction and abatement of the nuisance. Justice Hydenfelt delivered the opinion of the court, Chief Justice Murray concurring. The opinion is short, and, besides, its importance induces me to quote it at length:

"In the plan of the city of San Francisco, the survey into blocks, lots, and streets extended into the tide waters in front of the city, the object of which was to reach a sufficient depth of water on the land line for the convenience of shipping. It was necessarily anticipated that the water lots would be filled up to a level suitable for building or land carriage. That this was perfectly legitimate, in the establishment of a seaport town, is so self-evident that it needs no argument to prove it. The plaintiff obtained by purchase his lot, with a full knowledge of the plan of the city. The right of the owners of water lots to fill them up with earth, for the purpose of improvement and use, was practically admitted by him in filling up that part of his own lot, and the street in front of it, which was in the water. It is not material to inquire as to the first authority for the plan of the city, as extended into the water. It is sufficient that by the act of 26th of March, 1851, this plan was recognized by the state, and property in the lots covered by tide water vested in individuals. The right of the state to do this has been established by repeated decisions. She holds the complete sovereignty over her navigable bays and rivers; and although her ownership is, by the law of nations and the common and civil law, attributed to her for the purpose of preserving the public easement, or right of navigation, there is nothing to prevent the exercise of her power, in certain cases, to destroy the easement, in order to subserve the general good, which, when done, subjects the land to private proprietorship. The lot of the defendant was thus permitted, by state legislation, to be reclaimed from the water, and this was so before the plaintiff acquired

his lot. He therefore took without any riparian rights. The destruction of the easement in front of him had already been decreed by competent authority. But it is said that the filling up by the defendant is a nuisance, because it will destroy or impair the navigation of the bay. Assuming this to be true, the plaintiff, as I have shown, has no right to complain; and, in regard to the public, it is not one of those acts which would be denominated or classed as a nuisance. It is, at most, a purpresture, and as such, if destructive to navigation, or seriously affecting the public welfare, would subject the defendant to a prosecution by the people; certainly, not to an action by this plaintiff. Many of the positions taken by the plaintiff in the instructions asked are doubtless sound, and, applied in reference to the whole of this case, they are mere abstract propositions, and were properly refused."

In *Chapin v. Bourne* the action was ejectment to recover a lot within the line of the beach and water lot property. The plaintiff relied upon a grant from an alcalde of San Francisco. The defendant relied upon a deed from the board of land commissioners, made in pursuance of the act of May, 1853. The title of this act is, "To provide for the sale of the interest of the state of California in the property within the water line front of the city of San Francisco, as described in and by the act entitled 'An act to provide for the disposition of certain property of the state of California,' passed March 26, 1851." The court held (Terry, C. J., delivering the opinion) that neither party had title,—not the plaintiff, because: First. When the alcalde made the grant the pueblo of San Francisco had no title whatever to the water property. It belonged to the United States, who held it in trust for any new state that might be erected out of said territory, and passed to the state of California, on her admission, by virtue of her sovereignty, and that it did not pass under the act of March 26, 1851, because the grant was not recorded as required by said act. Second. The defendant had no title, because the title had passed to the city by the act of March 26, 1851, and that the commissioners had no power to sell any other than the reversionary interests of the state.

In *Hyman v. Read* the action was also ejectment, and the plaintiff and defendant, respectively, claimed under a purchase from the state land commissioners under the act of 1853, and from the city under the act of 1851. Both acts were an exercise, or attempt to exercise, by the legislature, of a power to vest the property in private ownership. The significance of the decision, as compared with prior ones, is that the property involved was a lot in the city slip. The contention of the defendant was that the act of 1851 conveyed only "lots," technically so called. The court held, however (Terry, C. J., rendering the opinion; Justice Field concurring), that all the land embraced in the general boundaries was conveyed to the city.

In *Holladay v. Frisbie* the court, by Chief Justice Field, said:

"The interest of the city in the beach and water lot property is a legal estate for ninety-nine years. The property is not devoted by the grant of the state to any specific public purpose, or made subject to the performance of any trusts by the city. It is held by a very different tenure, by which the city holds the land of the old pueblo, and which was the subject of elaborate consideration in *Hart v. Burnett*, 15 Cal. 530. These lands were given upon express trusts, and are now held, if not upon precisely the same trusts, yet upon trusts equally effectual to protect them from forced sale under execution. As to the beach and water lot property, the case is different. In that property

the interest of the city is absolute, qualified by no conditions, and subject to no specific uses. It is therefore a leviable interest, subject to sale under execution, and such interest in the premises in controversy passed to the defendant upon the sale and conveyance under his judgment and execution."

In this case the power of the legislature was illustrated by a confirmation of the Van Ness ordinance. Of this the court said:

"But, independent of all consideration of the title derived from the sale and conveyance of the sheriff, the defendant can successfully resist a recovery by the plaintiff by force of the title vested in him under the Van Ness ordinance. \* \* \* Whatever question may be raised as to the liability of his interest to forced sale, there can be none as to the validity and effect of his voluntary grant of the same, after such grant has received the approval and satisfaction of the legislature."

In *Wheeler v. Miller*, *Holladay v. Frisbie* was affirmed as to the estate of the city under act of 1851. It was again affirmed in *City and County of San Francisco v. Straut*. The action was ejectment for the recovery of one of the beach and water lots. The defense was adverse possession. The court held that:

"The interest of the city and county of San Francisco in its beach and water lot property is a legal estate for 99 years; and the right of the city for that term is as absolute a title, and as free from trust, as that of any private proprietor, and may be extinguished by adverse possession under the statute of limitations."

The court further quoted, in support of these propositions, *San Francisco v. Calderwood*, 31 Cal. 585; *Hoadley v. San Francisco*, 50 Cal. 274, 275,—and referred to *Yolo Co. v. Barney*, 79 Cal. 378, 21 Pac. 833.

In *Taylor v. Underhill*, 40 Cal. 473, Justice Temple said, speaking of lands below high-water mark:

"This state can probably sell the land, and authorize the purchaser to extend the water front so as to enable him to build upon this land. \* \* \*"

These decisions cover a period of 40 years, and have become a rule of property, and the foundation of many titles. They do not seem to be careless decisions, and, therefore, that consideration was given to the relations of the state to navigable waters, and to all other elements for a correct judgment, it is natural to suppose; and it seems an irresistible inference that if the legislature had the power to pass the act of 1851, conveying to the city, with the power to sell, land covered by navigable waters, subjecting them to private ownership and reclamation, or to public use, it would have like power over the lands covered by navigable waters in front of plaintiff's property. Plaintiff's counsel, however, deny the right with firmness, and support the denial with ability. They contend that the state had no power to dispose of lands covered by navigable waters to the city, or to any one else, and cite *People v. Gold Run Ditch & Min. Co.*, 66 Cal. 151, 152, 4 Pac. 1152; *Heckman v. Swett*, 99 Cal. 303, 33 Pac. 1099; *Chicago Water-Front Case*, 146 U. S. 453, 13 Sup. Ct. 110. Counsel say, "Now, this being the case [i. e. the title to the land, and not merely the supervision of a use, being in the state], it has no power to convey it away for a purpose not connected with the purpose of the trust;" citing *Hoadley v. San Francisco*, 50 Cal. 275,

276; *San Francisco v. Itsell*, 80 Cal. 57, 22 Pac. 74; *Hoadley's Adm'rs v. San Francisco*, 124 U. S. 646, 8 Sup. Ct. 659. It may be admitted as incontestable, if the title is held in trust, as in the cases cited, the state has no right to convey it away, divested of the trust; but, if this is true of the land now in controversy, it was true of the lands described in the act of 1851. But this act was sustained, as we have seen, by a number of cases, and in *Holladay v. Frisbie* and in *City and County of San Francisco v. Straut*, the interest of the city in the water lots was carefully distinguished from the interest of the city in pueblo property, which was the subject of the decisions in *Hoadley's Adm'rs v. San Francisco* and *San Francisco v. Itsell*, supra. It is worthy of note that Justice Field delivered the opinion of the court in *Hart v. Burnett*, which established the principle which applies to pueblo land, and delivered also the opinion in *Holladay v. Frisbie*, which establishes the distinction between them and the beach and water lots. The relation of these cases, therefore, or rather the distinction between them, must have been firm and clear in his mind, and in the mind of the court.

In *People v. Gold Run Ditch & Min. Co.*, supra, Justice McKee, in rendering the opinion of the court, said:

"As we have already said, the rights of the people in the navigable rivers of the state are paramount and controlling. The state holds the absolute right to all navigable waters, and the soils under them, subject, of course, to any rights in them which may have been surrendered to the general government. *Martin v. Waddell*, 16 Pet. 367. The soil she holds as trustee of a public trust for the benefit of the people, and she may, by her legislature, grant it to an individual; but she cannot grant the rights of the people to the use of the navigable waters flowing over it. These are inalienable. Any grant of the soil, therefore, would be subject to the paramount rights of the people to the use of the highway. And such was the doctrine of the common law. 'The *jus privatum*,' says Lord Hale in *De Jure Maris* (page 22), 'must not prejudice the *jus publicum*, wherewith public rivers and arms of the sea are affected to public use.' It is therefore beyond the power of legislatures to destroy or abridge such rights, or to authorize their impairment."

But there is no inconsistency between this case and the cases which preceded. No inconsistency was deemed to exist by the supreme court of the state, for that court, in *City and County of San Francisco v. Straut*, rendered afterwards, affirmed the prior cases. Nor can it be said it was intended to reverse *People v. Gold Run Ditch & Min. Co.* The language of the latter case, even if it be held as necessary to the judgment of the court, is but a general expression of a proposition uttered in a number of cases. The proper limitation of the language is expressed by the supreme court in *Shively v. Bowlby*, supra, or shown by the cases themselves. A limitation is expressed in quite general language in *Heckman v. Swett*, 99 Cal. 309, 310, 33 Pac. 1099,—a case cited by complainant. The court said:

"Navigable streams, and the shores to ordinary high-water mark, are held by the state in trust for the public; but qualified rights therein may be granted, so far as they are not inconsistent with, or are in aid of, the principal use, viz. for the purposes of navigation." (The italics are mine.)

What this qualification means is explained by the practice of the states of the Union and the decisions of the courts. *Hardin v.*

Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838, may be selected for illustration. Justice Bradley, speaking for the court, after stating that the title to shore and lands under water is regarded as incidental to the sovereignty of the state,—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishing (language which, it may be remarked in passing, is similar to Justice McKee's in *People v. Gold Run Ditch & Min. Co.*),—said:

"Such title being in the state, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by congress with regard to public navigation and commerce. The state may even dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them, and granting fisheries in particular localities; also, by the reclamation of submerged flats, and the erection of wharves and piers, and other adventitious aids of commerce. Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses; state control and ownership therein being supreme, subject only to the paramount authority of congress in making regulations of commerce, and in subjecting the lands to the necessities and uses of commerce. See *Manchester v. Massachusetts*, 139 U. S. 240, 11 Sup. Ct. 559; *Smith v. Maryland*, 18 How. 71; *McCready v. Virginia*, 94 U. S. 391; *Martin v. Waddell*, 16 Pet. 367; *Den v. Jersey Co.*, 15 How. 426."

*Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387-464, 13 Sup. Ct. 110, is urged as supporting plaintiff's contention. That case, in its facts, is conspicuously different from the one at bar. The grant was not of portions of land within a harbor line established by public authority to assist commerce; but it was a grant of the whole harbor, conveying its control to a private corporation,—a virtual abdication of the power of the state, the court said, and hence either void or revocable. I refrain from an extended examination of this decision, because it will come under consideration in another case, where a careful analysis of it will be necessary. It is only necessary now to point out its distinction from the case at bar, and to state the principal it establishes. It is not that a state cannot dispose at all of lands covered by navigable waters, but that, to quote the language of Justice Field:

"It is the settled law of the country that the ownership of, and dominion and sovereignty over, lands covered by tide waters within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has often been announced by this court, and is not questioned by counsel of any of the parties. *Pollard's Lessee v. Hagan*, 3 How. 212; *Weber v. Commissioners*, 18 Wall. 57."

This principle is repeated in *Shively v. Bowlby* and manifestly does not exclude the grants relied on by defendants. The right of a state to deny riparian rights is clearly established by that case, and the cases it reviews. "Each state," Justice Gray said (page 26, 152 U. S., and page 548, 14 Sup. Ct.), "has dealt with the lands under tide waters within its borders according to its own views of public justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether own-

ers of the adjoining upland or not, as it considered for the best interests of the public."

It will be observed from the cases that this right is an attribute of a state's sovereignty and control of tide lands, and of the doctrine (probably dependent upon it) that grants of the upland stop at high-water mark. These propositions are as firmly established in California as in other states, and the conclusion from them must be the same; that is, to quote Justice Gray's language in the Shiveley Case, "that the state has the right to dispose of its tide lands free from any easement of the upland owner."

In *Packer v. Bird*, 71 Cal. 134, 11 Pac. 873, the plaintiff claimed under a patent from the United States on a confirmed Mexican grant. The land was bounded by the Sacramento river, and the plaintiff therefore contended it extended to the middle of the stream. The court said:

"We do not concur in this view. The river being navigable in fact, the title extends no further than the edge of the stream. We think this conclusion accords with the rulings in *People v. Gold Run Ditch & Min. Co.*, 66 Cal. 138, 4 Pac. 1152, and *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674."

This case was taken by writ of error to the supreme court of the United States, and affirmed. 137 U. S. 661, 11 Sup. Ct. 210. Justice Field, speaking for the court, said:

"In the courts of the western states there is much conflict of opinion,—some, like the courts of Illinois, adopting the common-law rule to its fullest extent; and others, like the courts of Iowa, repudiating its application, in determining the navigability of the great rivers, and the rights of riparian owners upon them. A very elaborate consideration of the adjudged cases is found in *McManus v. Carmichael*, 3 Iowa, 1. Indeed, the opinion of the supreme court of Iowa in that case, and the opinion of the court of appeals of New York in *People v. Canal Appraisers* [33 N. Y. 461, 499], above cited, contain an exhaustive and instructive consideration of the whole subject, with a careful review of the decisions of the courts of the states. In this case we accept the view of the supreme court of California in its opinion, as expressing the law of that state,—'that, the Sacramento river being navigable in fact, the title of the plaintiff extends no further than the edge of the stream.' *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674."

This case was cited in *Hardin v. Jordan*, 140 U. S. 371-406, 11 Sup. Ct. 808, 838, as applying the principles expressed in *Barney v. Keokuk*, 94 U. S. 324, to California, in which it was held that the title of the riparian proprietor extends only to high-water mark, and that the city of Keokuk had a right to widen a street in front of the plaintiff's property below high-water mark, and authorize its occupation by railroad tracks and buildings, and that the riparian owner was not entitled to compensation.

In *People v. Canal Appraisers*, cited with approval in *Packer v. Bird*, it was decided that the Mohawk river is a navigable stream, and the title to its bed is in the people of the state of New York, and that the state had therefore the right to divert its waters without paying damages to riparian owners.

In *Hoboken v. Railroad Co.*, 124 U. S. 656, 8 Sup. Ct. 643, the court held that, by the laws of New Jersey, lands below high-water mark on navigable waters are the absolute property of the state, subject only to the power conferred upon congress to regulate foreign com-

merce, and commerce among the states, and they may be granted by the state either to the riparian owners or to strangers, as the state sees fit, and that the right given to the Hoboken Company by the state, to improve the lands in front of streets terminating at the water, was valid, and not subject to the easement of the streets.

It is said that *Weber v. Commissioners*, 18 Wall. 57, decides that a riparian proprietor has a right of access to the navigable part of the stream. This was an appeal from the circuit court for the district of California, in which court one Weber filed a bill against the board of state harbor commissioners of California, to compel them to abate and to remove certain erections made by them on the water front of San Francisco, which he alleged interfered with a wharf rightfully erected by him. Weber derived title under act of 1853 to certain lots lying along the water front of the city, on which he had a wharf. The board of harbor commissioners proceeded, under acts of the legislature, to improve the harbor, and, in the execution of the work, caused piling to be had, and capping and planking on both sides of the complainant's wharf, so as to prevent the approach to it of vessels. Against any claim of the state the plaintiff also pleaded the statute of limitations. Mr. Justice Field delivered the opinion of the court, and said:

"It is unnecessary for the disposition of this case to question the doctrine that a riparian proprietor, whose land is bounded by a navigable stream, has the right of access to the navigable part of the stream in front of his land, and to construct a wharf or pier projecting into the stream, for his own use or the use of others, subject to such general rules and regulations as the legislature may prescribe for the protection of the public, as was held in *Yates v. Milwaukee*, 10 Wall. 497. On the contrary, we recognize the correctness of the doctrine, as stated and affirmed in that case."

But *Yates v. Milwaukee* has received a different explanation in *Shively v. Bowlby*, and is made to depend upon the law of Wisconsin. Besides, the learned justice seemed to intend to confine his language to land bounded by a stream, properly so called, as distinguished from the sea, or arm of the sea, for he further said:

"Nor is it necessary to controvert the proposition that in several of the states, by general legislation or immemorial usage, the proprietor whose land is bounded by the shore of the sea, or an arm of the sea, possesses a similar right to erect a wharf or pier in front of his land, extending into the waters to the point where they are navigable. In the absence of such legislation or usage, however, the common-law rule would govern the rights of the proprietor, at least in those states where the common law obtains. By that law the title to the shore of the sea, and of the arms of the sea, and in the soils under tide waters, is, in England, in the king, and, in this country, in the state. Any erection thereon without license is therefore deemed an encroachment upon the property of the sovereign, or, as it is termed in the language of the law, a 'purpresture,' which he may remove at pleasure, whether it tend to obstruct navigation or otherwise."

The learned justice then stated the title of the state to the soil under tide waters as follows:

"Upon the admission of California into the Union upon equal footing with the original states, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits, passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right



of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states, the regulation of which was vested in the general government. Acting upon the rights thus acquired, the legislature of the state, on the 26th of March, 1851, at its first session after the admission, passed an act disposing of portions of the lands covered by the tide waters of the bay, in front of the city of San Francisco. That act is generally known to the state as the 'Beach and Water Lot Act.' "

The case, therefore, is authority that the act of 1851, as I have heretofore declared it to be, is a rightful exercise of the powers of the state; and it is adduced in *Shively v. Bowlby* as one of the later judgments of the supreme court, clearly establishing that the title and rights of riparian or littoral proprietors in the soil below high-water mark of navigable waters are governed by the local laws of the several states, subject to the rights granted to the United States by the constitution.

*Shirley v. Bishop*, 67 Cal. 545, 8 Pac. 82, does not militate against these views of the California laws. In that case, plaintiffs were the owners of a block of land in the city of Benicia,—whether land covered by water, or upland, does not appear. At any rate, it was bounded on the east by the navigable waters of Carquinez Straits, and the line of the permanent water front of the city of Benicia, established by an act of the legislature of the state, approved March 21, 1868. The defendants were attempting, under a franchise from the city of Benicia, to erect a wharf within three feet of plaintiffs' wharf, and parallel to it for about 60 feet,—that is, in the navigable waters of the straits, and beyond the water front established by law. An injunction was granted, and rightly granted. By establishing the water front, the legislature fixed a line beyond which wharves and other structures could not be extended (*Yesler v. Commissioners*, 146 U. S. 655, 13 Sup. Ct. 190), and fixed the lines of the highway. There was no question of riparian rights. The plaintiffs' rights were derived from the coincidence of their eastern line with the water-front line established by the legislature. If it had been further landward, the doctrine of *Weber v. Commissioners* would have applied.

There only remains to be considered the claim of the defendants of the dedication of Lewis street, and the claim of the plaintiff of the revocation of the dedication, by the constitution of the state adopted in 1879. To support their contention, defendants cite the act of the legislature approved March 11, 1858, entitled "An act concerning the city of San Francisco and to ratify and confirm certain ordinances of the common council of said city;" an act approved April 25, 1862, amendatory of various acts relating to the city. See St. 1862, p. 391. Section 1 of the ordinance confirmed by the first act is as follows:

"That the plan or map of the Western addition, reported by the commission created under an ordinance of the last common council of the city of San Francisco, be adopted by this board, and be declared to be the plan of the city, in respect to the location and establishment of streets and avenues, and the reservation of squares and lots for public purposes in that portion of the then incorporated limits of said city, lying west of Larkin, and southwest of Johnston streets."

Section 1 of the second act is as follows:

"All the original streets, as laid down upon the map now in the office of the city and county surveyor of the city and county of San Francisco, signed by C. H. Gough, Michael Hayes, and Horace Hawes, commissioners, and by John J. Hoff, surveyor, and generally known as the 'Van Ness Map,' and all other streets, lanes, alleys, places, or courts, now dedicated to public use, or which shall be hereafter dedicated to public use, lying between the Bay of San Francisco and Johnston and Larkin streets, including the two last named streets, are hereby declared to be open, public streets, lanes, alleys, places, or courts, for the purpose of this law; and the board of supervisors of said city and county are hereby authorized to employ the city and county surveyor to ascertain and establish the lines and width of all or any of said streets, lanes, and alleys, and the sizes of said places or courts, when they shall deem it necessary so to do."

I think this constitutes a dedication by the state. To support its contention, plaintiff cites section 2 of article 15 of the constitution of the state. It is as follows:

"No individual, partnership or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary or other navigable water in this state, shall be permitted to exclude the right or way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of the state shall be always attainable for the people thereof."

Counsel say:

"The provision to which we wish to direct special attention is contained in section 2. It will be observed that this section contains two separate and distinct prohibitions. In the first place, the right of way to navigable water must not be excluded. In the second place, the navigation of the navigable water must not be destroyed or obstructed. With the first of these prohibitions, we have nothing to do. We are concerned only with the second. And, leaving out extraneous matter, this prohibition is as follows: 'No individual, partnership or corporation, claiming or possessing \* \* \* tidal lands of a harbor, bay, inlet, estuary or other navigable water in this state shall be permitted \* \* \* to destroy or obstruct the free navigation of such water.'"

Passing the point that titles or rights acquired could not be revoked even by an amendment of a constitution, and the further point that plaintiff cannot plead the prohibition, I do not think its contention can be sustained. The language of the constitution is directed at "individuals, partnerships or corporations;" and, besides, I cannot but believe that if it had been the intention to abridge the power of the legislature to improve the harbors and establish uniform harbor lines, as it had been the practice, and may be necessity, to do, such intention would have been explicitly declared. The order to show cause must, therefore, be discharged, the temporary restraining order vacated, and the application for injunction denied, and it is so ordered.

**YOUNGSTOWN BRIDGE CO. v. KENTUCKY & I. BRIDGE CO. et al.**  
(TREASURER OF FLOYD COUNTY, Intervener).

(Circuit Court, D. Indiana. November 21, 1894.)

No. 8,918.

**TAXATION—VALIDITY OF ASSESSMENT—INDIANA STATE BOARD.**

The Indiana state board of tax commissioners, having jurisdiction to hear evidence and decide what property is assessable, determine its value for the purpose of taxation, and assess property within the limits of the state, made an assessment upon the property of a bridge company owning a bridge across a river between that state and an adjoining state. *Held*, that such assessment was not void because the board had, by mistake, erroneously included in such assessment a portion of the bridge actually within such adjoining state.

Suit in equity by the Youngstown Bridge Company against the Kentucky & Indiana Bridge Company and others. The treasurer of Floyd county, Ind., filed an intervening petition, asking that the receivers of the defendant corporation be directed to pay certain taxes alleged to be due from such corporation. The receivers filed an answer to the petition. Upon exceptions to this answer

Miller, Winter & Elam, for intervening petitioner.

Bennett H. Young, for receivers of defendant Kentucky & I. Bridge Co.

BAKER, District Judge. The treasurer of Floyd county, in the state of Indiana, filed his intervening petition in the above-entitled cause, asking that the receivers of the Kentucky & Indiana Bridge Company be directed to pay to him, as such treasurer, the sum of \$5,693.13, being the amount due from said bridge company for state and county taxes. The receivers, answering the intervening petition, allege that the taxes were not lawfully assessed upon the property of the bridge company, because the principal part of its property so assessed, consisting of a bridge across the Ohio river, with its approaches and appurtenances, is located in the state of Kentucky, and that the assessment was made in a lump sum upon its property in both states. It is insisted for the receivers that the assessment is void, if not in whole, at least pro tanto, because the state board of tax commissioners were not, and could not be, clothed with power to make a valid assessment upon the property of the bridge company located in the state of Kentucky. For the petitioner, it is insisted that the state board of tax commissioners is given jurisdiction to assess all property of the kind here assessed, within the limits of the state, and to hear evidence, and determine its value for the purposes of taxation, and that its determination is final and conclusive, in the absence of fraud.

It is the settled law of this state that the state board of tax commissioners is not a judicial tribunal, within the meaning of the constitution, and that it has only such quasi judicial powers as are possessed by every public officer vested with discretionary power; but when, in the exercise of its quasi judicial power, it has fixed the value of property falling within its jurisdiction, and has assessed such

property, its action in that behalf is final, and cannot be avoided or set aside, except for fraud on the part of the board. *Railway Co. v. Backus*, 133 Ind. 513, 83 N. E. 421. Upon its face, the assessment in question appears to be within the jurisdiction of the board. It professes to be an assessment made upon the property of the bridge company in Floyd county, in the state of Indiana. It is conceded that a portion of the property assessed is located in the state of Indiana, but it is insisted that the board did not confine its assessment to the property in this state, but included therewith property of the bridge company located in Kentucky. The precise question for decision, then, comes down to this: The board, professing to assess property in this state, by mistake, erroneously assessed some portion of the bridge property actually located in Kentucky as though located within the state of Indiana. Jurisdiction is the power to hear and decide. The board is vested with the power to hear and decide, not only on the value of taxable property, but it must necessarily have the power to hear and decide what property is properly assessable. Its decision is no more void when it decides erroneously than when it decides correctly. It is of the essence of the power to hear and decide that the determination may be erroneous as well as correct. To hold that jurisdiction is lost because of an erroneous decision would be to overturn principles as ancient and venerable as the law itself. Before the board can lawfully fix an assessment, it must determine that the property about to be assessed is the proper subject of assessment, and also the value which ought to be placed upon it for purposes of taxation. The determination of the one is not more within its rightful jurisdiction than the determination of the other. Every fact necessary to support the decision of the board is as conclusively settled against collateral attack as though expressly found by it. "Absolute nullities in judicial proceedings," says the supreme court of Louisiana in *Stackhouse v. Zuntz*, 36 La. Ann. 529, 533, "are such as result from radical defects, omissions, and irregularities appearing on the face of the record, and are not dependent on matters en pais to be established aliunde." So the doctrine that a judgment appearing to be valid on its face cannot be contradicted by evidence aliunde, or by matters dehors the record, has been expressly decided in Indiana, in *Earle v. Earle*, 91 Ind. 27, 42; *Phillips v. Lewis*, 109 Ind. 62, 68, 9 N. E. 395; *Kingman v. Paulson*, 126 Ind. 507, 26 N. E. 393; in Colorado, in *Hughes v. Cummings*, 7 Colo. 203, 2 Pac. 928; in Missouri, in *Scott v. Crews*, 72 Mo. 261, 263; in Tennessee, in *Byram v. McDowell*, 83 Tenn. 581, 585; *Stanley v. Sharp*, 48 Tenn. 417; in Vermont, in *Beech v. Rich*, 13 Vt. 595; in Wyoming, in *Ex parte Bergman*, 26 Pac. 914, 919. And the supreme courts of Illinois and Vermont have ruled that it cannot be controverted by plea. *Wellborn v. People*, 76 Ill. 516; *Beech v. Rich*, *supra*. As taxing officers act judicially, and have general and exclusive jurisdiction over assessments for purposes of taxation, an error in assessing exempt property does not render the assessment void. So it was held in Louisiana concerning an assessment on a schoolhouse owned by a church which was exempt by law. *First Presbyterian Church v. City of New Orleans*, 30 La. Ann. 259. It

was held in Minnesota that a tax judicially assessed is not void because the land was exempt (*County of Chisago v. St. Paul & D. R. Co.*, 27 Minn. 109, 6 N. W. 454); and the same ruling was made in England in respect to an assessment of a poor rate to the occupier of land, exempt because it belonged to a literary society (*Birmingham v. Shaw*, 10 Adol. & E. [N. S.] 868, 880, 59 E. C. L. 867, 879). The record of the state board of tax commissioners cannot be contradicted, varied, or explained by evidence aliunde, touching any matter whose decision is committed to it, any more than can the record of a court of general jurisdiction. *Railway Co. v. Backus*, supra. And it is clear, beyond dispute, that among the things expressly committed to it is the determination of what property is properly subject to assessment by it. This is the first question which it must determine in the exercise of its jurisdiction. Some tribunal must be intrusted with this power, and the legislature has confided it to a board composed of the most eminent personages in the state. The power is an important and delicate one, which cannot be administered with unerring certainty in every case, but its determinations are as likely to be unmixd with error and partiality as any other tribunal to which these questions could be committed. In the absence of fraud, the citizen who is aggrieved by its erroneous judgments must submit, without remedy. It follows that the answer is insufficient.

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HOOK et al. v. BOSWORTH et al.

(Circuit Court of Appeals, Seventh Circuit. November 27, 1894.)

No. 170.

1. RAILROAD FORECLOSURE—APPOINTMENT OF RECEIVER—OF RAILROAD NOT A PARTY.

A suit was brought by the trustee of a mortgage, made by the C. Ry. Co., for the foreclosure of such mortgage, and in such suit receivers were appointed, not only of the property of the C. Ry. Co., but of that of several other railway companies, not mentioned in the mortgage or made parties to the bill, but which were operated with the defendant company in one system, upon some plan not disclosed by the record; and certain petitions, cross petitions, and bills of parties whose relation was not shown by the record, were consolidated with the foreclosure suit; and the receivers so appointed were afterwards ordered to turn over the property of the J. Ry. Co., one of such other companies, to that company. *Held*, that the court was without jurisdiction to appoint receivers of the property of such companies, other than the defendant; that the order making such appointment, if not absolutely void, was revoked as to the J. Ry. Co. by the direction to the receivers to return its property to that company; and that the court could not direct persons who had received moneys belonging to such company to turn them over to the receivers.

2. SAME—RECEIVER'S RIGHT TO EARNINGS.

Where a railroad mortgage contains a provision that until default the mortgagor shall remain in possession of the railway, etc., exercise its franchises, and collect and use its revenues, a receiver appointed in a suit for foreclosure of the mortgage, the filing of the bill constituting the first demand for possession of the road, is not entitled to moneys earned by the railroad company prior to the filing of the bill, though not paid until after the appointment of the receiver.

**On Appeal from the Circuit Court of the United States for the Southern District of Illinois.**

Petition in the nature of a bill in equity by C. H. Bosworth and E. Ellery Anderson, receivers of the Chicago, Peoria & St. Louis Railway Company, against William S. Hook and Marcus Hook, to require defendants to pay petitioners certain money collected for transportation of mail. Petitioners obtained a decree. Defendants appeal. Reversed.

Isaac L. Morrison and Thomas Worthington, for appellants.

Bluford Wilson (Philip Barton Warren, of counsel), for appellees.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

**JENKINS, Circuit Judge.** The Chicago, Peoria & St. Louis Railway Company owned a railway in the state of Illinois extending from the city of Pekin to Jacksonville, with a branch line from Havana to Springfield. The Jacksonville, Louisville & St. Louis Railroad Company owned a railway extending from Jacksonville to Centralia, a distance of about 112 miles. The Litchfield, Carrollton & Western Railroad Company and the Louisville & St. Louis Railway Company were respectively the owners of other lines of railway, the record not disclosing their location. It may be inferred, however, that they connected at one or more points with the other railways mentioned. Each railway company was an independent corporation, and it is to be inferred from the record, although not specifically so stated, that these several lines of railway were parts of one general system, and were operated together under some arrangement not disclosed by the record. On the 21st day of September, 1893, the Mercantile Trust Company of New York filed its bill in the court below against the Chicago, Peoria & St. Louis Railway Company to foreclose a mortgage or trust deed upon the railway from Pekin to Jacksonville and from Havana to Springfield. On the same day the court appointed the appellees receivers of the lines of railway mentioned. The order provided, among other things, that the receivers should forthwith be in possession of, operate, and maintain said railway and premises—

"Being the railroad of the Chicago, Peoria & St. Louis Railway Company, comprising also the Jacksonville, Louisville & St. Louis Railroad Company, the Litchfield, Carrollton & Western Railroad Company, and the Louisville & St. Louis Railway Company, and including a partially constructed line of railway northwestwardly from Havana, together with all the constituent railroad lines now operated by said Chicago, Peoria & St. Louis Railway Company, commonly known as the 'Jacksonville Southeastern Line,' more fully and particularly described as follows, to-wit: Extended, lying, and being a railroad from the city of Pekin, through the counties of Tazewell, Mason, Cass, to and through the city of Jacksonville, in the county of Morgan; and thence, through the said county of Morgan and the counties of Macoupin and Montgomery, to and through Litchfield; and thence, through the counties of Montgomery, Macoupin, Madison, and St. Clair, to East St. Louis, in the said last-named county; and from Litchfield southeasterly, through the counties of Montgomery, Bond, and Clinton, to Centralia, in the county of Marion; and thence through the county of Marion, to Drivers, in the county of Jefferson; and from Havana, in said county of Mason, to

Petersburg, in the county of Menard; and thence to Springfield, in the county of Sangamon; also, from Barnett westerly through Carlinville, in said county of Macoupin; thence through Carrollton, in the county of Greene, to Columbiana, on the Illinois river,—together with all interests in, and contract rights and privileges for, the use of the Peoria & Pekin Union Railway from the said city of Pekin to the city of Peoria, in the county of Peoria, and all terminal contract rights and privileges at East St. Louis, all in the state of Illinois, together with all equipment owned, leased or held in car trusts or otherwise, and the tolls, rents, incomes, franchises, issues, and profits of the said Chicago, Peoria & St. Louis Railway Company and its said constituent companies, and all their appurtenances, as well as their land and other premises as now held, used, and operated by the said company, as fully described in their existing mortgages, deeds of trust, leases, contracts, and other evidences of title and possession, reference thereto, for greater certainty, to be had, with all property rights, powers, privileges and franchises and equities now owned, possessed, held or controlled by the said the Chicago, Peoria & St. Louis Railway Company; it being the purpose and intention of this order to clothe the said receiver with all property rights, powers, privileges, and franchises now owned, possessed, held, or controlled by the said 'the Chicago, Peoria & St. Louis Railway Company, or any of the said constituent or affiliated lines now under a common management as the Jacksonville Southeastern Line.'"

The bill of complaint in that case contained no reference to the Jacksonville, Louisville & St. Louis Railroad Company, or to any other of the companies above mentioned. Neither of them was a party to the bill, nor is any statement made therein of the manner in which, or the company by whom, such lines of railway were operated. The prayer of the bill, in addition to the usual prayer for foreclosure, asked for a receiver of the property covered by the mortgage of the Chicago, Peoria & St. Louis Railway Company, which mortgage did not affect any of the lines referred to other than those of that company. On the same day the court below ordered that certain petitions, cross petitions, and bills in the cases against the Chicago, Peoria & St. Louis Railway Company, namely, R. J. Cavett, receiver (entitled and filed in the cause of the Mercantile Trust Company against the St. Louis & Chicago Railway Company et al.), John M. Coughlin et al. (entitled and filed in the intervening petition of R. J. Cavett, receiver), Woodward & Tiernan Printing Company, the St. Louis & Eastern Railway Company, and the Atchison, Topeka & Santa Fé Railroad Company, be consolidated with the foreclosure suit mentioned, and under the title of that suit, and that they thereafter proceed under said name as one suit, with all rights reserved. The record before us is silent with reference to the character of those petitions, cross petitions and cross bills, or of the suit against the St. Louis & Chicago Railway Company. The receivers so appointed took possession not only of the property of the Chicago, Peoria & St. Louis Railway Company, but also of the lines of railway of the other companies mentioned. On the 5th of December, 1893, the court directed the receivers to return to the Jacksonville, Louisville & St. Louis Railroad Company its railway and property. On the 9th of December, 1893, one Henry W. Putnam filed his bill against the Jacksonville, Louisville & St. Louis Railroad Company for the foreclosure of a certain mortgage or trust deed upon the line of railway of that company from Jacksonville to Centralia, and

prayed for the appointment of a receiver, and on that day Mr. S. P. Wheeler was appointed such receiver. Thereupon, on that day, an order was entered by the court in the case of the Mercantile Trust Company against the Chicago, Peoria & St. Louis Railway Company, reciting the appointment of a receiver of the Jacksonville, Louisville & St. Louis Railroad Company in the Putnam suit, and directing that the property of that company be turned over and delivered by the appellees to, and that the accounting with respect to its management theretofore ordered to be rendered by them to that company be made with, its receiver. For the quarter ending October 1, 1893, there became due to the Chicago, Peoria & St. Louis Railway Company from the United States, for the transportation of the mails over its line of railway, the sum of \$4,632.63, of which amount \$453.20 was earned after September 21, 1893, and the remainder was earned prior to the filing of the bill of foreclosure and the appointment of the receivers. For the same quarter there became due to the Jacksonville, Louisville & St. Louis Railroad Company from the United States, for transportation of mails over its line of railway, the sum of \$2,653.56. On the 20th of January, 1894, the appellees, as receivers of the Chicago, Peoria & St. Louis Railway Company, filed their petition in the suit of the Mercantile Trust Company of New York against that company, that the appellants, William S. and Marcus Hook, who had received from the United States the several sums of money mentioned, be required to pay over the same to them. To this petition the Messrs. Hook made answer, setting forth that William S. Hook was, and had for many years been, president and general manager of the Chicago, Peoria & St. Louis Railway Company, and Marcus Hook its auditor and treasurer; that they had received from the United States the sum of \$4,632.63, the compensation for mail service over that road from July 1, 1893, to October 1, 1893; that William S. Hook, upon receiving the usual warrant, transferred the same to Marcus Hook, the treasurer of the company; that of said money the sum of \$453.20 was earned by the road between September 21 and September 30, 1893, and since the filing of the bill and the appointment of the receivers, and which amount Marcus Hook offered to pay to them; and that the balance of the money had been "applied in the payment of debts contracted on account of the operating of such line of railroad, and which in equity should be paid." The answer further admits the receipt from the government of \$2,653.56 for transportation of mails over the Jacksonville, Louisville & St. Louis Railroad, and that Mr. William S. Hook received the same as general manager of that railway company. The mortgages or trust deeds upon the two several railways each contained a provision that "Until default shall be made by the said party of the first part, its successors or assigns, in the payment of interest or principal of said bonds, or the due observance of the covenants and agreements hereinafter contained on the part and behalf of the said party of the first part, the said party of the first part, its successors or assigns, shall be suffered and permitted to remain in actual possession of said railway and premises, and to exercise the franchises and rights relating thereto, and to collect, receive,



and use revenues and profits thereof in any manner which shall not impair the lien created by these presents." The matter of the petition was heard by stipulation of the parties "upon the petition and answer thereto, with the right of either party to refer to, and make a part of the record, any of the files in said consolidated cause, and also the exhibit filed in the case of Henry W. Putnam against the Jacksonville, Louisville & St. Louis Railroad Company, and the interlocutory order entered in said cause appointing Samuel P. Wheeler receiver of the last-named railroad, and the bond and oath of office of said Wheeler." Upon the hearing of the petition the court rendered a decree that the appellants had wrongfully appropriated the several sums of money mentioned, and directed them forthwith to pay over to the petitioners, C. H. Bosworth and E. Ellery Anderson, the receivers of the Chicago, Peoria & St. Louis Railway Company, the sum of \$4,632.63, with interest from the date of the decree, being the amount received for mail service upon the Chicago, Peoria & St. Louis Railway, and also the sum of \$2,653.56, with like interest, being the sum received for transportation of mails over the Jacksonville, Louisville & St. Louis Railroad. The appellants bring here this decree for review.

1. We are unable to understand upon what principle the appellees, receivers of the Chicago, Peoria & St. Louis Railway Company, can maintain the right to recover of the appellants the moneys received by the latter for mail service over the lines of the Jacksonville, Louisville & St. Louis Railroad Company. The latter company was not a party to the suit in which the appellees were appointed receivers. There was neither attack therein made with respect to this railway, nor any claim asserted to its possession. The company was neither served with process in that suit, nor did it appear therein. The court therefore never acquired jurisdiction in that suit to appoint receivers of its property. The order would seem to have been passed upon the assumption that, because all the lines were practically component parts of one system, the public interest would be conserved by the continuance of such management under one head. It is not made clear to us that such necessity existed, nor are we informed why these separate and distinct lines of railway, although co-operating with each other in the conduct of business, could not be operated under separate management. Possibly it is to be preferred, if the interests were identical, that it should be under a single management. That is matter for those pecuniarily interested in the several railways. Such consideration, however, cannot avail to give the court jurisdiction over the property of one not a party to the suit, and with which it was in no legal sense concerned. The mortgage upon the Chicago, Peoria & St. Louis Railway in no way affected the property of the Jacksonville, Louisville & St. Louis Railroad Company, and the bill was wanting in any averment which would sanction the taking possession by the receivers of the property of the latter company. As before stated, we are not informed by the record of the nature of the intervening petitions consolidated with that foreclosure suit. It is intimated that they were by creditors of the Chicago, Peoria & St. Louis Railway Company for debts contracted by

it in the management of all the lines of railway mentioned. We are not informed by the record of the nature of the arrangement, if any, under which these lines were operated as one system. It may possibly be that, while one railway company operating the entire system would be responsible for all debts it incurred, creditors might also have a remedy over against a "constituent or affiliated" company, so called, for debts applicable to the management of a particular line. That would depend upon circumstances not here disclosed. Such right of action would not, however, warrant the taking possession of its property by receivers of another railway in a suit to which it was not a party. We should do violence to a fundamental principle of the law to uphold the right of receivers of one corporation to take possession of the property of another not a party to the suit in which such appointment is made. No one should be concluded without his day in court.

It is insisted that the direction to the receivers to take into their possession and control the railway of the Jacksonville, Louisville & St. Louis Railroad Company was voidable merely, not void. We cannot assent to this contention. If, however, such direction was merely voidable, the order in that regard was, before this petition, set aside and revoked. In a suit to which that company was a party, another has been appointed its receiver, and these appellees, in the suit in which the decree under review was rendered, and before this petition, directed to turn over the property of that company which came to their possession to such receiver. If, under the order of September 21, 1893, they acquired any right whatever over the property of that company, that right was extinguished by the order of December 5, 1893. Subject to the accounting ordered, their functions with respect to that company therefore ceased, if they ever had lawful right, and they thereafter had no more authority to collect debts due to that company than a stranger would have. If there exists any liability on the part of the appellants with respect to the transaction in question, that liability is to the receiver of the company, Mr. Wheeler, and not to the appellees. We perceive no ground upon which that portion of the decree can be sustained.

2. The amount received for mail service for the quarter ending October 1, 1893, was, with the exception of the sum of \$453.20, earned by the Chicago, Peoria & St. Louis Railway Company prior to the appointment of the receivers on September 21, 1893, but received by the appellant William S. Hook subsequently to such appointment. The bill filed that day was the first demand by the trustee for possession of the road. It has been repeatedly held, under clauses similar to that contained in this mortgage, that the mortgagee is not entitled to the rents and profits of the mortgaged premises until he takes actual possession, or until possession is taken in his behalf by a receiver, or until, in proper form, he demands and is refused possession. *Railroad Co. v. Cowdery*, 11 Wall. 459; *Gilman v. Telegraph Co.*, 91 U. S. 603; *Bridge Co. v. Heidelberg*, 94 U. S. 798; *Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. 420; *Macalester's Adm'r v. Maryland*, 114 U. S. 605, 5 Sup. Ct. 1065; *Grant v. Insurance Co.*, 121 U. S. 105, 7 Sup. Ct. 841; *Dow v. Railroad Co.*, 124 U. S. 652, 8 Sup. Ct. 673; *Sage v.*

Railroad Co., 125 U. S. 361, 8 Sup. Ct. 887. So that the complainant trustee, or the receivers as its representatives, have no right to the earnings prior to the filing of this bill. As to the amount earned since the bill was filed, there is no contention. The appellants concede the right of the appellees thereto. What right the receivers would have to the fund earned prior to the filing of the bill, if they represented judgment creditors, we do not find it necessary to determine. As we have before observed, the record discloses that certain intervening petitions, cross petitions, and bills (some of them filed in the cause of the Mercantile Trust Company against the St. Louis & Chicago Railway Company, of the nature of which suit we are not informed) were ordered to be consolidated with the principal cause for the foreclosure of the trust deed or mortgage. The record is wholly silent with respect to the nature of those petitions, cross petitions, and bills, and to the character which the petitioners, cross petitioners, and complainants therein assumed. We are only told that those proceedings, whatever they were, were consolidated with the principal suit. The stipulation under which the hearing was had reserved the right to either party to make part of the record upon such hearing any of the files in the consolidated cause, but from the certificate of evidence it appears that none of these intervening petitions or bills were presented in evidence or considered. We are therefore unable to say that the appellees represent creditors as well as the trustee. We cannot, therefore, adopt the suggestion of counsel that these intervening petitions, etc., represent "labor, supply, and traffic balance creditors." The fact does not appear from the record. We cannot assume it. It is, moreover, to be observed that by the stipulation the cause was heard "upon the petition and answer thereto," with right reserved to make part of the record certain exhibits mentioned. The petition here was in the nature of a bill in equity. The answer thereto asserted that the moneys in question received by the appellees for the earnings of the road prior to the receivership had been by the appellants "applied in the payment of debts contracted on account of the operating of such line of railroad, and which in equity should be paid." No issue was taken upon this answer, but the hearing proceeded upon the express agreement, as we construe it, that the facts stated in the petition and answer should be taken as true, the rule being that, in case of inconsistency between the bill or petition and the answer, the averments of the latter must be taken to be true. According to this record, therefore, the appellants have expended this money in the discharge of obligations incurred in the operation of the road which in equity should be paid. It would seem inequitable, under such circumstances, that they should be called upon to respond to the receivers for the amount so paid, unless possibly it might be claimed that they had no right, after the appointment of receivers, to receive or to so disburse the money as against representatives of creditors, appropriating it wholly to the payment of debts of their selection, when the debts discharged had only right to share ratably with other indebtedness of the corporation. We are, however, from this record, unable to

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regard these receivers as representatives of others than the trustee of the mortgage, who is not entitled to the earnings prior to the receivership. The decree will be reversed, and the cause remanded for further proceedings in conformity with this opinion.

**SOUTHERN CALIFORNIA MOTOR-ROAD CO. v. UNION LOAN & TRUST CO. et al.**

(Circuit Court of Appeals, Ninth Circuit. October 24, 1894.)

No. 129.

**1. RAILROAD MORTGAGE—USUAL COVENANTS—ALLOWANCES TO COUNSEL.**

A resolution of a board of directors of a railroad company, authorizing an issue of bonds, directed that such bonds should be secured by a mortgage "with the usual covenants and agreements." *Held*, that a covenant that the trustees should be entitled to just compensation, and to be reimbursed for all necessary expenses, "including expenses of all necessary attorneys, counsel, or agents in and about said trust," is properly inserted in the mortgage, and justifies the court in allowing counsel fees in a suit for foreclosure of the mortgage.

**2. COUNSEL FEES—AMOUNT OF ALLOWANCE.**

The amount of an allowance for counsel fees is, necessarily, to a great extent within the sound discretion of the trial court; and, finding nothing to indicate an abuse of discretion, this court declines to reduce an allowance of \$15,000 in this case.

**3. RAILROAD MORTGAGE—CHATTEL MORTGAGE ACT.**

Where a statute of a state (Civ. Code Cal. § 456) makes special provision for the mortgage by railroad companies of their property and franchises, a mortgage by such a company of its property and franchises, though including locomotives and rolling stock, is not subject to the provisions of another statute (Id. §§ 2955, 2959), relating generally to chattel mortgages, and requiring such mortgages to be accompanied by an affidavit of good faith.

Appeal from the Circuit Court of the United States for the Southern District of California.

This was a suit by the Union Loan & Trust Company against the Southern California Motor-Road Company and others to foreclose a mortgage. Decisions were rendered respecting the payment of certain moneys for grading and macadamizing (49 Fed. 267), and, on motion of defendant, for payment of its counsel fees (51 Fed. 106). On final hearing, a decree of foreclosure and sale was entered. 51 Fed. 840. The Southern California Motor-Road Company appeals.

R. E. Houghton, for Southern California Motor-Road Co.

Charles D. Houghton, for Mary A. Franklin.

Curtis, Oster & Curtis, for San Bernardino Nat. Bank.

Edwin H. Lamme, for Union Loan & Trust Co.

W. J. Curtis and Chapman & Hendrick, for First Nat. Bank of San Bernardino.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is a suit in equity brought by the Union Loan & Trust Company, as trustee, to foreclose a mortgage executed by the Southern California Motor-Road Company, to

secure the payment of certain of its bonds which were issued to enable it to construct its road. The principal question involved upon the appeal was whether the bonds were regularly issued, and the oral arguments were directed to that question; but, since the cause was argued and submitted, appellant has withdrawn from the consideration of this court "all opposition interposed \* \* \* to the invalidity or irregularity of the issue, or to the invalidity or irregularity of the transfer or sale of the bonds in suit." This withdrawal leaves only two questions for consideration, viz.: First. Did the court err in the matter of the allowance of counsel and receiver's fees? Second. Did the court err in ordering, by its decree, that the sum of \$12,000 should be retained out of the proceeds of the sale of the property of said motor-road company to satisfy the claim of the First National Bank of San Bernardino?

1. The contention of appellant is that no authority was ever given by the stockholders or board of directors to include in the mortgage the allowance of any counsel fees, and that no provision was made in the mortgage for the allowance of the same. This contention cannot be maintained. The resolution of the board authorizing the issuance of the bonds ordered that they should be secured by a first mortgage or deed of trust, "with the usual covenants and agreements to fully secure the payment of said bonds," etc.; and the mortgage contained a covenant that the trustee should be entitled to just compensation, and to be reimbursed for all necessary expenditures, "including expenses of all necessary attorneys, counsel, or agents in and about said trust, to be paid by the party of the first part." We are of opinion that this is such a "usual covenant" as was authorized by the board to be inserted in the mortgage, and that it justifies the action of the court in allowing counsel fees herein. The court allowed the sum of \$15,000 as counsel fees, and allowed the receiver for his services at the rate of \$6,000 per annum. These allowances are claimed by appellant to have been excessive and wholly unwarranted. The compensation to be allowed to counsel and receivers must in all cases be determined according to the circumstances of each particular case, and should correspond with the degree of care, responsibility, and ability that is required. Allowances of this character are necessarily, to a great extent, within the sound discretion of the trial court, "since it has far better means of knowing what is just and reasonable than an appellate court can have." *Stuart v. Boulware*, 133 U. S. 78, 82, 10 Sup. Ct. 242. We find nothing in the record which would justify us in saying that the court abused its discretion, and we decline to interfere with the action of the court in this respect.

2. The mortgage given by the motor-road company is prior in date to the attachments under and by virtue of which the First National Bank asserts its lien upon the rolling stock of said company. The statute of California provides that chattel mortgages may be made upon "locomotives, engines, and other stock of a railroad." Civ. Code, § 2955. And section 2957 provides that:

"A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good

faith and for value, unless, 1st, it is accompanied by the affidavit of all the parties thereto that it is made in good faith and without any design to hinder, delay, or defraud creditors."

The mortgage not being accompanied by such an affidavit; the circuit court held that the attachment liens of the bank were superior to the mortgage. *Union Loan & Trust Co. v. Southern California Motor-Road Co.*, 51 Fed. 851. There is a great diversity of opinion upon this question in the different state courts where no express statute exists upon the subject. *Jones, Ry. Sec. § 150*. Several of the states, owing to the conflict in the decisions of the courts, have settled the matter by direct legislation. In all of the decisions which hold that the locomotives, engines, and other rolling stock of a railroad are subject to the provisions of the act relating to chattel mortgages it is conceded, if the question is referred to, that, if there is an independent statute of the state authorizing railroad companies to mortgage their corporate property and franchises to secure the payment of their bonds, the chattel-mortgage act would not be applicable, because it must be and is universally acknowledged that it is within the power of the legislature of a state to regulate the mode and prescribe the manner in which the real and personal property within the state may be conveyed or mortgaged. The Civil Code of California, in dealing with the subject of railroads and of corporate stock, provides that railroad corporations, for the purpose of constructing and completing their roads, may, among other things, "mortgage their corporate property and franchises." Civ. Code, § 456. There are no conditions attached to this power. It is absolute, and gives to the railroad the right to mortgage its personal, as well as real, property for the purpose mentioned, without incumbering it with any of the conditions attached to the chattel mortgage act. The act relating to chattel mortgages may be applicable in cases where a mortgage is given by a railroad company simply upon its "locomotives, engines, or other stock," wholly independent and separate from its franchises and other corporate property; but when the mortgage of a railroad company, as in the present case, covers personal property in connection with the real estate and corporate franchises, as it is authorized by statute to do, such a mortgage creates a valid and binding lien on its personal as well as its real property, and the provisions of the chattel-mortgage act have no application to such a mortgage.

The decree of the circuit court is hereby modified by striking out therefrom that portion which provides for a reservation of the sum of \$12,000 from the proceeds of the sale, to be applied to the payment of the claim of the First National Bank of San Bernardino, and in all other respects it is affirmed. The Union Loan & Trust Company is entitled to recover its costs herein against appellant. Appellant is entitled to recover from the First National Bank one-tenth of the costs of the record on appeal, and all other costs by it incurred in presenting the issues between it and the bank.

## RISLEY v. VILLAGE OF HOWELL.

(Circuit Court of Appeals, Sixth Circuit. October 15, 1894.)

No. 174.

**MUNICIPAL BONDS—VALIDITY—FRAUD IN EXERCISE OF POWER TO ISSUE.**

If, in municipal bonds, the recitals of facts, taken collectively, are such as naturally and reasonably would inspire the confidence and belief of purchasers in the existence of the conditions which would make their issue lawful, and that was the intended and expected consequence of incorporating those recitals in the bonds, a bona fide purchaser would not be chargeable with notice, and defeated in his right of recovery as such, by the fact that an ordinance, recited in the bonds by its date only, misappropriated the bonds to an unlawful use. *Hackett v. Ottawa*, 99 U. S. 86, followed.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

This was an action by Oliver H. K. Risley against the village of Howell on certain bonds and coupons. Judgment was given for the defendant. 57 Fed. 544. Plaintiff brings error.

This case was brought here upon a writ of error to the circuit court for the Eastern district of Michigan. The facts were found by the court, a jury having been waived. Upon the facts thus found the conclusions of law were resolved against the plaintiff, and, judgment in conformity therewith having also been rendered against him, he sued out this writ, alleging that upon the facts found the judgment should have been for him. The action was brought to recover the amount claimed to be due upon certain bonds and coupons issued by the defendant.

The legislature of the state of Michigan in 1885 passed an act (found in the Local Acts of that year at page 16) authorizing the common council of the village of Howell to borrow money on its faith and credit, and to issue its bonds therefor, to the amount of \$20,000, which should be expended in making public improvements in the village, upon a vote of a majority of the electors of the village in favor of such loan, at a meeting called as provided in the act. This power was substantially conferred by the first section. Section 2 provided for the manner of taking the vote. Section 3 provided that: "If such loan shall be authorized by a majority of such electors, said bonds may be issued in such sums not exceeding the amount hereinbefore limited, and payable at such times with such rates of interest, not exceeding six per centum per annum, as the said common council shall direct, and shall be signed by the president of said village and countersigned by the recorder of said village, and negotiated by or under the direction of said common council, and the money arising therefrom shall be appropriated in such manner as said common council shall determine for the purpose aforesaid, and the said common council shall have power, and it shall be their duty, to raise by tax upon the taxable property of said village, such sum or sums as shall be sufficient to pay the amount of said bonds and the interest thereon as fast as the same may become due." This act was approved February 25, 1885, and ordered by the legislature to take immediate effect. On the following 5th day of March the common council of the village passed a resolution to submit to the electors the question whether money should be raised to the amount of \$20,000, to be secured by the bonds of the village, for the purpose of making public improvements therein, and directing the manner of the submission. The election was held on the 23d day of March ensuing, in accordance with the provisions of the above resolution, and resulted in a vote of 437, in a total vote of 443, in favor of the proposition submitted. The vote was canvassed by the common council, and the result minuted in its records. No action was taken by the common council in reference to the subject until the 12th day of August, 1885, upon which day it adopted an

ordinance reciting the above-mentioned act of the legislature and the vote of the electors in favor of the loan, resolving that the village borrow the said sum of \$20,000, at 6 per cent. interest, payable semiannually on the 1st days of ~~June and~~ December in each year until paid, for making public improvements in the village; and further resolving "that the Toledo, Ann Arbor & North Michigan Railroad Company is a public improvement in the village of Howell." The ordinance then proceeded to declare that bonds to the amount of \$20,000, payable with interest at 6 per cent., at times and in amounts therein specified, be issued in aid of said railroad company, and payable to James M. Ashley, Jr., the agent of the company, or bearer, but not to be delivered to him except in accordance with a contract between Ashley, the railroad company, and the village, of that date. The substance of the contract consisted of provisions relating to the conditions and time when the bonds should be delivered to the payee; the principal condition being that the company's road should be built ready for the running of trains between certain specified localities, and a certificate to that effect of the state railroad commissioner be made and filed with the Fourth National Bank of New York, which was in the meantime to hold the bonds as depository. There was an attempt by one of the citizens of the village to prevent by legal measures the issuance of the bonds, but it was evaded by the common council, and the bonds were transmitted to the bank in New York. At the time of the making and depositing of the bonds in the bank they were not sealed, the village having no seal; but subsequently one was procured, and the president of the common council proceeded to New York, and there sealed the bonds.

On or about the 25th day of September, 1886, the railroad commissioner of the state made the certificate required by the contract above mentioned, showing the performance of the conditions. It was filed with the bank in New York, and the bonds were thereupon delivered by it to the payee, James M. Ashley, Jr. The bonds were all in the following form, except as to the number borne by each and the date of maturity thereof:

No. —

\$1,000.00.

"The United States of America.

"State of Michigan [Michigan coat of arms], Village of Howell.

"Improvement Bond.

"Know all men by these presents, that the village of Howell, in the state of Michigan, acknowledges to owe and promises to pay to J. M. Ashley, Jr., or bearer, one thousand dollars, lawful money of the United States of America, on the first day of —, in the year of our Lord one thousand eight hundred and —, at the Fourth National Bank, in the city of New York, with interest at the rate of six per centum per annum, payable semiannually on the first days of December and June in each year, on the surrender of the annexed coupons as they severally become due. This bond is issued under and by authority of a special act of the state of Michigan, entitled 'An act to authorize the village of Howell to raise money to make public improvements in the village of Howell, being No. 248 of the Local Acts of 1885 of the legislature of the state of Michigan,' approved February 25, 1885, and also under the ordinance of the village of Howell passed August 12, 1885.

"In testimony whereof, the said village of Howell has caused these presents to be signed by the president and recorder of said village, and to be sealed with the seal of said village, this twelfth day of August, A. D. 1885.

"[Seal.]

[Sgd.] Geo. H. Chapel.

"[Sgd.] Jay Corson."

They were numbered from 1 to 20, and fell due at dates running from January 1, 1888, to June 1, 1897, and bore interest coupons in usual form. The bonds and coupons were all disposed of by Ashley for the benefit of the railroad company. The plaintiff is the owner and holder of part of these bonds and coupons. Others he holds in trust for other persons. He and the other owners of the bonds in suit are bona fide purchasers for a valuable consideration, without notice of any infirmity in the bonds, unless they are charged with notice of what was contained in the ordinance above mentioned, and which is referred to on the face of the bonds.



Luke S. Montague, for plaintiff in error.

Edwin F. Conely and Orla B. Taylor, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

Having made the foregoing statement of the facts, SEVERENS, District Judge, delivered the opinion of the court.

In the determination of the validity of municipal bonds of the character of those involved in the present suit, two questions of controlling importance are quite often presented. The first one is whether the municipality was empowered by the legislature to issue bonds of the character of those in suit; and, secondly, if such authority is found, but some irregularity or fraud has attended their issue, what effect should be given to representations of facts contained in the bonds where they have come into the hands of bona fide purchasers, who have bought them for value, in reliance upon the truth of such representations? As to the question of power, there has been apparently a growing tendency in the courts to look with close scrutiny into the source of the authority for the making and issuing of such bonds, and to deny the power unless it is given expressly or by clear implication. But if the power is found to exist, and bonds have been issued in professed execution of the power, containing recitals of things done by the municipality or its officials in conformity with the requirements of the authorizing statute, and those things are peculiarly within the knowledge and duty of the officials executing the bonds, there has been no relaxation of the rule which protects bona fide purchasers relying upon the truth of representations made in the bonds against the irregularities and frauds of the municipality or the officials who represent it in the exercise of the power. In the present case there can be no question but that at the time when these bonds were executed the common council of the village of Howell had complete authority in law and in fact to issue and negotiate the bonds of the village for the purpose of raising money to be applied in the making of such public improvements as the common council should determine. The statute and the vote of the electors supplied all the required authority. The validity of a law in all substantial particulars identical with this was recognized by the supreme court of Michigan in the case of *Common Council of Cedar Springs v. Schlich*, 81 Mich. 405, 45 N. W. 994, where it was also held that a court of equity would not, at the suit of the village, enjoin the negotiation of bonds which the common council had by fraudulent evasion issued in aid of the same railroad company under circumstances much the same as those involved in the present record.

It is material to notice, in passing, the order of things in the transaction as prescribed by the statute. First, a vote of the electors was to be taken whether the common council should be permitted to borrow money and issue bonds for a lawful purpose thereafter to be determined by the common council. The proceeds of the bonds were intended by the statute to be brought into the treasury of the

village. Then, secondly, the common council were to determine the kind of public improvement to which the funds should be devoted. Thirdly, that being done, the fund was to be devoted to the payment of the expenses of the public improvement thus determined upon. The vice in the transaction in which these bonds were issued was in the malfeasance of the common council in misappropriating the bonds to an unlawful use. It was the settled law of Michigan that it was incompetent for the legislature, under the constitution thereof, to authorize the municipalities of the state to aid in the construction of railroads. *People v. Salem*, 20 Mich. 452; *Bay City v. State Treasurer*, 23 Mich. 499. Whether the electors contemplated the ultimate disposition which was made of these bonds or not, it was an abuse of the powers of the common council to make that disposition of them, and a legal fraud upon the village. That fraud was perpetrated in the execution of a power which they were exercising in behalf of the village, and, as respects an innocent holder, the fraud in the diversion of the bonds themselves or their proceeds was the fraud of the principal in whose name the bonds were issued, and the village must abide the responsibility therefor. It was said by this court in the case of *Cadillac v. Institution for Savings*, 7 C. C. A. 574, 58 Fed. 935, repeating the language of the supreme court in former decisions, that a corporation is held by the same obligations as an individual to adhere to the truth in its dealings with others, and that it cannot defeat the claims which its own conduct and representations have superinduced; and, in the nature of things, its representations must be those made by its officials. The circuit court of appeals for the Eighth circuit, in a well-considered opinion, just published, clearly indicates the demarkation between those questions which relate to the authority to issue bonds and those which concern the regularity of its exercise, and emphasizes the obligation of good faith towards purchasers in the exercise of the power. *National Life Ins. Co. v. Board of Education*, 10 C. C. A. 637, 62 Fed. 778. If the plaintiff, and those from whom he derived his title, were chargeable with notice of the fraud, the bonds would not be enforceable against the village. Thus far there seems to be no serious controversy. But it is claimed in behalf of the defendant that these obligations bore upon their face a reference to the ordinance directing their issue which disclosed their fraudulent character, and that the recital of the ordinance was notice to any purchaser of the bonds of the facts appearing from the ordinance, and which he would have learned from an inspection thereof. This brings us to the vital question in the case, and presents the point upon which the court below seems to have turned the case in favor of the defendant.

In order to determine what effect should be given to this part of the recitals in the bonds, reference must be had to the whole instrument under the just and familiar rule of construction. In one part of each of the bonds it was represented that it was an "improvement bond." This, taken in connection with the subsequent reference to the statute, meant that it was a bond issued to provide means for a public improvement. In another place it was represented that the bond was "issued under and by authority of a special act of the state

of Michigan entitled 'An act to authorize the village of Howell to make public improvements in the village of Howell,' being Act 248 of the Local Acts of 1885 of the legislature of the state of Michigan, approved February 25, 1885, and also under the ordinance of the village of Howell, passed August 12, 1885." What was the meaning of this representation? To say that a thing is done "under and by the authority" of a statute referred to is equivalent to saying that it is done in conformity with it, and authorized by it. In *Stoddard v. Chambers*, 2 How. 284, 317, the supreme court said, in speaking of a statute which excluded from its operation locations of land previously made "under any law of the United States": "Now, an act under a law means in conformity with it, and unless the location of the defendant shall have been made agreeably to law" he is not within the exception. Bringing all the recitals in the bonds together, they amount to a representation that they were issued to raise money to defray the expenses of a public improvement of a kind to be determined by the common council, that the requirements of the law had all been complied with, and that an ordinance in conformity with the law had been passed directing their issuance; for if the ordinance was not in conformity with the law, inasmuch as it preceded the issue of the bonds, it falsified the preceding statement that the bonds were issued in conformity with the statute. And we can entertain no doubt whatever but that this was precisely the way in which the framers of these bonds intended the recitals to be construed. They were inserted to fortify the bonds, and give assurance of their legal validity to purchasers, and invite their confidence. Read in the light of the known purpose of the makers, it cannot but be believed that it was intended to represent that the ordinance for the issue of the bonds was in pursuance of the statute which had just been recited. Least of all can it be believed that the framers of these bonds intended by the reference to the ordinance to challenge the attention of purchasers to it, or expect that that would follow by reason of the reference.

The general rule of construction applies, that in determining the intent and meaning of any part the general purpose of the whole is to be regarded. And it would seem a very just rule also that the meaning which the maker of an instrument intends and expects the other party to put upon it should be adopted if the other has accepted it in that sense, and the words will bear that construction. The import of these recitals is substantially the same as of those in the bonds involved in *Hackett v. Ottawa*, 99 U. S. 86, and *Ottawa v. National Bank*, 105 U. S. 343; and in respect to the ground for an estoppel the case is not distinguishable from those. There the bonds recited that they were issued by virtue of the charter of the city, and in accordance with an ordinance of the city council entitled "An ordinance to provide for a loan for municipal purposes." It was held that these recitals estopped the city from denying, as against a bona fide holder, that the law had been complied with in the issue of the bonds. The authority of these decisions has never been questioned, and it is unnecessary to cite the long list of cases in which they have been cited and approved. It makes no substantial differ-

ence that in those cases the recital of the ordinance stated the title indicating the purpose of the ordinance, showing it to be a legal one, and that in the present case such statement is made by necessary implication from other language employed.

There is nothing in the case of *Barnett v. Denison*, 145 U. S. 135, 12 Sup. Ct. 819, opposed to this conclusion. That case, as stated by Mr. Justice Brown, in delivering the opinion of the court, involved "the single question whether a requirement of a charter that the bonds issued by a municipal corporation shall specify for what purpose they are issued is so far satisfied by a bond which purports on its face to be issued, by virtue of an ordinance, the date of which is given, but not its title or contents, as to cut off defenses which might otherwise be made." Much reliance is placed upon an excerpt from that opinion of language used *arguendo* by Mr. Justice Brown that "ordinarily the recital of the fact that the bonds were issued in pursuance of a certain ordinance would be notice that they were issued for a purpose specified in such ordinance." This might be literally true if that recital were the only one in the ordinance, and thus stood unaffected by any context. But reference to the opinion shows that the writer was considering the effect of the recital as a representation by which the city would be bound, for he refers to *Hackett v. Ottawa* and *Ottawa v. National Bank*, above cited, where the only question pertinent to the discussion was whether the city was estopped by the recital of the purpose for which the ordinance was passed. The defendant, however, contends that the plaintiff cannot set up an estoppel against the village, for the reason that the action of the common council was a matter of record, which was open to anybody for examination. The cases cited in support of this contention do not, however, support it. In *Crow v. Oxford*, 119 U. S. 215, 7 Sup. Ct. 180, the bonds in suit purported to have been issued under a statute of Kansas of March 1, 1872, and it further appeared from the bonds themselves that that law had not been in force long enough to allow the notice of election which it required to have been given prior to their issue. But the plaintiff, notwithstanding all this, claimed to recover upon the ground that there was another statute of Kansas, passed March 2, 1872, which authorized the issue of such bonds, and which was in force long enough to have allowed the requisite notice of election. The public records of the proceedings, however, upon which the bonds were issued, showed that they were taken under the act recited in the bonds, and not under the other act which was invoked to support them. Relative to the duty of the purchaser to examine those records, the court said (at page 222, 119 U. S., and page 180, 7 Sup. Ct.): "Even though the plaintiff purchased the bonds and coupons," as the finding of the fact says, "before their maturity, for value, without actual notice of any defense to them, or of any defect or infirmity in the proceedings for issuing them, he was, in the absence of such recitals in the bonds as would protect him, bound by the information open to him in the official records of the officers whose names were signed to the bonds." The court then proceeded to decide that the recitals did not protect the plaintiff, but, on the contrary, showed that, as already said, no

adequate notice could possibly have been given. In *Nesbit v. Independent District*, 144 U. S. 610, 12 Sup. Ct. 746, bonds had been issued by the municipal corporation in excess of the limitation imposed by the constitution of the state. The bonds were held to be void for lack of power. The question whether the power to issue such bonds at all was exhausted, and no longer existing, involved the inquiry whether the limited amount had already been reached; and it was held, in the absence of an express recital of the number of bonds which had been issued, that the purchaser was bound to refer to the public records, which disclosed the fact of the overissue, and that he was affected by notice of the facts he could thus have ascertained. In that case the question was the primary one of the existence of authority, and not one of irregularity in the exercise of a power confessedly existing, and it belongs to that class of cases where it has been held that no recital implying the existence of the power could supply the lack of it. The case of *Sutliff v. Lake County Com'rs*, 147 U. S. 230, 13 Sup. Ct. 318, was a case of the same character. The bonds in suit were part of an issue in excess of the limitation prescribed by the constitution of the state, and, as the public records to which the purchaser had access disclosed the lack of power, he was held bound by the facts disclosed by them, notwithstanding the recital in the bonds that they were issued in conformity with the statute. That case is distinguishable upon the same ground as in the last case above referred to.

We are of opinion that, upon the facts found, the common council had complete authority to issue such bonds as these in suit, and that the defendant is estopped from setting up the fraudulent conduct of its own officials in the issue of them by the assurances contained in their recitals that they were issued in pursuance of the statute authorizing them. The judgment must be reversed, and the cause remanded to the court below, with directions to enter judgment for the plaintiff for the amount of the bonds and coupons in suit, with interest at the rate therein specified.

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FINDLAY v. WESTERN UNION TEL. CO.

(Circuit Court, W. D. Virginia. May 23, 1894.)

TELEGRAPH COMPANIES—FAILURE TO TRANSMIT MESSAGE.

The receiver of a message, as well as the sender, is bound by a condition in the contract requiring claims for damages to be presented to the telegraph company within 60 days after the day the message is filed for transmission.

This was an action by C. R. L. Findlay against the Western Union Telegraph Company to recover damages for failure to deliver telegraphic messages to him.

Fulkerson, Page & Hurt, and D. Trigg, for plaintiff.  
Scott & Staples, for defendant.

PAUL, District Judge. This is an action for damages against the defendant telegraph company for its failure to deliver to the plaintiff

two dispatches sent to him by E. Y. Mitchell, curator, etc., one of which dispatches was sent from St. Louis on September 17, 1891, and the other from Rolla, Mo., on September 19, 1891. These messages offered to the plaintiff the position of professor of chemistry in the School of Mines at Rolla, at a salary of \$1,800. The declaration alleges that, by reason of the negligence of the defendant in not delivering promptly the said messages, the plaintiff was prevented from accepting and obtaining the position offered him, the same having been filled by another before the plaintiff could answer said telegrams and accept the offer made to him. The dispatches sent and delivered contained, among other provisions, this condition:

"The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission."

It is admitted that this requirement was not complied with; no notice of the claim being given within 60 days after the messages were filed with the company for transmission, or after their delivery to the plaintiff. All the evidence being introduced in the case, the defendant asked for the following instruction to the jury:

"The court instructs the jury that it was the duty of the plaintiff in this case to present in writing to the defendant company his claim for damages claimed under the declaration within sixty days from the date of filing of the messages from E. Y. Mitchell to the plaintiff; and, if they believe from the evidence that said claim was not presented in writing within sixty days from such date, they must find for the defendant."

It is admitted by counsel for the plaintiff in the discussion that, according to the decisions of the courts, this rule is a reasonable one as to the sender of the message, and that it is binding upon him; but it is insisted that it is not binding on the sendee or receiver of the message. It is urged that the receiver of the message is not a party to the contract between the sender and the telegraph company. Counsel for the defendant insist that it is binding on both the sender and the receiver of the message, and that neither can recover in a suit with this condition in the contract of transmission. The declaration alleges in two or more counts that on the 17th day of September, 1891, and on the 19th day of September, 1891, one E. Y. Mitchell, a curator of the University of Missouri, delivered to the defendant a certain message or dispatch at his office in the town of Rolla, Mo., directed to and addressed to the plaintiff at Abingdon, Va., and contracted with the defendant to transmit and deliver the said dispatch or message to the plaintiff at Abingdon, Va., according to the provisions of law, and according to said contract, promptly and without delay. It further alleges:

"That said E. Y. Mitchell paid to the defendant \* \* \* all the costs and charges that it demanded for the transmission and delivery of said dispatch or message, according to its regulations, and according to the contract of transmission and delivery of said dispatch or message as undertaken by it, as hereinbefore set forth; \* \* \* and that the defendant failed \* \* \* to deliver the dispatch promptly without delay, as it was its duty to do under its aforesaid contract; and that its failure to deliver to him the said message or dispatch promptly, as was its duty and obligation to do, was caused by the negligence of the defendant company, its agent," etc.

The plaintiff thus claims the benefit of this contract of transmission, and avers that he has been damaged by a breach of it; claims the benefit of its obligations; makes himself a party to its provisions, placing himself in this relation to it, and demanding a strict enforcement of his own rights under it. It cannot be successfully contended that he is exempt from the operation of certain provisions of the contract, to be complied with on his part before he can successfully assert his rights to the benefits accruing under it, or a redress of wrongs growing out of its violation. The contract is an agreement between the sender and the telegraph company that, for a stipulated price, the company shall carry a message from the sender, and deliver the same to the receiver. It is the same contract when delivered to the receiver that it was when it came from the hands of the sender. He takes it with all the rights that accrued to the sender, and he assumes all the obligations that it imposes on the sender when he comes to assert his rights under it.

In the limited time at the disposal of the court since adjournment yesterday evening, it has not had time to make many extracts from the authorities cited sustaining this position. It refers to *Thompson on Negligence* (page 847), where it is held that "the receiver of the message is privy to the contract between the sender and the telegraph company." Again: "It seems reasonable that, for all purposes of liability, the telegraph company shall be considered as much the agent of him who receives as of him who sends the message." *Sherrill v. W. U. Tel. Co.* (N. C.) 14 S. E. 94, is a case in which it is held that the restriction under discussion applied to the receiver of a message. *W. U. Tel. Co. v. Dougherty* (Ark.) 15 S. W. 468; *Express Co. v. Caldwell*, 21 Wall. 264. The foregoing authorities, as well as others that might be cited, sustain the position of counsel for defendant that the limitation of 60 days within which a claim must be filed in writing applies as well to the receiver as to the sender of a message. The court, on principle, can arrive at no other conclusion than that the reasons for the existence and enforcement of the rule against the sender are the same, and equally strong for the enforcement of the same against the receiver.

**Waiver:** But it is claimed that the defendant company waived its rights to the enforcement of this rule in the correspondence had between its attorney and the attorneys for the plaintiff. The court cannot agree with this position. So far from waiving this requirement, the first letter received from the attorney for the defendant company insists on its enforcement. Its language is:

"I would call your attention to the printed notice on this company's blanks requiring that all claims for damages be presented in writing within sixty days from the sending of the message. Mr. Findlay has entirely failed in the matter of such requirement, which has uniformly been held by the courts a good and sufficient defense to an action in damages."

**Conclusion:** That the condition requiring notice of claim for damages to be given to the company within 60 days is binding upon the receiver as well as the sender of the message. The instruction asked for by the defendant embodies the law, and will be given to the jury.

Plaintiff's instruction is inconsistent with the views of the court, and with the instruction just given for the defendant, and must be refused.

## ALASKA TREADWELL GOLD MIN. CO. v. WHELAN.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1894.)

No. 161.

### 1. FELLOW SERVANTS—QUESTION FOR JURY.

In an action for personal injuries it appeared that plaintiff was one of a gang of workmen employed in defendant's mine to break up rock in the ore pit, from which the broken rock was drawn, from time to time, through chutes, to a lower level, at which the chutes were closed by gates. Defendant had a general manager, and a superintendent in charge of each of several works belonging to it, and the gang to which plaintiff belonged worked under the direction of one F., its boss, whose duties were to see that the men did their work, to direct them where to work, to notify them when rock was to be drawn through the chutes, and to direct when rock should be drawn through any particular chute. There was a conflict of evidence as to whether F. was authorized to employ and discharge men at work under him. Plaintiff, who was at work on the top of a pile of rock, covering the head of a chute, was injured by being drawn through the chute with the rock. There was a conflict of evidence as to whether, on the occasion in question, F. notified plaintiff that the chute was to be drawn. *Held*, that it was properly left to the jury to determine whether or not F. was a fellow servant of plaintiff.

### 2. SAME—CONTRIBUTORY NEGLIGENCE.

The question of plaintiff's contributory negligence was also properly left to the jury.

### 3. SAME—NEGLIGENCE.

An instruction to the jury to the effect that if defendant, by a standing rule directed any one to notify the men working about the chutes when a chute was to be drawn, plaintiff could not recover, unless defendant was guilty of gross negligence in employing unsuitable persons, was erroneous, since the first branch of such instruction ignored the duty defendant owed to plaintiff, and the last branch introduced an issue not made by the pleadings; but such error was harmless to defendant.

### 4. SAME—GROSS AND SLIGHT NEGLIGENCE.

Where the defendant requested the court to charge that plaintiff could not recover if the jury found that his injuries were in any manner the result of want of ordinary care on his part, it was not error for the court to modify such instruction by adding: "Unless the defendant was guilty of gross negligence, and the plaintiff's negligence was slight."

In Error to the District Court of the United States for the District of Alaska.

Action by Patrick Whelan against the Alaska Treadwell Gold Mining Company. Plaintiff recovered judgment, and defendant brings error.

T. Z. Blakeman, for plaintiff in error.

Lorenzo S. B. Sawyer, for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is an action to recover damages for injuries received by the negligence of the defendant (plaintiff in



error). The complaint alleges that plaintiff (defendant in error), on the 23d day of November, 1891, while in the employ of defendant as a laborer at its mine at Douglass Island, in Alaska, was severely and permanently injured by being drawn through the chute from the ore pit when the draw in the tunnel below was opened to load the cars used in conveying the ore to the mill; that this accident occurred without any negligence on his part, by the negligence of defendant. The answer admits that the accident occurred, but denies that plaintiff was injured to the extent charged, or that his injury was caused by the negligence of defendant, and alleges that plaintiff was guilty of contributory negligence. Upon these issues the cause was tried before a jury, which resulted in a verdict in favor of plaintiff for \$2,950. There was but one witness introduced on behalf of plaintiff,—the plaintiff himself.

The defendant owned a mill, mine, and chlorination works. It had a general manager. It also had a superintendent or foreman in charge of each of its works. It had three shifts of workmen engaged at labor in the mine,—two in the daytime and one at night. Each shift had separate bosses. A man named Finley was the shift boss at night, and upon this shift the plaintiff was at work when the injury was received. The plaintiff's duty was to break rock, and get it ready to go through the chutes, to be loaded into cars for conveyance to the mill. He had been employed at that work for about six months prior to the accident. In a place designated as the "pit" the quartz rock blasted from the lodes was thrown where it was broken into pieces, and made ready for the mill. From this pit several chutes led downward into a tunnel, where there was a railroad track leading out to the mill, and on which cars were run to receive the broken rock from the chutes. The lower end of the chutes, which were several feet below the floor of the pit, had gates to be opened when the rock was to be drawn from the chutes into the cars. Plaintiff and one McCormick were working in chute No. 17, which was full of broken rock, and the rock was piled over it about 30 feet deep. On the top of this pile were large pieces of rock, which, on the night the accident occurred, the plaintiff and McCormick were directed, by Finley, to break. It was Finley's duty to direct when the rock from any particular chute was to be drawn. It was his custom to go into the pit, and notify the men when he was going to draw from the chute. There is a conflict in the evidence as to whether Finley came back that night after ordering the men to break the rock. The plaintiff testified that he did not. The jury must have found that he did not, or, if he did, that plaintiff did not see or hear him. Within an hour after plaintiff commenced work, under Finley's orders, chute No. 17 was drawn, and plaintiff went through with the rock, and was injured.

1. At the close of the evidence the defendant moved the court to direct the jury to return a verdict for defendant upon the following grounds:

"First. That it appears from the testimony that the negligence, if any, which caused the accident to the plaintiff, and the consequent injuries, are the result of the negligence of a coemployé or fellow workman, Sam. Finley,

for which the defendant is not liable. Second. That it appears from the testimony that the plaintiff contributed to the accident himself by carelessly and negligently walking over the top or mouth of the chute after he had warning that rock was to be drawn from there."

The court overruled the motion.

Did the court err in refusing to instruct the jury to find a verdict for defendant? The first and most important question is whether Finley, the night boss of the shift of workmen employed at the mine, was a fellow servant of the plaintiff. Finley's duties were to see that the men did their work, to direct them where to work, and to notify them when rock was to be drawn from the chutes. It was the duty of plaintiff to obey Finley's orders. Finley was his boss. These questions are undisputed. There was a conflict in the testimony as to whether Finley was authorized to employ and discharge men at work under him, or whether he had done so. Plaintiff testified that Finley employed him, and he knew that Finley had discharged other men. Upon this state of the evidence the court submitted the question—as a question of fact—to the jury as to whether or not Finley was a fellow servant, by the following instruction:

"The jury is instructed that the true test is whether the person in question is employed to do any of the duties of the master. If so, he cannot be regarded as the fellow servant, but is the representative of the master, and any negligence on his part in the performance of the duty thus delegated to him must be regarded as the negligence of the master. You have heard the testimony as to Finley's authority and duties, and whether or not he had any power to employ men or discharge them, or whether he simply acted under another man, who had the same power over him that was exercised over other laborers."

We do not deem it necessary to discuss the various definitions of the general rules upon this subject, nor to review the conflicting decisions which prevail in the different state courts in regard thereto. The instruction given by the court, which was not objected to, is within the principles announced by the supreme court of the United States as the governing rule in determining whether or not, in any given case, the injury was caused by the acts of a fellow servant (*Railroad Co. v. Baugh*, 149 U. S. 369, 13 Sup. Ct. 914); by the circuit court of appeals in *Railroad Co. v. Ward*, 10 C. C. A. 166, 61 Fed. 927; and by this court in *Railroad Co. v. Charless*, 2 C. C. A. 380, 51 Fed. 562. It is true that Finley and the plaintiff were employed and paid by the same master, and were occasionally brought together in the same common employment. "But it is by no means true that all persons who are in the employ of a common master are fellow servants of each other, in the sense that one of them is not entitled to recover from the common master for injuries caused by the negligence of another employé. Ever since the rule first enunciated in *Priestly v. Fowler* was sent upon its devious way, there has not been a court in England or this country that has maintained the contrary. All the labor of the courts since the rule was established at the outset has been in determining its principal limitations. \* \* \* The true test, it is believed, whether an employé occupies the position of a fellow servant to another employé or is the representative of the

master, is to be found, not from the grade or rank of the offending or injured servant, but it is to be determined by the character of the act being performed by the offending servant by which another employé is injured; or, in other words, whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master. The master, as such, is required to perform certain duties, and the person who discharges any of these duties, no matter what his rank or grade, no matter by what name he may be designated, cannot be a servant within the meaning of the rule under discussion." McKin. Fel. Serv. § 23. The defendant is not released from liability by the fact that there were superior agents standing between Finley and the corporation, who had control and supervision over his acts. The supreme court of the United States has repeatedly declared that a master, in employing a servant, impliedly engages with him that the place in which he is to work, and the tools and machinery which is furnished him, or the instrumentalities by which he is surrounded, shall be reasonably safe, and that a failure to discharge this duty exposes the master to liability for injury caused thereby to the servant; that it is wholly immaterial how, or by whom, the master discharged that duty; and that the master's liability is not made to depend in any manner upon the grade of service of a coemployé, but upon the character of the act itself, and a breach of the positive obligation of the master. *Hough v. Railway Co.*, 100 U. S. 213; *Railroad Co. v. Herbert*, 116 U. S. 648, 6 Sup. Ct. 590; *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914; *Railroad Co. v. Daniels*, 152 U. S. 684, 14 Sup. Ct. 756. These general principles have been universally followed by this court. *Railroad Co. v. Charles*, 2 C. C. A. 389, 51 Fed. 562; *Pacific Co. v. Lafferty*, 6 C. C. A. 474, 57 Fed. 536; *Railway Co. v. Novak*, 9 C. C. A. 629, 61 Fed. 582. It was the master's duty, in the present case, to provide a reasonably safe place for its employés to work, to keep the chutes through which the quartz rock was drawn in reasonably good condition and repair, to employ competent persons in the management thereof, and to notify the workmen engaged in breaking rock in the pit when the rock in the chute would be drawn. This latter duty it delegated to the night boss, Finley. Plaintiff, by his contract of service, did not assume the risk that this duty would not be performed.

In *Railroad Co. v. Ward*, supra, the court of appeals, in discussing a similar question, said:

"It is not material, therefore, that the switchman, who in this instance was injured, and the track repairers, whose negligence caused the injury, worked in the same yard, and for the same general purpose of maintaining and operating the railroad of the common employer. It was a duty which, under implied contract, the railroad company owed to the switchman, to keep the yard and tracks where he was employed to do his work—hazardous enough under the most favorable conditions—in a reasonably safe condition; and if the trackmen to whom the discharge of that duty was intrusted negligently left in the track, and between the ties, which they had recently been ballasting, a dangerous hole, which caused the injury complained of, their negligence was attributable to the plaintiff in error; and the case was properly submitted to the jury without reference to the question of responsibility for injuries caused by fellow servants."

The present case is distinguishable in some of its facts from *Randall v. Railroad Co.*, 109 U. S. 484, 3 Sup. Ct. 322, upon which defendant principally relies. There the court held that a brakeman working a switch for his train was a fellow servant with the engineer of another train, because, among things, "neither works under the orders or control of the other." Here it is undisputed that the plaintiff did work under the control of Finley, and was at all times subject to his orders. Although the question whether or not Finley employed and discharged workmen that were under his control might not of itself be conclusive under the test laid down by the court, it was an important factor in determining whether or not he was a fellow servant with the plaintiff or the vice principal of the defendant. Ordinarily, the question whether the servant whose negligence caused the injury is a fellow servant with the injured person is a question of law; yet under all the facts of this case and the law applicable thereto it is made clear that the court did not err in submitting it to the jury. It was the duty of the court to declare the law, and give the rule as to the definition of fellow servants as applicable to the facts, and for the jury to determine whether under the facts the case came within the definition. Especially is this true in all cases where, as here, there was a conflict in the evidence as to some of the essential facts. "The case should not have been withdrawn from the jury unless the conclusion followed as matter of law that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish." *Texas Railway Co. v. Cox*, 145 U. S. 606, 12 Sup. Ct. 905, and authorities there cited.

The court did not err in submitting the question of contributory negligence to the jury. This, perhaps, sufficiently appears from what has already been said upon the other branch of the motion, and but little need be added upon this point. It was the duty of the jury, in determining this question, to consider the surroundings in which the plaintiff was placed; the noise of the drills near where he was at work; the fact that the top of the chute was completely covered over with rock to such a depth that it was difficult, if not impossible, to tell where it was. Moreover, the mere fact that there was a conflict of evidence as to whether Finley notified the plaintiff when the rock was to be drawn from the chute made it the duty of the court, under proper instructions, to submit this question to the jury. *Kane v. Railroad Co.*, 128 U. S. 91, 9 Sup. Ct. 16; *Jones v. Railroad Co.*, 128 U. S. 443, 9 Sup. Ct. 118; *Railroad Co. v. McDade*, 135 U. S. 571, 10 Sup. Ct. 1044; *Railway Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569; *Railway Co. v. Ives*, 144 U. S. 409, 12 Sup. Ct. 679; *Railroad Co. v. Amato*, 144 U. S. 467, 12 Sup. Ct. 740; *Railroad Co. v. Jarvi*, 3 C. C. A. 433, 53 Fed. 70.

2. After defendant's motion was overruled, the defendant requested the court to instruct the jury as follows:

"(2) To make the defendant liable in this case for the injury received by the plaintiff, the evidence must satisfy you that the defendant was guilty of negligence causing the injury to plaintiff; and if you find from the evidence that the company, by its general manager, or by its superintendent

of the men under him, directed any one of the employés or workmen of defendant to notify the men working about the chutes in the pit whenever rock was to be drawn from the chutes into the train, and that this was a standing rule of the defendant company, then your verdict must be for the defendant, whether such employé gave the notice and carried out the rule or not, as in that case the negligence of such employé in not giving the notice would not be the negligence of the defendant."

The court modified this by adding the words, "Unless you also find from the evidence that the defendant was guilty of gross negligence in employing as such workmen or employés unsuitable, unskilled, and unreliable persons," and as thus modified the instruction was given. This instruction, as asked for by the defendant, was clearly erroneous, and it ought to have been refused. It entirely ignored any reference to the duty which the corporation owed to the plaintiff, and released it from all liability in the premises, provided the jury should find that its general manager or superintendent had directed any of the workmen to notify the men working about the chute when it would be drawn, if there was a standing rule of the company to that effect. There was no rule of the company to that effect offered in evidence. It was not shown that the company had any "standing rule" upon the subject. The testimony shows that it was the custom of the night boss to give the notice, and that this duty had been assigned to him to perform. It is true that upon the cross-examination of the plaintiff, when asked if that was a rule of the company, he answered in the affirmative; but it is apparent from the record that he did not mean that the company had adopted a "standing rule." The instruction authorized the jury to find a verdict for the defendant if it had such a standing rule, whether the plaintiff knew of it or not. The modification which the court made was also objectionable in this: that it introduced an issue that was not raised by the pleadings. It does not appear that this specific objection was made in the court below. Courts should avoid stating abstract principles which have no application to the issues raised in the case either by the evidence or by the pleadings, even if such principles are, in all respects, correctly stated. The safest course for courts to pursue when an imperfect instruction is asked for is to refuse the instruction, and to embody in its charge a correct statement of the principles applicable to the case. The court, in its charge to the jury in this case, instructed the jury upon all the issues raised in the case as favorably to the defendant as the law would warrant, and, taking all the instructions and charge together, we are of opinion that there is no ground for believing that the jury could possibly have been misled by the modification made to this instruction. How could the defendant have been prejudiced by the modification? It affirmatively appears that the jury must necessarily have found that the injury was caused by the negligence of Finley in failing to give notice to plaintiff when the rock in the chute was drawn. If the jury had found that Finley gave the notice, then, under the charge of the court, the verdict would of course have been for the defendant. If Finley gave the notice, there was no negligence, and the jury could not have found that he was incompetent. If he did not give the notice, he was guilty of negligence, and his negligence was the neg-

ligence of the corporation, and this warranted the jury in rendering a verdict in favor of plaintiff; and it was wholly immaterial whether he was a suitable, skilled, or reliable servant.

3. The defendant further requested the court to give the following instruction:

"(4) The master is never liable for injuries received by a workman in its employ if the injuries are the result of any negligence on the part of the person injured. That is what the law calls 'contributory negligence.' And if you find from the evidence that the accident which caused the plaintiff's injuries was in any manner the result of want of ordinary care on the part of the plaintiff to avoid the accident and escape the damage, the plaintiff cannot recover, and your verdict must be for the defendant,"

—Which the court modified by adding thereto the words:

"Unless you also find from the evidence that the defendant was guilty of gross negligence, and the plaintiff's negligence was slight."

The court did not err in making this modification. Beach, Contrib. Neg. § 9. The judgment of the district court is affirmed, with costs.

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#### HARRINGTON v. HERRICK.

(Circuit Court of Appeals Ninth Circuit. October 24, 1894.)

No. 126.

##### DEATH OF PARTNER—SUBSEQUENT ACTION ON FIRM NOTE.

2 Hill's Ann. St. and Code Wash. §§ 947-953, provide that on the death of a member of a partnership his administrator shall include in the inventory, in a separate schedule, all the firm's property, and be entitled to its custody and control for the purposes of administration, and that he shall give bonds in a sum double its value, and administer thereon the same as on estates of decedents, unless the surviving partner shall within five days after the inventory is filed, or such other time as the court allows, apply for administration of the copartnership estate, and give bonds in a sum double the value of the property. *Held*, that, where one of the members of a partnership dies, and his administrator administers the firm's estate because of failure of the surviving partner to apply for administration, such administrator is not a necessary party to an action against such survivor on a note given by the firm.

Error to the United States Circuit Court for the District of Washington, Northern Division.

Action by E. M. Herrick against W. A. Harrington, surviving partner of the firm of Harrington & Smith, on promissory notes executed by such firm. There was an order sustaining a motion to strike defendant's plea in abatement, and a judgment for plaintiff. Defendant brings error. Affirmed.

Plaintiff in the court below brought his action against the defendant upon four promissory notes executed in the firm name of Harrington & Smith, averring that the defendant, W. A. Harrington, and one Andrew Smith were, at the date of the execution of said notes, copartners doing business as merchants at the city of Seattle, in the state of Washington, and at the city of San Francisco, Cal., under the firm name and style of Harrington & Smith. The complaint also averred that prior to the commencement of the action the said Andrew Smith died, in the state of California, and that the defendant, Harrington, was the only surviving

member of the said firm of Harrington & Smith. To this action the defendant filed a plea in abatement, to which the court below sustained a demurrer. The defendant thereupon filed an amended answer, which, after traversing certain of the allegations of the complaint, set forth certain affirmative defenses, and concluded with the following plea in abatement:

"Division X.

"Further answering, and for plea in abatement herein, defendant states:

"(1) That there is a defect of parties defendant in this action, to wit, that the said action is based upon four separate and distinct obligations in writing, each of which is a joint obligation executed in the name of Harrington & Smith, a copartnership consisting of W. A. Harrington and Andrew Smith, and existing at all the times in plaintiff's complaint mentioned up to the 31st day of December, 1891, when the said Andrew Smith died.

"(2) That under and by virtue of the laws of the state of Washington it is provided that in the case of the decease of one of the members of a copartnership the executor or administrator of such deceased copartner shall include in the inventory of such person's estate, in a separate schedule, the whole of the property of such copartnership, and shall be entitled to the custody and control of all the copartnership property for the purpose of administration, and shall give bonds of double the value of the copartnership property, and shall administer thereon in the same manner as provided for the administration of the estates of deceased persons, unless the surviving partner shall within five (5) days from the filing of said inventory, or such other time as the court may allow, apply for the administration of such copartnership estate, and give bonds therefor in double the value of such property.

"(3) That on the 11th day of March, A. D. 1892, by the order of the superior court of the state of Washington, county of King, sitting in probate, A. E. MacCulsky and Frank Hanford were duly appointed such administrators of the estate of the said Andrew Smith, deceased, in the state of Washington; and this defendant, W. A. Harrington, having waived his right to the administration of said copartnership estate, and consented thereto, the said A. E. MacCulsky and Frank Hanford were by the orders of said court upon said date duly appointed administrators of the entire estate of the said copartnership of said Harrington & Smith.

"(4) That the said administrators have duly qualified, and have given bonds for double the value of the said copartnership property in the manner provided by law, and have entered upon the discharge of their duties as such administrators, and taken into their possession, custody, and control the assets of the said copartnership, and are now proceeding to administer thereon in the manner provided by laws of the state of Washington.

"(5) That the said copartnership property is within the state of Washington, and within the jurisdiction and control of the said superior court sitting in probate, and is now in process of administration as aforesaid.

"(6) That by reason of the premises hereinbefore set forth this defendant has not possession of the copartnership property, and has no control thereof as the surviving partner of the said copartnership of Harrington & Smith or otherwise.

"(7) That by reason of the premises aforesaid the said administrators of the estate of the late copartnership of Harrington & Smith aforesaid, to wit, A. E. MacCulsky and Frank Hanford, are necessary parties defendant herein, and are within the jurisdiction of this court, and the process of this court can be duly and legally served upon said administrators; and that defendant avers that without the presence of the administrators herein as parties defendant to this action all of the rights of the parties to this cannot be fully and finally determined. Wherefore defendant prays: First. That this cause be abated until the said A. E. MacCulsky and Frank Hanford be brought in and made parties defendant to this action as administrators of the estate of the said copartnership and of the estate of the said Andrew Smith."

The said cause being called for trial on the 20th day of March, 1893, plaintiff moved the court to strike from defendant's answer the foregoing plea in abatement, which motion was treated by the court and parties as a renewal of his demurrer. The court thereupon sustained said motion, and ordered said plea stricken from said answer, to which the defendant at the time duly excepted, and his exception was allowed. A judgment was thereafter rendered in favor of the plaintiff and against the defendant in the court below for the full amount of said notes with interest. From said judgment and the foregoing order striking out defendant's plea in abatement the said defendant now appeals to this court.

The following is the statute law of the state of Washington in relation to the administration of copartnership estates, contained in volume 2 of Hill's Annotated Statutes and Code of Washington:

"Sec. 947. (1435.) The executor or administrator of a deceased person who was a member of a copartnership shall include in the inventory of such person's estate, in a separate schedule, the whole of the property of such partnership; and the appraisers shall estimate the value thereof, and also the value of such person's individual interest in the partnership property, after the payment or satisfaction of all the debts and liabilities of the partnership.

"Sec. 948. (1436.) After the inventory is taken, the partnership property shall be in the custody and control of the executor or administrator for the purposes of administration, unless the surviving partner shall within five days from the filing of the inventory, or such further time as the court may allow, apply for the administration thereof, and give the bond therefor hereinafter prescribed.

"Sec. 949. (1437.) If the surviving partner apply therefor, as provided in the last section, he is entitled to the administration of the partnership estate, if he have the qualifications and competency required for a general administrator. He is denominated an administrator of the partnership, and his powers and duties extend to the settlement of the partnership business generally, and the payment or transfer of the interest of the deceased in the partnership property remaining after the payments or satisfaction of the debts and liabilities of the partnership, to the executor or general administrator, within six months from the date of his appointment, or such further time, if necessary, as the court may allow. In the exercise of his powers and the performance of his duties, the administrator of the partnership is subject to the same limitations and liabilities, and control and jurisdiction of the court, as a general administrator.

"Sec. 950. (1438.) The bond of the administrator of the partnership shall be in a sum not less than double the value of the partnership property, and shall be given in the same manner and be of the same effect as the bond of a general administrator.

"Sec. 951. (1439.) In case the surviving partner is not appointed administrator of the partnership, the administration thereof devolves upon the executor or general administrator, but before entering upon the duties of such administration he shall give an additional bond in double the value of the partnership property.

"Sec. 952. (1440.) Every surviving partner, on the demand of an executor or administrator of a deceased partner, shall exhibit and give information concerning the property of the partnership at the time of the death of the deceased partner, so that the same may be correctly inventoried and appraised; and in case the administration thereof shall devolve upon the executor or administrator, such survivor shall deliver or transfer to him, on demand, all the property of the partnership, including all books, papers, and documents pertaining to the same, and shall afford him all reasonable information and facilities for the performance of the duties of his trust.

"Sec. 953. (1441.) Any surviving partner who shall refuse or neglect to comply with the requirements of the last section may be cited to appear before the court; and unless he show cause to the contrary, the court shall require him to comply with such section in the particular complained of."

The court overruled the demurrer to the complaint, and sustained the demurrer to the plea. These rulings are assigned as error.



E. C. Hughes, for plaintiff in error.

Wm. Lair Hill, for defendant in error.

Before McKENNA, Circuit Judge, and ROSS, District Judge.

After stating the case as above, McKENNA, Circuit Judge, delivered the following opinion:

It is conceded by plaintiff in error that according to the common law the action was properly brought, and to establish it defendant in error quotes a number of text writers and decisions. We may therefore start with this rule as established.

It is expressed in Bates on Partnership (section 746), as follows:

"In collecting claims due from the firm by action against the surviving partner the remedy is at law, and not in chancery, for the survivor has all the assets, and there is no need to apply to equity, and the creditor has no lien; and the same principles apply, as nearly as possible, that govern an action by the surviving partner to collect a claim. The surviving partner is severally liable, in all jurisdictions, whether the administrator can also be sued or not. Death severs the promise, and, though it may become joint and several by statute or decision, it is, after death, nowhere joint."

The plaintiff in error, however, contends that the rule has been changed by the Washington statute. Counsel say on pages 9 and 10 of brief:

"In Story on Partnership (section 361), it is said: 'The joint creditors of the partnership, while all partners are living and solvent, can enforce no claim against the joint effects or separate effects of the partners except by a common action at law. It is only in cases where there is a dissolution by the death or bankruptcy of one partner that the right of the joint creditors can attach as a quasi lien upon the partnership effects, as a derivative subordinate right, under and through the lien and equity of the partners.' It is our contention that it was upon this principle, and this alone, that the right of the partnership creditor to prosecute his demand against the surviving partner was originally recognized by the courts. The creditor was deemed to have an equitable right through the lien and equity of the partners to have his demand satisfied out of the copartnership estate. As the surviving partner had the entire control and power of disposition over this estate, the creditor was permitted to proceed directly against the survivor. In this state, however, a complete substitute is provided by statute for the common-law method of settling copartnership estates."

Counsel, however, do not establish their deduction by any case, and their reasoning is not satisfactory. The Washington statute does not take away the right a surviving partner has of administering the assets of the firm, but only guards it in the interests of representatives of the deceased partners, by requiring a bond, and substitutes the supervision of the probate court for a court of equity. The obligations of the surviving partner are not released, and the remedies of the creditors are not changed. If this had been the intention, surely it would have been clearly expressed, as counsel for the defendant rightly urges. "No statute," said Mr. Justice Strong in *Shaw v. Railroad Co.*, 101 U. S. 565, "is to be construed as altering the common law, further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." See, also, *Burnside v. Whitney*, 21 N. Y. 148. *Cook v. Lewis*, 36 Me. 340, and *Putnam v. Parker*, 55 Me. 235, are not opposed

to this interpretation of the Washington statute. As the statute requires a bond from the surviving partner as a condition, it follows that until he gives it he may not dispose of any part of the partnership property, nor is he entitled to its possession, as respectively declared in those cases. It was decided, however, in *Strang v. Hirst*, 61 Me. 10, that after giving bond a suit for the recovery of assets must be prosecuted in the name of the surviving partners; citing *Putnam v. Parker*, *supra*.

It is not necessary to pass on the point made by defendant that there can be no reversal in this court for error in ruling on any plea in abatement other than a plea to the jurisdiction of the court. But see *Stephens v. Bank*, 111 U. S. 197, 4 Sup. Ct. 336, 337.

The judgment of the circuit court is affirmed.

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CARLISLE v. COOPER et al.

(Circuit Court of Appeals, Second Circuit. October 25, 1894.)

1. COSTS—AGAINST THE UNITED STATES.

In the absence of legislation by congress authorizing costs against the government, they cannot be imposed in any suit to which it is a party; and neither the act of June 1, 1872 (Rev. St. § 914), conforming the practice of the federal courts to that of the states where they are held, nor the act of August 1, 1888, authorizing condemnation proceedings, and making similar provision as to conformity to state practice, etc., gives such authority.

2. SAME—FOLLOWING STATE PRACTICE.

The secretary of the treasury, on behalf of the United States, instituted in the southern district of New York a suit to condemn certain lands, pursuant to the act of congress of August 1, 1888, authorizing such proceedings, and conforming the practice, etc., to that in similar proceedings in state courts. After trial, appointment of commissioners, and appraisal, it appeared that the funds appropriated by congress were insufficient to pay the award, and the suit was thereupon discontinued. The court, following the provisions of the New York condemnation law, awarded costs to the several defendants, and an allowance to an attorney appointed to represent defendants not served. *Held*, that both were unauthorized, no statute having permitted the rendition of judgment for costs against the United States in such cases, and the allowance being only recoverable in an action against the government brought conformably with an act of congress authorizing such a recovery.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was a proceeding by the secretary of the treasury of the United States for the condemnation of certain real estate in the city of New York, embraced in the block bounded by Bowling Green, Whitehall, Bridge, and State streets, and was in pursuance of the acts of congress of August 1, 1888 (25 Stat. 357); September 14, 1888 (25 Stat. 479); June 28, 1890 (26 Stat. 183); and of March 3, 1891 (26 Stat. 850). Upon the trial, judgment was given for the petitioner, and commissioners of appraisal were appointed. One year subsequent to the filing of their report, the petitioner having failed to move for

a confirmation, the proceedings were dismissed, at the instance of certain of the defendants, the judgment vacated, and an extra allowance awarded, sufficient to cover their costs and expenses herein. The secretary of the treasury brings error.

Prior to the filing of the petition in this proceeding, there was an application by the same petitioner to condemn the same land, pursuant to a special act existing in the state of New York. This application was dismissed. 45 Fed. 396.

A. B. Boardman, for plaintiff in error.

Edward Mitchell, U. S. Atty.

Wm. D. Shipman and Chas. C. Marshall, for defendants in error.

Shipman, Larocque & Choate, Anderson, Howland & Murray, J. Frederick Kernochan, and Strong & Cadwalader, for owners of lots, 2, 5, 6, 7, 15, and 16, defendants in error.

Before BROWN, Circuit Justice, and WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The plaintiff in the court below seeks by this writ of error to review a judgment of the circuit court in a suit brought to condemn certain real estate in New York City for public uses, dismissing the suit, and awarding costs and additional allowances to the several defendants, owners of different parcels of the land, against the plaintiff. He assigns error only of that part of the judgment which awards the costs and additional allowances.

The suit was brought pursuant to an act of congress of August 1, 1888, entitled "An act to authorize condemnation of land for sites of public buildings, and for other purposes." This act authorizes the secretary of the treasury, or any other officer of the government having authority to procure real estate for public uses, to acquire the same for the United States by condemnation under judicial process, and confers jurisdiction upon the circuit or district courts of the United States of the district wherein the real estate is located. Section 2 of the act provides as follows:

"The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform as near as may be to the practice, pleadings, forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding."

After the suit had proceeded to a trial upon the issues made by the answers of the several defendants, a decision that the plaintiff was entitled to the appointment of commissioners of appraisal, the appointment of commissioners, the hearing of testimony, and the filing of the report of the commissioners, it appeared that the money in the hands of the secretary of the treasury, appropriated by congress for the acquisition of the property, was insufficient to satisfy the awards reported by the commissioners. Thereupon, the defendants moved to dismiss the suit, and at the hearing of that application the plaintiff elected that the suit be discontinued and wholly dismissed

as to all the parties defendant thereto, and as to all the real estate in controversy. The court, in discontinuing and dismissing the suit, adjudged that the plaintiff pay, out of any funds in the treasury department of the United States available for such purposes, to the several defendants, certain taxable costs, together with an additional allowance of 5 per centum, as further costs, upon the amount awarded by the report of the commissioners to each defendant. The aggregate sum of the additional allowance was \$105,000. The court also adjudged that the plaintiff pay, out of any funds in the treasury department of the United States available for such purposes, the sum of \$1,000 to Arthur H. Masten, the attorney for the defendants who had not been personally served or appeared in the action. The additional allowances were made pursuant to section 3372 of the New York Code of Civil Procedure, which authorizes the court, in condemnation suits, to grant to the prevailing party "an additional allowance for costs, not exceeding five per centum upon the amount awarded." The allowance to Mr. Masten was made pursuant to sections 3363 and 3372 of the Code, which provide as follows:

"Sec. 3363. \* \* \* If a service other than personal has been made upon any defendant and he does not appear upon the presentation of the petition the court shall appoint some competent attorney to appear for him and attend to his interests in the proceeding."

"Sec. 3372. \* \* \* The court shall also direct in the final order what sum shall be paid \* \* \* to an attorney appointed by the court to attend to the interests of any defendant upon whom other than personal service of the petition and notice may have been made, and who has not appeared, for costs, expenses and counsel fee, and by whom, or out of what fund, the same shall be paid."

It is insisted for the plaintiff in error that no costs or allowances can be awarded against the government without permission of an act of congress, and that there is no such act applicable to the present case. Whether costs were properly awarded against the government, and, if so, whether the amount allowed by the circuit court was authorized by law, are questions which depend upon the effect of the act of congress of August 1, 1888. Section 721 of the United States Revised Statutes (originally section 34 of the judiciary act of 1789) has no application to the case. *U. S. v. Thompson*, 98 U. S. 486; *Ex parte Fisk*, 113 U. S. 720, 5 Sup. Ct. 724. In the absence of legislation by congress authorizing costs against the government, they cannot be imposed in any suit to which it is a party. The principle is that the sovereign power is not amenable to judgments for damages or costs without its own consent. *U. S. v. Hooe*, 3 Cranch, 73; *U. S. v. Barker*, 2 Wheat. 395; *The Antelope*, 12 Wheat. 546; *U. S. v. McLemore*, 4 How. 286; *U. S. v. Boyd*, 5 How. 29; *Reeside v. Walker*, 11 How. 272; *Briggs v. Light Boats*, 11 Allen, 157; *State v. Kinne*, 41 N. H. 238; *Collier v. Powell*, 23 Ala. 579; *U. S. v. Davis*, 4 C. C. A. 251, 54 Fed. 147. When, however, the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendants of set-offs, legal and equitable, to the extent of the demand made or property claimed, and stand, with ref-

ference to the rights of the defendants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy. The *Siren*, 7 Wall. 152. It was undoubtedly the purpose of the act of August 1, 1888, to extend to condemnation suits brought by the government the provisions of the act of June 1, 1872 (now section 914, Rev. St. U. S.), which prescribes, in effect, that in civil actions at law the circuit and district courts of the United States are to conform their practice and procedure, as near as may be, to that of the state courts in like causes in the state wherein such circuit or district courts are held. If such suits had been governed by these provisions, the act of August 1, 1888, was wholly unnecessary legislation. The act explicitly extends the provisions of the former act to government condemnation suits, and includes them in the category of causes in which the circuit and district courts of the United States are to conform their practice, as near as may be, to that prescribed for the state courts by the laws of the state in which the suit is brought. As its phraseology is industriously copied from the former act, the same meaning must be given to it. It has never been supposed that the act of June 1, 1872, was intended as a consent by congress to waive the immunity of the government from judgments for damages or costs. We have not been referred to any adjudication, nor have we found any, in which it has been held to have that effect. It was intended to remedy the inconvenience to the legal profession of having different systems of practice in the federal and the state courts in the same state. Nearly all the states had enacted codes of practice, and the common-law system of pleadings and practice which obtained in the federal courts was obnoxious to the generation of lawyers who had been educated under the codes. The inconvenience was recognized, and the statute enacted to obviate it. *Nudd v. Burrows*, 91 U. S. 441. Congress could not have supposed that its remedial legislation would permit judgments against the government for damages or costs. If any such suggestion had been made, it would have been met by the consideration that any attempt, in state codes or practice acts, to accomplish that result, would be nugatory legislation. *U. S. v. Thompson*, *supra*. These observations are equally applicable to the act of August 1, 1888.

When congress has intended to permit claims and judgments to be recovered against the United States, it has spoken in no uncertain terms. By the act of March 3, 1887, it has made provision for suits against the government of the United States and for judgments, which, as to the amount due, shall be binding and conclusive upon the parties. Section 15 of that act prescribes that, if the government of the United States shall put in issue the right of the plaintiff to recover, the court may, in its discretion, allow costs to the prevailing party. Outside of this statute, and some other statutes relating to special cases, we know of no authority which permits a judgment to be rendered against the government of the United States for costs. So far as the judgment of the circuit court attempts to impose such a liability, it is erroneous.

The allowance to a defendant, taxable by the New York Code of Civil Procedure, is, in essence and in a technical sense, an item of costs. It is treated as such by the Code provisions, and by the decisions of the courts of New York. The allowance to Mr. Masten stands upon a different footing. Unlike ordinary costs, such an allowance does not belong to the party, and is not included as a part of his judgment. The Code directs the court to appoint some competent attorney to protect the interests of the absent property owner throughout the progress of the suit, and award to such attorney such compensation as in its judgment may seem proper. The property owner does not become responsible for compensation, and the allowance is not an indemnity to him for his expenses. The allowance made to Mr. Masten to compensate him for services rendered as an officer of the court may be the basis of a recovery in a suit brought pursuant to the act of March 3, 1887. But a judgment for a money recovery can only be obtained against the government of the United States in a suit instituted conformably with a statute of congress which authorizes such a recovery. The judgment is reversed, and the suit remitted to the circuit court, with instructions to modify the judgment by striking out all the costs and allowances therein awarded.

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#### HUNTINGTON v. SAUNDERS.

(Circuit Court, D. Massachusetts. November 20, 1894.)

No. 444.

1. **BANKRUPTCY—SUPERVISORY POWER OF CIRCUIT COURT—PROCEEDINGS FOR DISCHARGE.**

On a petition to a circuit court, under Rev. St. § 4986, for revision of orders of a district court dismissing a creditor's specifications of objection to the discharge of a bankrupt, and granting the discharge, the circuit court has no power to correct mere irregularities in the proceedings in the district court; and if the partial record presented does not enable the circuit court to determine whether, on the whole case, the creditor is entitled to have his specifications considered, or whether the bankrupt is not entitled to a discharge, it offers nothing proper for consideration.

2. **SAME—GRANTING DISCHARGE—REGISTER'S CERTIFICATE OF CONFORMITY.**

Under Rev. St. § 5114, which requires, as a prerequisite to the discharge of a bankrupt, that it shall appear to the court that he has in all things conformed to his duty under the statute, the register's certificate of such conformity is not essential to a discharge.

3. **SAME—FAILURE TO SUBMIT TO EXAMINATION.**

That the record presented to the circuit court, on a petition for revision of an order granting a bankrupt's discharge, shows that there were orders for the examination of the bankrupt and his wife, but does not show that they were examined, or that the bankrupt was unable to procure the attendance of his wife, raises no sufficient presumption, in the absence of a full presentation of the facts, of a failure by the bankrupt to conform to his duty under the statute, which, under Rev. St. § 5114, should prevent his discharge.

Petition for Revision of Orders of the District Court of the United States for the District of Massachusetts, in Bankruptcy.

The petition was filed by James Huntington, a creditor having proved his claim, in the matter of William A. Saunders, a bankrupt, and was as follows:

(1) Respectfully represents James Huntington, of Cambridge, in said district, a creditor, having proved his claim in said bankruptcy, that on October 1, 1875, said Saunders was adjudged bankrupt by the district court for said district on a petition of creditors filed July 13, 1875; and, in due course of proceedings thereon, unsecured debts to the amount of three hundred and twenty thousand dollars were proved against his estate, and Francis J. Parker, of Newton, Richard J. Monks, of Boston, in said district, and this petitioner, were duly appointed assignees, and accepted that trust.

(2) Before his failure, in April, 1875, the bankrupt had been for many years doing a large business, and had in his possession a very large estate, and, after he failed and retired to his house, creditors were quieted by the assurance that their claims would be paid, so that some months elapsed before bankruptcy proceedings ensued, and the investigations of the assignees could be commenced; and this time was used by the bankrupt, with the assistance of numerous agents and attorneys, in concealing the estate, and disposing of the same to the prejudice of the creditors, but no payments were made to them, and the bankrupt disclosed a very small quantity of property to the assignees, of less than five thousand dollars in amount, and the assignees afterwards recovered about twenty-five thousand dollars, and the amount of all dividends to creditors was less than seven per cent. on the debts proved. Petitioner believes that a much larger amount of assets was concealed from the assignees, and not recovered, for want of better information.

(3) From the time of his failure, in April, 1875, the bankrupt remained for more than fifteen years in and about his house, giving no information or assistance to the assignees regarding the discovery and adjustment of his property and affairs, and was pretending continual sickness, while the shifting of funds and real estate and securities was carried on for more effectual concealment; and when, on petition of the assignees, filed March 1, 1876, he was required to appear for examination before the register having charge of the case, he did not appear at the time fixed therefor, or offer to appear at any other time, and no reason for his absence was shown; and when the assignees again applied for such examination, in November, 1880, he sent a physician's certificate to show that he was not then in condition to appear, but did not offer to appear at any other time, and has never been examined or given any information whatever about his estate, and has not shown his books or papers used in his business.

(4) In September, 1876, Mary P. Saunders, the wife of said bankrupt, was duly ordered and summoned to appear before said register for examination in regard to the estate in bankruptcy, but did not appear, and on the return of a second summons by the marshal she did not so appear; and though it appears by the record that she was sworn for examination on February 7, 1877, she did not appear for examination as required, and the bankrupt did not at any time show that he was unable to procure her attendance.

(5) The bankrupt applied for a discharge by a petition filed July 19, 1876, and notice thereon was given, returnable May 25, 1877; and this petitioner objected to the granting of a discharge, and on June 4, 1877, filed in court written specifications of his objections, to which no exception was taken for either form or substance, and the same were duly referred to said register; and at several hearings thereof before the register, the bankrupt being there represented by counsel, much testimony and documentary evidence was offered by this petitioner, and admitted, in support of said specifications, but no counter evidence was offered by the bankrupt; and the matter was argued by counsel, and the hearing was duly closed in the year 1878, but no report has been made thereon by the register to the court.

(6) The said specifications of objection to the discharge, filed as aforesaid, a copy whereof is hereto annexed, were true in fact, and most of them were fully proved, and from the filing thereof the bankrupt regarded his petition

for discharge as hopeless, and thereafter, by counsel, consented to several judgments in favor of this petitioner in the state courts of Massachusetts, and otherwise abandoned his petition for discharge; and the delay of said register in filing his report on the objections thereto was caused, not by anything done or omitted by this petitioner, but by reason of the consent and according to the request of the bankrupt.

(7) On December 19, 1893, the bankrupt made an application to the court of bankruptcy, praying that the said specifications of objection be dismissed, or that the same be set down for trial at an early day; and on December 23, 1893, this application was brought to the attention of that court, in the presence of counsel for both parties, and the court summarily, without hearing any evidence or consulting the register, ordered that the specifications be dismissed for want of prosecution, leaving the petition for discharge pending. And thereupon this petitioner filed an application to the court of bankruptcy, praying that the petition for discharge, being the other part of the same proceeding, be also dismissed; but when this application was, on December 30, 1893, in presence of counsel for both parties, brought to the attention of the court, it was refused and summarily ordered to be dismissed without hearing any evidence; and, without appointing any time for trial or hearing of the matter, the discharge of the bankrupt was forthwith ordered to be granted by the court, notwithstanding the certificate of the register made on said December 30, 1893, a copy whereof is hereto annexed, and notwithstanding the several objections to such discharge set forth in this petition.

Wherefore, your petitioner, feeling aggrieved by the above-mentioned orders or decrees of said district court, which he believes to be erroneous, prays that the same may be revised and reversed by this court.

Annexed to the petition were a copy of the specifications of objections to the discharge, filed by petitioner, referred to in the petition, and a copy of the certificate of the register, also referred to therein, which was as follows:

At Boston, in said district, on the 30th day of December, 1893, I, S. Lothrop Thordike, register in bankruptcy, hereby certify that said bankrupt has in all things conformed to his duty under the acts of congress relating to bankruptcy, and appears to be entitled, under the provisions thereof, to receive a discharge.

Excepting, however, that my record does not show that the bankrupt submitted to examination, but does show that on November 13, 1890, a physician's certificate was shown that he was not in condition to be examined.

Excepting, also, that the record shows that the bankrupt's wife, though summoned, did not appear for examination, and it does not show that the bankrupt was unable to procure her attendance.

Excepting, also, that the question is referred to the judge, whether certain evidence in the case, tending to show grounds for withholding a discharge, is still open for consideration, although the objections under which that evidence was taken have been dismissed for want of prosecution.

The answer of the bankrupt to the petition for revision was as follows:

(1) The bankrupt admits the allegations of paragraph one (1) of said petition.

(2) The bankrupt denies the allegations of paragraphs two (2), three (3), four (4), five (5), six (6), seven (7) of said petition, except as follows: That is to say, he admits that he applied for a discharge, as set forth in paragraph No. five (5) of said petition; that notice thereon was given, returnable at the time therein stated; and that specifications of objection were filed as therein stated. He also admits that on December 19, 1893, he made application to the district court in bankruptcy, praying that said specifications might be dismissed, and that the same were dismissed on notice and hearing by said district court; and that on December 30, 1893, the discharge of the bankrupt was granted by said court; but this respondent says that said pe-



tition for discharge was granted after due hearing by said district court, at which evidence was heard by said court, and said bankrupt and his wife were duly sworn and testified.

And this respondent further says that all the proceedings of said district court in relation to the discharge of said bankrupt were in due form of law, and in conformity with the acts of congress relating to bankruptcy, and that the petitioner, in his said petition, has shown no cause why the same should be revised or reversed by this court.

The petitioner filed a reply to the answer, joining issue thereon, and thereupon proofs were taken.

George W. Parke, for petitioner.

William B. Durant, for Saunders.

PUTNAM, Circuit Judge. It is conceded that the evidence available in the district court touching the merits of the objections to the bankrupt's discharge has not been laid before this court, nor has like evidence been taken here *de novo*. Only such portions have been produced as are supposed to throw light on the seventh paragraph of the revisory petition addressed to us, and on some other propositions, which we will refer to further on. The seventh paragraph is as follows:

"On December 19, 1893, the bankrupt made an application to the court of bankruptcy, praying that the said specifications of objection be dismissed, or that the same be set down for trial at an early day; and on December 23, 1893, this application was brought to the attention of that court, in the presence of counsel for both parties, and the court summarily, without hearing any evidence or consulting the register, ordered that the specifications be dismissed for want of prosecution, leaving the petition for discharge pending. And thereupon this petitioner filed an application to the court of bankruptcy, praying that the petition for discharge, being the other part of the same proceeding, be also dismissed; but when this application was, on December 30, 1893, in the presence of both parties, brought to the attention of the court, it was refused, and summarily ordered to be dismissed, without hearing any evidence; and, without appointing any time for trial or hearing of the matter, the discharge of the bankrupt was forthwith ordered to be granted by the court, notwithstanding the certificate of the register made on December 30, 1893, a copy whereof is hereto annexed, and notwithstanding the several objections to such discharge set forth in this petition."

For aught that appears in this proposition, the conclusion granting a discharge may have been correct, though reached by an irregular course of proceedings. The allegations of this paragraph, so far as essential to this hearing, are disputed; and thus an issue of fact is raised, which is not, and cannot be, determined by an inspection of the records of the district court, and upon which the appellant has offered for our consideration the testimony of witnesses, asking us to resort to parol proof for its determination. Clearly, the revisory power given by section 4986 of the Revised Statutes does not go to this extent. It does not give this court the power, which may be exercised on an appeal in equity or a writ of error, of revising and correcting mere irregularities arising in the course of proceedings in the district court, nor any method of enforcing any orders or directions in that behalf. We have no power, under the section in question, except to "hear and determine the case" itself,

either on the proofs in the district court, or, if allowable, on such additional new proofs as may be submitted to us. Nor is it permissible to split up the proceeding in the district court, and offer it to us for revision piecemeal, as the appellant attempts to do. Our jurisdiction is limited to the result reached by the district court, or, at the most, to the determination of matters which appear by the record of that court to have been determined or done by it. In this case this power is limited to revision of the order granting a discharge, and perhaps of the order dismissing the specifications. The record presented does not enable us to determine whether, on the whole case, the appellant is entitled to have his specifications considered, or whether the bankrupt is or not entitled to a discharge, and therefore it offers nothing proper for our consideration.

But it is claimed that it appears of record that the bankrupt is not entitled to his discharge, because—First, there is no proper certificate of regularity from the register; second, because the bankrupt did not submit to an examination; and, third, because he did not secure the examination of his wife, as provided by section 5088 of the Revised Statutes.

Only the second of these was covered by the creditor's specifications of the grounds of opposition to the discharge. But, waiving that fact, all three resolve themselves into, and are disposed of by, the general considerations which we have already stated. There is no rule of law which makes the register's certificate of regularity a prerequisite to a discharge. Although section 5114 of the Revised Statutes requires, as such prerequisite, that it shall appear to the court that the bankrupt has in all things complied with his duty under the statutes, yet to make a register's certificate essential would turn over the administration of justice to a subordinate official, who is not even a constitutional judicial officer. Even the duty to require a last examination, apparently imposed by section 4998 of the Revised Statutes, does not arise without an order. *U. S. v. Clark*, Fed. Cas. No. 14,806. The court has the undoubted power to satisfy itself without a register's certificate, and even in the face of a hostile one. What the district court did in this particular is a part of its own mere course of proceedings, which does not appear of record, and over which we have no power. The expressions in *Bellamy's Case*, 1 Ben. 426, 430, Fed. Cas. No. 1,267, and in other cases of like character, instead of impugning this position, support it. It appears that in the Southern district of the Second circuit there were rules of the district court requiring a certificate of regularity, and these also made the return of all papers by the register a prerequisite to a discharge. It is absurd to suppose that a loss of papers by the register would perpetually bar the discharge of an innocent bankrupt; and, as both prerequisites stand on the same basis, it is plain that they were required only to aid the court, and that, like other rules of like character, they must yield when, under special circumstances, they stand in the way of the law.

The appellant claims that the record shows that there were orders for the examination of the bankrupt and his wife, but does not show

that they were examined, or that the bankrupt was unable to procure the attendance of his wife under section 5088 of the Revised Statutes, and that this raises a presumption, which cannot be met as the case stands, arising against the bankrupt under section 5114, already referred to. But there is no rule of law that all the facts touching these orders which might have been shown to the district court should appear of record, and the presumption the appellant suggests is contrary to all experience in the practical administration of justice. Non constat the district court did not know or find that neither the bankrupt nor his wife was duly notified to appear for examination, or that they were unable to appear through sickness or some other misfortune, or that they appeared and the party who applied for the examination did not appear.

It is to be borne in mind that, as this record comes to us, we are not considering what we might or should find on a full presentation of facts, but what the district court might in legal possibility have found. Therefore, all these propositions come back to the considerations which apply to the seventh paragraph of the petition for revision.

The petition is dismissed, with costs.

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**In re KEARNS, Collector.**

(District Court, W. D. Pennsylvania. November 1, 1894.)

**OLEOMARGARINE—INSPECTION OF BOOKS OF WHOLESALE DEALER.**

A collector of internal revenue has no authority, under section 3173, Rev. St., to require a wholesale dealer in oleomargarine to produce his books for examination and inspection.

This was a petition by E. P. Kearns, collector of internal revenue for the Twenty-Third district of Pennsylvania, praying for an attachment against C. B. Clark for an alleged contempt in failing to comply with a summons issued to him by the collector, and requiring him to produce for inspection the books, etc., used by him as resident manager for the firm of Armour & Co., wholesale dealers in oleomargarine.

Harry Alvin Hall, U. S. Atty.

D. T. Watson and L. B. D. Reese, for defendants.

**BUFFINGTON, District Judge.** During the years 1893 and 1894, Armour & Co. paid an annual tax to the United States of \$480, as wholesale dealers in oleomargarine, and as such made monthly returns to the government of the amounts of their sales, with the names of the purchasers. On October 18, 1894, E. P. Kearns, Esq., collector of internal revenue for the Twenty-Third district of Pennsylvania, being of opinion such returns were false and fraudulent, summoned C. B. Clark, resident manager of said firm, to appear before him to testify "in a certain case arising under the internal revenue laws, depending before me, wherein Armour & Co., wholesale dealers in oleomargarine, who were required as such by law

to render to me certain monthly returns of objects subject to tax, delivered to me returns for the months in the year 1893 and the year 1894, which in my opinion are false and fraudulent," and also to produce "each and every ledger, day book, cash book, blotter, sales book, journal, dray ticket, and other memoranda used by you or in connection with your business as manager for Armour & Co., as wholesale dealers in oleomargarine for and during the years 1893 and 1894, relating to the subject-matter of the said investigation." Clark failed to comply with this order, whereupon the collector presented a petition to the judge of the district court, praying for an attachment against him as for a contempt. To the rule issued thereon, Clark made answer expressly denying that the returns made by Armour & Co. were false and fraudulent, and contending that Armour & Co. have kept all books required by law, and that these are open to the inspection of the revenue officers; that they object to producing their private books, showing rates of sales, as an invasion of private rights; that the collector has no authority "to compel the production of the private books of wholesale dealers in oleomargarine in a proceeding like the one at bar"; that Armour & Co. have paid all their taxes as wholesale dealers, and the taxes on all oleomargarine sold by them have also been paid; that the present proceeding was not to settle or fix any tax against them, but "that he [the collector] and his assistants may search those books to attempt to obtain evidence to be used against third parties in proceedings against them, or some of them, for the sale of oleomargarine in alleged disregard of the acts of congress"; and, lastly, if the allegations of the collector were true, and the returns were false and fraudulent, Armour & Co. would be subject to fine and forfeiture, and, if the collector is given power by act of congress to compel them to produce papers, it is in violation of the fourth amendment to the constitution. The matter was heard on petition and answer, no proofs being submitted. It is not contended that Armour & Co. have not paid all taxes assessed against them, or that they have sold oleomargarine upon which the taxes were not paid, but it is stated at bar by the counsel for the government that the collector suspects the real names of purchasers of oleomargarine from them have not been given by Armour & Co. in their monthly returns, and as a result the government has been unable to collect taxes from persons buying from them, and afterwards retailing it; that the purpose of the returns from wholesalers is to furnish this information; and he asserts the collector's rights to inspect the respondents' business books to ascertain these facts, and the present proceeding is had to compel the production of the books for that purpose.

The question presented is one of grave moment. It is earnestly contended that such an inspection is lawful; that it is necessary for the efficient administration of the revenue service, and the collection by the government of its just dues; that only dishonest men will object to its allowance: that the honest one has nothing to fear from such an examination. But this is begging the entire question. Books and papers are the private and absolute prop-

erty of the owner, or, as Lord Camden said in *Entick v. Carrington*, 19 How. St. Tr. 1066:

"Papers are the owner's goods and chattels. They are his dearest property, and are so far from enduring a seizure that they will hardly bear an inspection."

In *Re Pacific Railway Commission*, 32 Fed. 241, Justice Field said:

"Of all the rights of the citizen, few are of greater importance, or more essential to his peace and happiness, than the right of personal security; and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without enjoyment of this right, all others would lose half their value."

So highly was this right to one's papers esteemed that, within certain limits, it was preserved from legislative action in the constitution,—the fourth amendment,—"the right of the people to be secured in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." The exclusive possession of them is reckoned one of the absolute rights of the citizen. Such possession is not to be invaded, save for proper cause; and any individual, public or private, who seeks to invade it, must have the warrant of legal authority for so doing. If no such warrant can be found, the silence of the books is an unanswerable argument against the validity of the claim. Nor should such claim rest upon mere implication or analogies. The absolute rights of the citizen remain absolute until the law, by as absolute and certain provisions, abridges those rights.

Applying these fundamental principles to the case in hand, we may say that the books in question are the private property of the respondents; and no one can take them from their custody, or has a right to inspect them, against their consent, without express warrant of law, and the burden of showing such a right rests on him who claims it. Does such right exist in the collector in the present case? The contention of the government is that by section 3 of the act of 2d August, 1886 (24 Stat. 209), a special tax was imposed on wholesale dealers in oleomargarine; that section 41 of the act of 1st October, 1890, provided for their keeping such books and making such returns as might be prescribed by the commissioner of internal revenue with the approval of the secretary of the treasury; that such regulations were prescribed 12th March, 1891 (Internal Revenue Regulations, ser. 7, No. 9, p. 44), as follows:

"Wholesale dealers in oleomargarine will make monthly returns on form 217, showing in detail the serial numbers of packages and number of pounds of oleomargarine received direct from manufacturers and other wholesale dealers, also the quantity disposed of, with the name and address of each person to whom sold or returned."

It is then contended: That wholesale dealers in oleomargarine, making these returns, are subject to the provisions of section 3173, Rev. St., which provides, in part, as follows:

"And if any person on being notified or required as aforesaid shall neglect or refuse to render such list or return within the time required as aforesaid, or whenever any person who is required to deliver a monthly or other return of objects subject to tax fails to do so at the time required, or delivers any

return, which, in the opinion of the collector, is false or fraudulent, or contains any undervaluation or understatement, it shall be lawful for the collector to summon such person or any other person, having possession, custody or care of books of account containing entries relating to the business of such person, or any other person he may deem proper, to appear before him and produce such books at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects liable to tax or the returns thereof."

That sections 3174, 3175, Rev. St., provide for the service of such summons, and for the application for an attachment to the district judge, in case of a refusal by the person summoned to comply, and that the foregoing constitute a warrant for the action of the collector.

The determination of the present case, in our view, involves three questions (for it is to be noted that Armour & Co. do not claim exemption from the production of their books by reason of the fact that they would tend to criminate them), as follows: First. Does section 3173, Rev. St., apply to wholesale dealers in oleomargarine? Second. If so, is the monthly return required of such dealer, viz. one "showing in detail the serial numbers of packages and number of pounds of oleomargarine received direct from manufacturers and other wholesale dealers, also the quantity disposed of, with the name and address of each person to whom sold or returned," such a one as is contemplated by said section, which provides, "Whenever any person who is required to deliver a monthly return or other return of objects subject to tax fails to do so at the time required, or delivers any return which, in the opinion of the collector, is false or fraudulent or contains an undervaluation or understatement, it shall be lawful," etc.? Third. Do the averments of the petition, with the denials of the answer and the absence of all testimony, afford the satisfactory proof required by section 3175, Rev. St., to warrant the grant of an attachment?

When the act of 30th June, 1864, of which section 3173 is a part, was passed, oleomargarine was not a commercial commodity, or recognized as a subject of possible taxation, if indeed it even existed at that time. It was first made subject to special tax by the act of 2d August, 1886 (24 Stat. 209), which was "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine." This act was not a supplement or amendment to other revenue legislation, but was a distinct and independent one. It created a complete and comprehensive system in itself, and, by its various sections, regulated the taxation, manufacturing, selling at wholesale and retail, the import and export, of oleomargarine; provided for its analysis; and fixed punishments for violation of its provisions. By section 3 thereof, certain general provisions of the revenue system were extended to the new subject of taxation. After enumerating the persons subject to tax it provides:

"And sections 3232, 3233, 3234, 3235, 3236, 3237, 3238, 3239, 3240, 3241 and 3243 of the Revised Statutes of the United States are, so far as applicable, made to extend to and include and apply to the special taxes imposed by this section and to the persons upon whom they are imposed."

The incorporation of these sections in the oleomargarine law and the omission of section 3173, under which the present proceeding is justified, as indeed also of all the provisions of the act of 30th June, 1864, is highly significant. It is contended that that section is broad and comprehensive in terms, and was meant to apply to all special taxes then existing, or that might thereafter be imposed. Whatever force such contention would have in reference to other laws and other subjects of taxation, it cannot avail when applied to the act of 2d August, 1886. Congress has precluded it by selecting certain special sections, as comprehensive as section 3173, themselves part of the general revenue system, and extending their provisions, and no others, to this new object of taxation. If congress deemed it necessary, to specify such sections of the revenue system, to extend them to oleomargarine, how can its omission to specify and extend section 3173 be considered other than a deliberate declaration that it was not extended? To say otherwise is at variance with the recognized canon of construction, "*Expressio unius est exclusio alterius.*" And that congress recognized the necessity of specifically extending section 3173 to new subjects of taxation imposed by statutes, not supplemental, when it desired to do so, is shown by the amendment of that section by section 34 of the act of 28th August, 1894 (No. 227), so as to cover the income tax imposed by that bill; an amendment, we note, which is here cited by way of illustration only.

After due consideration, we are of opinion that Rev. St. § 3173, does not apply to wholesale dealers in oleomargarine. Such being this case, a discussion of the two other questions is needless, as the present rule must be discharged. And it is so ordered.

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In re TOM YUM.

(District Court, N. D. California. November 15, 1894.)

No. 11,109.

**ADMISSION OF ALIENS TO UNITED STATES—JURISDICTION OF IMMIGRATION OFFICERS—HABEAS CORPUS.**

The provision in the sundry civil appropriation act of August 18, 1894, making the decision of an immigration or customs officer excluding an alien from admission to the United States final, unless reversed on appeal to the secretary of the treasury, does not give that officer final jurisdiction to determine that a person of Chinese descent is not a citizen of the United States, where he claims the right to admission on the ground that he is a citizen; and the question of his citizenship may be determined by the courts on writ of habeas corpus.

This was a motion to quash a writ of habeas corpus.

Chas. A. Garter, U. S. Atty., for the motion.

Lyman I. Mowry, opposed.

MORROW, District Judge. This matter comes before me on a motion to quash the writ of habeas corpus issued by this court on

October 11, 1894. The writ was sued out upon the petition of one Tom Sing, on behalf of Tom Yum, a Chinese passenger on the steamer Gaelic, from Hong Kong. It is averred in the petition for the writ that Tom Yum is unlawfully imprisoned, detained, confined, and restrained of his liberty by Capt. Pearne, master of the steamship Gaelic; that it is claimed by said master that said passenger is a subject of the emperor of China, and must not and cannot be allowed to land, under the provisions of the act of congress of May 6, 1882, entitled "An act to execute certain treaty stipulations relating to Chinese," and the acts amendatory thereof and supplemental thereto; that said passenger does not come within the restrictions of said acts, but, on the contrary, the petitioner alleges that said passenger was a resident of the United States, and departed therefrom, on the steamship Oceanic, on the 17th day of June, 1879; that said passenger is a citizen of the United States, and was born at No. 722 Dupont street, in the city and county of San Francisco, state of California; that he applied to the collector of the port for a landing, but said application was denied; wherefore, the petitioner prays that a writ of habeas corpus may issue in behalf of said Tom Yum, to test the legality of the latter's detention. The writ having issued, the district attorney intervened on behalf of the United States, opposing the discharge of Tom Yum, and filed subsequently the motion to quash the writ, which is the motion now under consideration.

The legal propositions raised by this motion involve the interpretation of a provision contained in the act entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30th, 1895, and for other purposes," approved August 18, 1894 (28 Stat. p. 390). The provision reads as follows:

"In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the secretary of the treasury."

The constitutionality of the provision, so far as it empowers the collector of the port, as the appropriate customs officer, to pass upon the right of an alien to come into this country, is not denied, nor, indeed, is the question open to any doubt. A similar provision is to be found in section 8 of the act of March 3, 1891 (26 Stat. 1085), which excludes from admission into the United States certain classes of aliens, and invests the inspection officers and their assistants with exclusive power to pass upon the right of aliens to enter this country, subject to an appeal to the superintendent of immigration, whose decision is final, unless reviewed by the secretary of the treasury. The validity of this provision was considered by the supreme court in the case of *Nishimura Ekiu v. U. S.*, 142 U. S. 651, 12 Sup. Ct. 336. Mr. Justice Gray, in delivering the opinion of the court in that case, said:

"The supervision of the admission of aliens into the United States may be intrusted by congress either to the department of state, having the general



management of foreign relations, or to the department of the treasury, charged with the enforcement of the laws regulating foreign commerce; and congress has often passed acts forbidding the immigration of particular classes of foreigners, and has committed the execution of these acts to the secretary of the treasury, to collectors of customs, and to inspectors acting under their authority. See, for instance, Act March 3, 1875, c. 141 (18 Stat. 477); Act Aug. 3, 1882, c. 376 (22 Stat. 214); Act Feb. 23, 1887, c. 220 (24 Stat. 414); Act Oct. 19, 1888, c. 1210 (25 Stat. 566),—as well as the various acts for the exclusion of the Chinese. An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful. *Chew Heong v. U. S.*, 112 U. S. 536, 5 Sup. Ct. 255; *U. S. v. Jung Ah Lung*, 124 U. S. 621, 8 Sup. Ct. 663; *Wan Shing v. U. S.*, 140 U. S. 424, 11 Sup. Ct. 729; *Lau Ow Bew*, Petitioner, 141 U. S. 583, 12 Sup. Ct. 43. And congress may, if it sees fit, as in the statutes in question in *U. S. v. Jung Ah Lung*, just cited, authorize the courts to investigate and ascertain the facts on which the right to land depends. But, on the other hand, the final determination of those facts may be intrusted by congress to executive officers; and in such a case, as in all others in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine, or controvert the sufficiency of, the evidence on which he acted. *Martin v. Mott*, 12 Wheat. 19, 31; *Railroad Co. v. Stimpson*, 14 Pet. 448, 458; *Benson v. McMahon*, 127 U. S. 457, 8 Sup. Ct. 1240; *In re Luis Oteiza y Cortes*, 136 U. S. 330, 10 Sup. Ct. 1031. It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law. *Murray v. Improvement Co.*, 18 How. 272; *Hilton v. Merritt*, 110 U. S. 97, 3 Sup. Ct. 548."

In accordance with this doctrine, it is contended by the district attorney that the writ of habeas corpus cannot be resorted to in this case, for the reason that the collector of the port, by virtue of his authority to pass upon the right of an alien to enter this country, is vested with the authority of passing upon the question of nativity and citizenship of a person of Chinese descent, and, that being so, that the only method of review provided for is by an appeal to the secretary of the treasury; in other words, it is claimed that the writ of habeas corpus cannot be availed of to review the decision of the collector in this matter, because the latter is invested with the authority of determining whether a Chinese person seeking admission into the United States is an alien, or a citizen of this country. It is well settled that the writ of habeas corpus cannot be used to review, as upon a writ of error, the decision of a judicial or quasi-judicial tribunal or officer lawfully constituted by law, and acting within the proper confines of his jurisdiction; and, on the other hand, it is equally certain that the writ may be resorted to—in fact, that is one of its great functions—to inquire into the jurisdiction exercised by such tribunal or officer, for the purpose of ascertaining whether such power has been kept within its legal limits, and the proceedings therein have been according to law. The scope of the writ of habeas corpus, in proceedings similar to these, was succinctly and clearly

stated by Mr. Justice Blatchford in *Re Luis Oteiza y Cortes*, 136 U. S. 330, 10 Sup. Ct. 1031, where the supreme court had under consideration the authority of a commissioner in an extradition case. It was sought to have the supreme court of the United States review the decision of the commissioner. The learned justice said:

"A writ of habeas corpus, in a case of extradition, cannot perform the office of a writ of error. If the commissioner has jurisdiction of the subject-matter and of the person of the accused, and the offense charged is within the terms of a treaty of extradition, and the commissioner, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused, for the purpose of extradition, such decision of the commissioner cannot be reviewed by a circuit court or by this court on habeas corpus, either originally or by appeal."

The following authorities are all to the same effect: In *re Day*, 27 Fed. 678, 681; In *re Cummings*, 32 Fed. 75; In *re Dietze*, 40 Fed. 324; In *re Vito Rullo*, 43 Fed. 62; *Benson v. McMahon*, 127 U. S. 457, 8 Sup. Ct. 1240; and the case of *Nishimura Ekiu v. U. S.*, *supra*.

But it will be observed that the provision of the statute in question refers only to cases where aliens are excluded from admission into the United States under any law or treaty, and it is with respect to them that the decision of the appropriate immigration or customs officer, if adverse to their admission, is final, unless reversed on appeal to the secretary of the treasury. If, for instance, the Chinese person is an alien, but applies for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, the determination of this question will rest exclusively with the appropriate immigration or customs officer, and his decision will be final, unless reversed on appeal by the secretary of the treasury. So with respect to aliens, concerning whom questions arise as to whether they have been excluded from admission into the United States under any of the acts relating to immigration; the decision of the immigration or customs officer, in such cases, is made final, subject only to an appeal to the secretary of the treasury. But does it follow that these officers have the exclusive authority of determining the preliminary question whether a person coming into the United States is a citizen or an alien? Had the provision under consideration been as broad in its terms as that contained in the act of September 18, 1888, entitled "An act to prohibit the coming of Chinese laborers to the United States," the contention of the district attorney would have great force. It was there provided, in section 12 (25 Stat. 478):

"That before any Chinese passengers are landed from any such vessel, the collector, or his deputy, shall proceed to examine such passengers, comparing the certificates with the list and with the passengers; and no passenger shall be allowed to land in the United States from such vessel in violation of law; and the collector shall in person decide all questions in dispute with regard to the right of any Chinese passenger to enter the United States, and his decision shall be subject to review by the secretary of the treasury, and not otherwise."

This act never went into effect, for the reason that the Chinese government refused to ratify the then pending treaty with the United

States, upon which the force of the act as law depended; but it serves to show that congress had in that act the purpose of conferring upon the collector the authority of deciding all questions in dispute with regard to the right of any Chinese passenger to enter the United States, and this purpose has not been so clearly or definitely expressed in the act under consideration. That the present provision, from the language used, relates to "aliens" only, and has nothing whatever to do with "citizens," is beyond question. But, as before stated, this must not be construed to imply that the collector is divested of all authority over Chinese passengers. On the contrary, he has, under this law, undoubted jurisdiction over aliens; his authority to pass upon their right to enter this country is clear and unmistakable, and his decisions, as to them, conclusive upon the courts. This jurisdiction includes the exclusive right to determine whether a Chinese passenger is a laborer or a merchant, according to the requirements of section 2 of the act of November 3, 1893 (28 Stat. 7), and to pass upon the qualifications of Chinese persons claiming to be diplomatic officers, etc. In short, his authority to examine and determine the qualifications of aliens of the Chinese race to enter the United States is complete, and, subject to an appeal to the secretary of the treasury, is conclusive; and the courts are in duty bound to give full effect to the jurisdiction conferred upon the collector, and his decisions, so far as they concern aliens, will not be disturbed or interfered with. The question is, however, one of an entirely different complexion with regard to citizens, or Chinese passengers claiming to be citizens, of the United States. The latter are not included, either expressly or by implication, in the present act. As to them, the collector is without authority to finally and conclusively pass upon their right to come into this country. Precisely the same question arose in *Re Panzara*, 51 Fed. 275. In that matter, an application was made by Angelo Panzara and others for a writ of habeas corpus, it being alleged that they were illegally detained by the master of the ship *Cheribon*. The master produced the petitioners in accordance with the writ, and made return that:

"The above-named persons had been placed in his custody as master of said steamship, and on board thereof, by the direction of the superintendent of immigration of the port of New York, to be sent back to Italy."

To this return the petitioners made answer that they were not alien immigrants, but were residents of the United States, where they had acquired a domicile, and that when returning to their respective homes in the United States, from a voyage to Italy, undertaken by them with the intention of coming back to the United States, they were unlawfully detained, and directed to be sent back to Italy, by the superintendent of immigration. The questions raised involved the interpretation of the term "alien immigrants," and the extent of the jurisdiction of the superintendent of immigration under the act of March 3, 1891, prohibiting the entering of certain classes of aliens, viz. idiots, insane persons, paupers, or persons likely to become a public charge; persons suffering from a loathsome or

a dangerous contagious disease; persons who have been convicted of a felony or other infamous crime, or misdemeanor involving moral turpitude, etc. Judge Benedict, in passing upon the question of the jurisdiction of the superintendent of immigration under the provisions of that act, decided that the power of the federal superintendent of immigration to return passengers who were aliens was confined to "alien immigrants" alone, and did not extend to residents of the United States, who had acquired a domicile therein, and had departed from this country with the intention of returning; nor, the learned judge held, did the jurisdiction of passing upon the right of "alien immigrants" to enter this country include the further power of finally passing upon the question whether a passenger was an "alien immigrant" or a "resident," subject only to an appeal to the secretary of the treasury, as provided by that act. In referring to the jurisdictional character of that question, the judge said:

"The statute conferring power upon the superintendent of Immigration to order the return of persons arriving in the United States from foreign countries confines his power to alien immigrants. He has no jurisdiction to direct the return to a foreign country of a person not an alien immigrant. The question whether the petitioner is an alien immigrant is therefore a jurisdictional one, and the finding of the commissioner upon that question is not conclusive upon the courts. That question, when presented to the court by a petition for habeas corpus, must be decided by the court upon the evidence presented to the court in such proceeding."

This statement of the law is peculiarly applicable to the present case, and further citation of authority would seem to be unnecessary. I am of the opinion, therefore, that the collector of the port does not possess the power of finally and conclusively passing upon the jurisdictional question whether a Chinese person is an alien or a citizen, subject only to an appeal to the secretary of the treasury. The determination of the question in the matter now before the court, viz. whether Tom Yum is a citizen, as he claims to be, or is an alien, is the very fact upon which the jurisdiction of the collector depends. If he is an alien, then the collector has undoubted and complete jurisdiction, but, if he is a citizen, the authority vested in him by the provision, in unmistakable terms, does not empower him to finally pass upon the latter's right to come into this country. It is difficult to see, therefore, how his decision upon a fact on which his very jurisdiction rests can be deemed conclusive upon this court. The authority claimed for the collector is certainly not expressly conferred on him by the terms of the provision in question, nor do I think that the language therein used can be susceptible of such an interpretation of his jurisdiction. The motion to quash will therefore be denied.

THE BLAIR CAMERA CO. v. THE EASTMAN CO.

(Circuit Court of Appeals, First Circuit. October 31, 1894.)

No. 105.

This was a suit by The Eastman Company against The Blair Camera Company for infringement of a patent. A decree was rendered for complainant; the circuit court holding that the defendant's apparatus infringes the 3d, 26th, 29th, 30th, 31st, and 32d claims of letters patent No. 317,049, granted to Walker and Eastman, May 5, 1885. 62 Fed. 400. Defendant appeals.

John L. S. Roberts (Causten Browne, of counsel), for appellant.  
M. B. Philipp and Chauncey Smith, for appellee.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

PER CURIAM. We fully concur with the reasoning and conclusions of the judge who sat in the circuit court. We refer to the opinion in *Shute v. Sewing Mach. Co.*, 64 Fed. 368, passed down this day, touching modifications of the decree and the order as to costs. The decree below will be modified so as to be expressly limited to the claims specifically passed on by the circuit court, and as thus modified is affirmed. Neither party will recover any costs of appeal.

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EDISON ELECTRIC LIGHT CO. et al. v. CITIZENS' ELECTRIC LIGHT,  
HEAT & POWER CO.

(Circuit Court, E. D. Pennsylvania. June 29, 1894.)

No. 26.

1. PATENTS—INFRINGEMENT BY USER.

The purchaser of a patented article is not liable as an infringer where he purchased it from one having a legal right to sell it. *Adams v. Burke*, 17 Wall. 453, and *Hobble v. Jennison*, 13 Sup. Ct. 879, 149 U. S. 361, followed.

2. SAME—PRELIMINARY INJUNCTION—DECISION IN ANOTHER CIRCUIT.

A decision by another circuit court that the person from whom the present defendant purchased the alleged infringing articles had a legal right to sell them is sufficient ground for denying a motion for a preliminary injunction.

This was a bill by the Edison Electric Light Company and others against the Citizens' Electric Light, Heat & Power Company for infringement of letters patent No. 223,898.

Dyer & Seely, C. E. Mitchell, and S. B. Huey, for complainants.  
J. L. Steinmetz, for defendant.

DALLAS, Circuit Judge. This is a motion for a preliminary injunction to restrain the defendant from using certain electric lamps in alleged violation of the rights of the complainants, under what is known as the "Edison Patent for Incandescent Lamps." The substantial question is as to the weight which should, upon this application, be accorded to the action of the circuit court for the Northern district of Ohio, on certain motions made in that court for, and to dissolve, preliminary injunctions in suits upon the same patent. In disposing of the motions referred to, Judge Ricks delivered three opinions, which have been discussed at length by counsel and

attentively read by me; but I do not deem it necessary or advisable to express any opinion of my own upon the subject with which they deal. It is enough to say that he has decided that the lamps now involved could be lawfully made and sold by the defendant's vendor; and under *Adams v. Burke*, 17 Wall. 453, and *Hobbie v. Jenison*, 149 U. S. 361, 13 Sup. Ct. 879, the user of a patented article is not liable as an infringer where he purchased it of a person who had a legal right to sell it. Nothing is now indicated as to the view which may be taken of this case when considered upon pleadings and proofs; but I am of opinion that, because a preliminary injunction against the maker of the lamps has been refused in the Sixth circuit, this court should not, upon interlocutory application, enjoin the use of them by a defendant who bought them from that maker. The motion for a preliminary injunction is denied.

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TRAUT & HINE MANUF'G CO. et al. v. WATERBURY BUCKLE CO.  
(Circuit Court, D. Connecticut. November 16, 1894.)

No. 820.

1. PATENT—INFRINGEMENT—PRELIMINARY INJUNCTION.

Defendant's device showed all the elements of the broadest claim of the patent to George E. Adams (No. 487,689), for a "cast-off" device for connecting and disconnecting the web and the front end of a pair of suspenders, but defendant's arrangement of parts was not wholly that of the patent, but the practical equivalent, the patentee's arrangement not being essential to the operation of his device. *Held*, that a preliminary injunction should be granted, and its operation suspended until the case be heard and disposed of by the circuit court of appeals.

2. SAME—ANTICIPATION.

An affidavit that certain exhibits, claimed to anticipate or limit the scope of the patent in suit, were conceived prior to the application, and manufactured prior to the issue of the patent, and that the exhibits were suggested to take the place of a certain imported device alleged to have been in use in this country prior to the date of the patent, is too indefinite to constitute a defense.

This was a bill in equity by the Traut & Hine Manufacturing Company and George E. Adams against the Waterbury Buckle Company for infringement of a patent. Heard on motion for preliminary injunction.

Mitchell, Hungerford & Bartlett, for complainants.  
Terry & Bronson, for respondent.

TOWNSEND, District Judge. Motion for a preliminary injunction. The patent in suit, No. 487,689, is for an improvement in garment supporters, and was applied for by the complainant George E. Adams, August 9, 1892, and granted December 6, 1892. The complainant corporation is the exclusive licensee under said patent. The complainant and defendant corporations are each large manufacturers of suspender fittings. The invention claimed covers a novel construction of the device known as a "cast-off," whereby the web and the front ends of a pair of suspenders are readily and rapidly con-

nected and disconnected. The objects of the invention are stated to be "to produce a cast-off device, through which a portion of the attaching loop may readily slide with the constant changes in position of the wearer," and "to provide an ornamental form of cast-off device which will be durable in construction and simple and convenient in operation." The combination claimed comprises oppositely pivoted back and front plates, the lower portions of each being concave,—the back member or guard tongue in order to receive and support the suspender cord, the front member in order to fit snugly over said guard tongue,—and a catch, and lip to engage said catch. The catch is described in the specification and shown in the drawings as located "at the point of junction between the concavity and the lip," which is at the center of the concavity formed by the two opposing sides when in attachment.

The claims of said patent are as follows:

"(1) In a cast-off for garment supporters, in combination, two oppositely pivoted members, having oppositely arranged concavities to receive a cord or its equivalent, and a latch for positively locking the members together, as described. (2) In a cast-off for garment supporters, the combination, with a depending plate having a downwardly curved transverse concavity and a guard tongue curving upward from the edge thereof, of an oppositely curved locking member, adapted to fit over the guard tongue, as described. (3) The combination, with the plate, 9, having the concavity, 10, the guard tongue, 11, and a catch, 12, and pivoted to the link, 5, by the ears, 8, 8, of the locking member, 14, also pivoted to said link, and having a lower concavity, adapted to cover said guard tongue, a lip, 15, for engaging the catch, 12, and a thumb piece, 16, as and for the purpose described."

Title in complainants is proved. There has been no adjudication establishing the validity of the patent, but acquiescence is claimed, and is supported by affidavits from which the following facts appear: The first cast-offs manufactured in accordance with the claims of said patent were furnished in September, 1892, to Fisk, Clark & Flag, suspender makers in New York City, who had obtained the exclusive control of the patented article. It was not furnished to the general trade until February or March, 1894. During the whole period since the fall of 1892, covering, it is claimed, two seasons in each year, the public have acquiesced in the validity of said patent. Notwithstanding the fact that the trade in general have expressed a desire to obtain such cast-offs, and were unable to do so until recently on account of the Fisk, Clark & Flag contract, the affidavits of several of the largest manufacturers and dealers in various states show that they recognized the novelty and great utility of the device, and refrained from the infringement of the patent. The sales have been constantly increasing, and already amount to upwards of a million cast-offs. So far as appeared on the hearing, this cast-off was a meritorious article, and a decided improvement upon those shown by the prior art. The affidavits of the witnesses for defendant do not seriously question the validity of the patent. These facts support the presumption of validity raised by the grant of the patent sufficiently to warrant a temporary injunction.

The defendant denies infringement. It appears that the style of cast-off furnished to the trade in February or March, 1894, differs

from that manufactured for Fisk, Clark & Flagg, and from the device illustrated in the drawings of the patent. The cast-off manufactured by defendant is almost identical with this later model. The claim of defendant is that neither of these cast-offs is covered by the patent. Complainants' exhibit, "Waterbury Cast-Off," shows the device manufactured by the defendant. The lower portion of the back plate is curved in the shape of a letter J, the upper or front part forming a lip. The front plate is not concave. It is slightly curved, but such curve is not absolutely essential to the practical operation of the device. It has a lip to engage the catch in the back plate, but this lip and catch, when in engagement, are not located at the center of the concavity, but at the upper end of the front part of the back plate. It therefore has neither the specific oppositely arranged concavities, nor the catch at the point of junction between the concavity and the lip, of the first and third claims.

It is strenuously urged by counsel for complainants that defendant's cast-off contains the elements of complainants' invention in the combination claimed by the patentee, provided the patent is properly and fairly construed. Whether this contention is correct depends upon the construction of the second claim, which appears to be the broadest of the three claims. All of the elements of the patented device are found in defendant's cast-off. The question is whether they are constructed and combined as described in said patent. The lower end of the front plate is adapted to be used as a thumb piece. I think the curve at the lower part of defendant's back plate may fairly be considered as the practical equivalent of the concavity in the back plate of complainants' patent. Each is so constructed and arranged as to receive and hold the button-hole loop, and allow it to readily slide with the constant changes in position of the wearer. The front plate, although not concaved or snugly fitting, yet is "adapted to fit over the guard tongue." The phrase "as described" does not necessarily confine the patentee to every detail of construction stated in the specification. It must be interpreted in the light of the substance and substantial purpose of the invention. The location of the catch is not, and is not stated to be, a special feature of complainants' invention. It relates merely to the form of the device. The object was to so arrange it that it might be readily engaged and disengaged. The downward pull being entirely on the back plate, it is not essential to the practical operation of the device that said catch be located at the center of the concavity. *Lake Shore & M. S. Ry. Co. v. National Car-Brake Shoe Co.*, 110 U. S. 235, 4 Sup. Ct. 33; *Snow v. Railway Co.*, 121 U. S. 617, 7 Sup. Ct. 1343.

The affidavit of Dwight S. Smith, the general superintendent of the defendant corporation, as to certain exhibits claimed to anticipate or limit the scope of the patent in suit, is not sufficiently definite to constitute a defense. He merely states that they were conceived by him prior to the date of the application for the patent in suit, and were manufactured by the defendant corporation prior to the date of the issuing of said letters patent. There is no evidence to show the character of the conception, or whether or not it was reduced to practice. The same criticism applies to the statement in



his affidavit that these exhibits were suggested to take the place of some imported device alleged to have been in use in this country prior to the date of the patent.

I am inclined to think, though with some hesitation, that the limitations contended for by defendant should not be applied. In the recent case of Consolidated Bunting Apparatus Co. v. Metropolitan Brewing Co., 8 C. C. A. 485, 60 Fed. 93, Judge Lacombe, delivering the opinion of the court of appeals refusing to confine the claim to a certain form illustrated and described in the patent, says:

"Except for the italicized phrase quoted in the first of these descriptions, there is no reference whatever in the specification to a knife-edge bearing valve. Nowhere is there pointed out any advantage arising from the use of that particular form of mechanical fit valve. There is no suggestion that anything depends upon the bearing being of this shape; nothing to show that such a construction was regarded by the patentee as an improvement, to be covered by his patent; and the claim is not for a combination with a knife-edge bearing valve, but for one with a mechanical fit valve, which term, as has been shown, covers many other bearings besides the knife-edge; and a construction of the first claim which will confine it to knife-edge bearing valves cannot be sustained." *Delemater v. Heath*, 7 C. C. A. 279, 58 Fed. 414.

See, also, *Woodward v. Machine Co.*, 8 C. C. A. 622, 60 Fed. 283.

Under all the circumstances, I think the ends of justice will best be promoted by granting the injunction asked for, but suspending its operation until the case can be heard and disposed of by the circuit court of appeals. Let a decree be entered for a preliminary injunction, and also an order suspending its operation in accordance with this opinion.

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MUD SCOWS NOS. 18, 19, 21, 25, and 31.

(Circuit Court of Appeals, Second Circuit. May 29, 1893.)

No. 96.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by Frederick Stebbins, Archibald Watt, Clement Doty, Frederick Hart, and Patrick O'Keefe against Mud Scows Numbers 18, 19, 21, 25, and 31, for salvage services performed by the steam tug Archibald Watt. A decree was rendered for libelants (50 Fed. 227), from which the Morris & Cummings Dredging Company, claimant, appeals.

Albert A. Wray, for appellant.

Franklin A. Wilcox (Wilcox, Adams & Green, on the brief), for appellees.

PER CURIAM. We do not think the sum allowed as salvage in this case, viz. \$150 for each \$6,000 scow, is at all unreasonable, irrespective of any calculation as to the probability of one or more of them causing damage, while adrift, to other vessels. Therefore, in affirming the decree, we do not think it necessary to discuss the questions raised as to the propriety of taking that contingency into consideration in fixing the amount of salvage allowance. The decree of the district court is affirmed, with interest and costs.

## THE HAVANA.

LIBERTY STEAMBOAT CO. v. TURNER. SAME v. REED. SAME v. ROSSMAN. SAME v. ROBERTS et al.

(Circuit Court of Appeals, Second Circuit. October 16, 1894.)

Nos. 115-118.

## MARITIME LIENS—HOME PORT—FOREIGN OWNERSHIP.

A maritime lien for necessary repairs and supplies, furnished in the port of enrollment, may be enforced against a vessel owned by a corporation created by another state.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by Henry B. Turner against the steamer Havana, the Liberty Steamboat Company, claimants, for repairs and supplies, and was heard, with three other libels against the same vessel for the same purpose, respectively by Andrew Reed, Jacob Rossman, and George I. Roberts and others. Decrees were rendered for the libelants in each of the cases (54 Fed. 201), from which the claimant appeals.

Wm. S. Maddox, for appellant.

Geo. W. Murray, for Turner.

Mark Ash, for Reed and Rossman.

H. D. McBurney, for Roberts.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. These are appeals from four decrees of the district court, Southern district of New York, sustaining maritime liens for repairs and supplies furnished to the steamer Havana by the respective libelants. The claimant assigns as error that the Havana was in her home port when the repairs and supplies were furnished, and that they were furnished on the orders of the owner, and not on the credit of the vessel. It appears that the steamer was owned by the Liberty Steamboat Company, a New Jersey corporation. It is well settled, therefore, under the authorities, that when in New York, although enrolled there, she was in a foreign port, the residence of a corporation being the state which has incorporated it, although the individual stockholders may reside elsewhere. The Plymouth Rock, 13 Blatchf. 505, Fed. Cas. No. 11,237. Upon an examination of the record on appeal and the new proofs taken in this court we concur in the opinion of the district judge that the several libelants relied upon the credit of the vessel, and that Schrader, who ordered the repairs and supplies, was practically the master, exercising all the ordinary functions of that office except the actual navigation of the ship, which was in charge of Pertaen, who, although described as master, seems in fact to have been but the pilot. The repairs and supplies were necessary to the vessel, were furnished to her in a foreign port, and, in the absence of satisfactory proof of an agreement between libelants and owner that the owner should be exclusively liable for payment, they are liens on the vessel. The several decrees are affirmed, with interest and costs.

WISCONSIN MARINE & FIRE INS. CO.'S BANK v. LEHIGH & F.  
COAL CO. (MOLSON'S BANK, INTERVENER.)

(Circuit Court, N. D. Illinois. November 5, 1894.)

1. **INSOLVENT CORPORATION—UNLAWFUL PREFERENCE—WHAT CONSTITUTES.**

The president of an insolvent corporation, whose tangible property was in the custody of the law, gave a bank the company's note, payable on demand, for a debt not due. Suit was commenced on it the next day. The company filed its appearance, pleaded the general issue, waived a jury, and consented to an immediate hearing. Execution was issued, and returned nulla bona, and on the same day the bank filed a creditor's bill. A director of the company was individually liable, as guarantor and otherwise, for the debt due such bank. *Held* an unlawful attempt to give the bank a preference over other creditors of such company.

2. **SAME—DISTRIBUTION OF ASSETS—RIGHTS OF CREDITORS.**

In the absence of any attack on the bona fides of the debt, and of any actual fraud in such proceeding, such bank was entitled to share ratably with all other creditors of such company in the distribution of its assets by a receiver.

Bill by the Wisconsin Marine & Fire Insurance Company's Bank against the Lehigh & Franklin Coal Company, in which the Molsons' Bank intervened. Complainant demurred to the intervening petition. Demurrer overruled.

C. E. More, for complainant.

Weigley, Bulkley & Gray, for receiver.

Peckham & Brown, for Molsons' Bank.

Chas. S. Miller, for defendant.

JENKINS, Circuit Judge. Treating the intervening petition as amended as proposed,—which I do not understand to be opposed,—the case stands thus: On the 17th of April, 1893, the Lehigh & Franklin Coal Company was wholly and entirely insolvent, had ceased to do business, and its property in the state of Wisconsin had during the preceding week been attached by creditors, of all of which the complainant had knowledge. The company was indebted to the complainant at that time; and on that date the president of the coal company executed a note, payable on demand, without grace, for \$66,336.25, for an indebtedness not then matured. For the indebtedness to the bank one A. C. Yates, a director of the coal company, was personally and individually liable, the indebtedness being in the form of notes and drafts upon which Yates was maker, indorser, or guarantor, and was covered by a general guaranty running from Yates to the bank. The president of the coal company delivered the note to the solicitors of the coal company, who placed the same in the hands of an attorney, Mr. More, connected in business and occupying the same office with said solicitors. On the 18th of April, Mr. More commenced suit in this court upon such note in favor of the bank against the coal company. Contemporaneously therewith the coal company filed its appearance, pleaded the general issue, filed a stipulation waiving a trial by jury and consenting to an immediate hearing, and thereupon judgment was immediately en-

tered upon such note. On the same day a like judgment was entered in favor of the Globe National Bank in the state court, under which the sheriff took possession of all the tangible property of the coal company situated within the county of Cook. Execution upon the judgment in favor of the complainant was immediately issued, and immediately returned nulla bona. On the same day this creditors' bill was filed by the bank, the complainant, to subject the assets of the coal company to the payment of its judgment, and a receiver was immediately appointed with the consent of the coal company, which entered its immediate appearance in the suit. Under these proceedings there has been impounded a fund over and above all expense of the receivership aggregating \$22,612.63. On the 11th of May, 1893, the Molsons' Bank, the intervening petitioner, obtained a judgment against the coal company in invitum for \$7,101.54 and costs, and on the 13th of May, 1893, filed its intervening petition, which, with the proposed amendments, declared the facts stated, and asked that its judgment should be first paid out of the assets of the coal company, or that the funds should be distributed pro rata among the creditors of the coal company who may prove their claims in this proceeding. To this petition the bank, complainant, demurs.

I am of opinion that this case is ruled by *Manufacturing Co. v. Hutchinson* (lately decided by the court of appeals in this circuit) 63 Fed. 496. I cannot but regard the proceedings resulting in the judgment in favor of the bank, complainant, as an attempt to give a preference to its debt over the debts of the other creditors of the coal company, as surely so as if the president of the coal company had executed to the bank a mortgage of the property of the coal company. At that time the coal company was no longer a going concern. It had ceased to do business. Its tangible property was largely, if not wholly, in the custody of the officers of the law. The note to the bank, complainant, was given for a debt not then matured, and was made presently payable. It was given without authority of the board of directors. While the president of a going concern may have authority to execute obligations in behalf of his company in the usual conduct of its business while it is a going concern, when it ceases to do business, and has become bankrupt, such function of its president ceases, and he has no right, without authority of the board of directors, to usurp their function, and to grant preference at his pleasure to the creditors of his company. In such case his occupation is gone, except in respect to the care of the property in the interest of all the creditors of the company. The debt to the bank, complainant, according to the allegations of the intervening petition, was secured by the personal responsibility of one of the directors of the coal company. In *Manufacturing Co. v. Hutchinson* it was ruled that it was incompetent for the directors, the corporation being insolvent, to secure or to give preference to such a debt with a view to absolve one of its directors. Certainly the president of an insolvent corporation, without authority of the board of directors, cannot exercise any such function. I am therefore clear in opinion that the demurrer must be overruled.

It does not follow, however, that because the bank, complainant, could not thus obtain a preference over other creditors, the intervening petitioner is entitled to the benefit of a priority which its petition condemns in the bank, complainant. There is no real attack upon the bona fides of the actual indebtedness to the bank, complainant, although it is asserted—but merely upon belief—that the note given by the president on the 17th of April was in excess of the actual indebtedness. The complainant bank, irrespective of the attempted preference, was entitled to share ratably with all other creditors of the coal company in the distribution of its assets. There was no actual fraud or moral turpitude in the transaction. It amounted merely to a constructive fraud, because the law condemns such transactions. This does not debar the complainant of its right to share with other creditors in the distribution of the estate, nor does it prevent the court from imposing upon the fund in the interest of the bank, complainant, the expense incident to the accumulation of the fund. The order will therefore be that the amendments proposed to the intervening petition will be allowed, the demurrer to the original petition to stand as a demurrer to the petition as amended. The demurrer will be overruled, with leave to the complainant bank, if it shall be so advised, to answer thereto to the merits within 20 days; otherwise a decree will be passed that the fund be charged with the expense of this bill, including a reasonable counsel fee to the solicitors for the complainant, and for distribution of the fund according to law.

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MORAN et al. v. HAGERMAN et al.

(Circuit Court of Appeals, Ninth Circuit. October 23, 1894.)

No. 86.

**1. EQUITY PRACTICE—FINAL DECREE—AMENDMENT.**

M. Bros. owned 310 bonds of the O. & N. R. Co. out of an issue of 600, of which the remaining 290 were claimed to be invalid. The trustee of the mortgage securing the bonds brought suit to foreclose, and have the proceeds of sale of the road applied to such bonds as were valid, making the railroad company only a party. Pending the foreclosure suit, M. Bros. brought suit against the holders of the 290 bonds and the railroad company, praying that the holders of such bonds be decreed not to be entitled to share in the proceeds of the foreclosure sale. Holders of 147 of such bonds answered, alleging the validity of their bonds, and praying for a decree accordingly. A decree for foreclosure was entered in the first suit, the road was sold, and bought in by M. Bros., and a decree entered, adjudging M. Bros.' bonds entitled to be first paid out of the proceeds of sale, under which the whole proceeds of the sale were paid to M. Bros. No appeal was taken from such decree. In the second suit a decree was entered adjudging M. Bros.' bonds entitled to be first paid, from which an appeal was taken to the supreme court, which reversed such decree as to the holders of 31 of said 290 bonds, and held them entitled to share equally with M. Bros. Upon the mandate of the supreme court, which directed that such execution and further proceedings be had in the cause, in conformity to the decision of that court, as ought to be had, a decree was entered in the circuit court, adjudging only that the holders of such 31 bonds share upon terms of equality with M. Bros. At a subse-

quent term, upon petition of holders of such 31 bonds, an order was made, modifying the decree by directing a master to ascertain the amount due, out of the proceeds of the sale, on M. Bros.' bonds and on the 31 bonds, and upon the report of such master a final decree was made, awarding the holders of such 31 bonds their proportion of the proceeds of the sale, and decreeing that they recover the same of M. Bros. *Held*, that the decree first entered on the mandate of the supreme court was not final, and did not preclude the court from further action, even at a subsequent term, since such decree fell short of a fulfillment of the decision of the supreme court, whose mandate remained in force until its behests were complied with.

2. **EQUITY PLEADING—ANSWER AND CROSS BILL—AFFIRMATIVE RELIEF.**

The objection that the affirmative relief prayed for in defendants' answers and awarded them by the final decree should have been sought by cross bill could be waived, and came too late after the entry of the decree of the supreme court adjudging defendants entitled to the relief sought, though it seems that such relief might have been awarded on the answers and the petition for amendment of the decree, regarded as a supplemental answer, the state of the facts at the time the answers were put in not having required such relief as is the function of a cross bill.

3. **ESTOPPEL—REPRESENTATION OF BONDHOLDERS BY TRUSTEE.**

*Held*, further, that the holders of the 31 bonds were not estopped to enforce their decree in the second suit by the decree in the foreclosure suit, though not appealed from, since the trustee of the mortgage represented the holders of bonds only for the protection of their lien, within the scope of the powers conferred by the deed of trust, and not to deny their right.

4. **MORTGAGE FORECLOSURE—PAYMENT BY SURRENDER OF BONDS.**

*Held*, further, that personal judgment against M. Bros. in favor of defendants was rightly rendered, though they had paid for the road by surrender of their bonds, and not in money; since such sale was regarded in law as made for money, and the court might have ordered that they pay into court the amount justly due defendants.

Appeal from the Circuit Court of the United States for the District of Nevada.

This was a suit by Charles Moran and others against J. C. Hagerman, administrator, and others. From a final decree in favor of defendants, complainants appeal.

Robert M. Clarke, for appellants.

W. E. F. Deal and Edmund Tauszky, for appellees.

Before McKENNA and GILBERT, Circuit Judges.

GILBERT, Circuit Judge. In the year 1881, Moran Bros., the appellants in this case, were the owners of 310 bonds of \$1,000 each of the Oregon & Nevada Railroad Company, which bonds were secured by a mortgage deed of trust to the Union Trust Company of New York. The total issue of the bonds was 600, but the validity of the remaining 290 was denied by Moran Bros. In March, 1883, the trust company began a suit in the United States circuit court for Nevada to foreclose the deed of trust and sell the mortgaged property, and to have the proceeds of the sale applied to the 310 bonds held by Moran Bros., and such other bonds, if any, as had been legally issued. The trust company and the railroad company were the only parties to the suit. On April 14, 1883, and while that suit was pending, Moran Bros., as complainants, brought, in the same

court, a second suit, which is the suit now before this court on appeal, alleging in their bill that the 290 bonds above referred to were fraudulent, and praying for a decree that the holders thereof be not entitled to share in the proceeds of the foreclosure sale. To this suit the holders of the 290 bonds and the railroad company were made parties defendant. On May 19, 1883, the answer of certain of the holders of the 290 bonds was filed, denying the charge of fraud, and alleging that the bonds held by them—147 in all—were valid, and were acquired by them for a valuable consideration, and praying for a decree in accordance with such facts. The railroad company answered, admitting the allegations of the bill. On August 7, 1883, the circuit court made an interlocutory decree in the first suit, which may be called the "foreclosure suit," finding the averments of the bill to be true, and ordering a sale of the mortgaged property, and a return of the proceeds into court to await the order of distribution to be thereafter made. The property was sold on April 17, 1884, for \$372,534.21, to Moran Bros., which sum was the amount due them upon their 310 bonds, together with the costs. After the entry of the order of sale in the foreclosure suit, testimony was taken in that suit upon the question of the validity of the 290 bonds, but the holders of those bonds were not present or notified of that proceeding. Testimony was also taken at about the same time in the present suit. On March 29, 1884, the circuit court rendered its decision in both suits, and on May 6th following entered a decree in the foreclosure suit adjudging that said 147 bonds were not entitled to participate in the proceeds of the sale of the property, except as to the surplus remaining after the payment of the 310 bonds of Moran Bros. No appeal was taken from that decree. On May 13, 1883, the circuit court made its decree in the second suit,—which is this suit,—to the same effect as in the foreclosure suit. On March 23, 1886, an appeal was taken to the supreme court from the decree of the circuit court in this cause, and on March 3, 1890, the supreme court reversed the decree of the circuit court as to the appellees herein, who are the holders of 31 of said 147 bonds, holding that they were entitled to share in the proceeds of the sale upon terms of equality with Moran Bros. *McMurray v. Moran*, 134 U. S. 150, 10 Sup. Ct. 427. The mandate of the supreme court was issued July 19, 1890, and was filed in the circuit court November 3, 1890. It directed that "such execution and further proceedings be had in said cause, in conformity to the decree and opinion of this court, as, according to right and justice and the laws of the United States, ought to be had." On February 2, 1891, the circuit court, for the purpose of carrying out said mandate, rendered a decree in this cause, adjudging that the appellees "share in the proceeds of the said sale in proportion to the amount of bonds held by them respectively, and upon terms of equality with the complainants." On October 24, 1891, Watkins, one of the appellees, filed a notice of a motion and petition for an order amending and modifying the decree of February 2, 1891, so that there be inserted therein an order directing the master to ascertain the amount due on the 341 bonds, and the amount of the proceeds of the foreclosure sale, and the costs of that suit and sale, and the proportion of the

proceeds properly applicable to the payment of Moran Bros.' 310 bonds and the 31 bonds owned by the appellees, and that upon ascertainment and determination of said matters the appellees have judgment and execution against Moran Bros. for their proportionate amount of said proceeds, "and for such other or further order in the premises as is consistent and in conformity with the opinion, decree, and mandate of the supreme court of the United States, in this cause." The notice stated that the motion would be made upon the ground that said matters were omitted from the decree by oversight, inadvertence, and mistake. It was stated in the petition that the proceeds of the sale after payment of the costs had been paid to Moran Bros. in the sum of \$367,234.55. Objection was made by Moran Bros. to the motion and petition upon the ground, among other objections, that the term at which the decree of February 2, 1891, was entered, had expired before the motion and petition were filed, and that, therefore, the court had no jurisdiction or control of the decree, or power to modify the same. The court overruled the objections, and upon the 9th day of May, 1892, made an order granting the prayer of the petition, modifying the decree accordingly, and directing the master to ascertain and report to the court concerning the matters alleged in the petition. On September 6, 1892, a final decree<sup>1</sup> was made, affirming the report of the master, and awarding the appellees their proportion of said proceeds in the sum of \$33,419.57, with interest from the date of the sale, amounting in the aggregate to \$51,659.44, and decreeing that the appellees recover the same of and from Moran Bros. The appeal is taken from the final decree, and the only error assigned is that the circuit court had lost jurisdiction of the cause, and had no power to modify the decree of February 2, 1891, for the reason that the term of the court at which that decree was rendered had expired before application was made for its amendment.

Whether there was error in entering the order and decree subsequent to the decree of February 2, 1891, depends upon whether or not the decree of that date was final, and was such as to carry out in all respects the decree and mandate of the supreme court. The decision of the supreme court was that the appellees herein were entitled to their pro rata share of the proceeds of the sale, and the mandate required that such execution and proceedings be had in the circuit court as ought to be had in conformity with the decree and the opinion of the supreme court. In short, the mandate directed the circuit court to take such steps as should be necessary to place the appellees

<sup>1</sup>An appeal was taken from this decree to the supreme court, complainants in their assignment of errors alleging that the decree should have been in their favor, "for the reason that the term had elapsed at which said original decree was made, and the said circuit court had lost jurisdiction of said suit, and had no power or authority to modify or amend said original decree, or to make any order or decree in said suit in any manner affecting the rights of the parties herein." The supreme court dismissed the appeal because of the absence of a formal certificate of the "question of jurisdiction," which precluded any review of a cause directly appealed from the circuit court, under the fifth section of the act of March 3, 1891, on the ground that the jurisdiction of that court was in issue. 151 U. S. 329, 14 Sup. Ct. 354.



in possession of their just proportion of the proceeds of the mortgaged property. The decree of February 2, 1891, fell short of doing this. It was but a repetition of the terms of the mandate. It decreed that the appellees, together with Moran Bros., should have their 341 bonds paid pro rata out of the proceeds, but it contained no order of distribution; indeed, the proceeds were no longer in the possession of the court, and it contained no statement of the amount of the proceeds, or the amount due the appellees. It did not direct the payment by Moran Bros. to the appellees of any sum whatever. The mandate remained in force until its behests were complied with. A decree which fell short of a fulfillment of the decision of the supreme court, and failed to secure to the successful litigant the relief to which he was decreed to be entitled, was not a final decree, and did not preclude the court from further action, even at a subsequent term. The circuit court could not, by a partial compliance, lose the power to obey the mandate to its full extent. The suit had been begun by Moran Bros. for the purpose of obtaining a decree directing the payment of their bonds to the exclusion of the bonds held by the bondholders whom they brought into court as defendants. The latter denied that the bonds of Moran Bros. were entitled to such preference, and they alleged the validity of their own bonds, and prayed that they be decreed to participate in the proceeds, and for general relief. Upon these issues the cause was tried. It was held by the supreme court that the appellees herein were entitled to the relief they prayed for. It was the duty of the circuit court to obey the mandate, and furnish that relief. The decree of February 2, 1891, failed to secure it. Under that decree the appellees could recover only their costs in the appeal. They could not obtain the money which the supreme court had said was theirs. It was still necessary for the circuit court to ascertain the amount of the proceeds, to whom they had been paid, the amount thereof justly due the appellees, and by whom that amount should be paid them, and to order the payment accordingly. To do this the cause was referred to a master. His function was not ministerial, as in the case of a decree requiring him to sell property and distribute the proceeds according to the order of the court, but it was judicial, since he must necessarily ascertain and determine the amount of money each bondholder should have, and the sum that should be paid by the one to the other. A decree that left this undone was not a final decree. *Green v. Fisk*, 103 U. S. 518; *Craighead v. Wilson*, 18 How. 199; *Railroad Co. v. Swasey*, 23 Wall. 405; *Iron Co. v. Martin*, 132 U. S. 91, 10 Sup. Ct. 32; *McGourkey v. Railway Co.*, 146 U. S. 544, 13 Sup. Ct. 170. We find no error, therefore, in the action of the court in amending the first decree.

The appellants were allowed, under the permission of the court, to make other assignments of error, one of which is that the appellees are not entitled to the relief afforded by the amended decree, for the reason that such relief is not within the issues made in the pleadings, since the appellees were content to answer the bill, denying the complainants' equities, and filed no cross bill asking for affirmative relief. The answer, as we have already seen, declared affirma-

tively the validity of the defendant's bonds, and prayed for the same relief that would have been sought by a cross bill. At that time the mortgaged property had not been sold. The complainants and defendants in this cause were the holders of the mortgage bonds. Prima facie, all were entitled to share equally in the proceeds. The complainants denied that this was true, and brought the suit to assert their right first to be paid. The defendants made answer controverting the allegations of the bill, and coupling their defense with a prayer for the relief which was finally accorded them by the decree which is appealed from. They had equities in the subject-matter of the suit, the protection of which, as the case then stood, did not require such affirmative relief as is the function of a cross bill. They would have secured all they sought by their answer if the complainants had been adjudged not entitled to the relief they sued for. The subsequent sale and distribution of the fund made necessary the affirmative relief which was prayed for in the answer and granted in the decree. The petition on the application to amend the decree brought all the necessary facts before the court, and for that purpose may be deemed a pleading in the nature of a supplemental answer. Under such pleadings the court had the power to decree all the relief the defendants were entitled to. In *Fost. Fed. Pr.* § 170, it is said:

"Although a defendant can, by his answer, obtain the benefit of any defense he may have against the plaintiff's claim, he can, except in a very few cases, obtain no relief against the latter in the same suit beyond what results necessarily from the denial of the prayer of the bill."

In *Bradford v. Bank*, 13 How. 69, the court said:

"The more modern course of proceeding is to dispense with the cross bill, and make the same decree upon the answer to the original bill that would be made if a cross bill had been filed, if the defendant submits in his answer to a performance of the real agreement between the parties. The answer is viewed in the light of a cross bill, and becomes the foundation for a proper decree by the court."

But, in any view of the case, the objection that the affirmative relief which was prayed for in the answer should have been sought by a cross bill is one that could be waived, and an objection upon that ground, first made after the entry of a decree of the supreme court decreeing defendants to be entitled to the relief so prayed for, certainly comes too late. *Kelsey v. Hobby*, 16 Pet. 269, 277.

It is next contended that the decree in the foreclosure suit, holding the bonds of the appellants to be a first lien upon the mortgaged property, estops the appellees to enforce their decree in this suit. It is urged that the bondholders were all represented by the trustee in the foreclosure suit; that the decree in that suit remains unappealed from, and unreversed; and that the question of the validity of all the bonds was there litigated and determined. The appellees cannot be said to have been parties to the foreclosure suit in any sense other than that the complainant therein, the trustee, represented the holders of all the bonds for the purpose of foreclosure. The trustee sustained that relation only for the enforcement of the lien and the collection of the debt. So far as concerned the debtor and other lien holders, if any there were, it represented all the bondholders

who were protected by the deed of trust. While it is true that the trustee had commenced the foreclosure with a bill which averred that the bonds of Moran Bros. should be first paid, it did not make the holders of the other bonds, the appellees herein, parties to the suit, nor did it seek to have them brought in. On the contrary, Moran Bros., the holders of the bonds which the trustee was seeking to pay in preference to the others, commenced the suit which is now here on appeal, and brought the appellees into court to defend the same. We are unable to see how Moran Bros. can now say that the decree rendered in the suit so commenced by them is not binding upon all the parties thereto. It is only where the trustee acts for the bondholder within the scope of the powers conferred upon him by the deed of trust that his acts bind the latter. When he denies the right of the bondholder in proceedings to foreclose, the latter may make application to the court to be admitted as a party to the litigation, or he may, as in this case, bring the subject before the court in a new or ancillary suit. From the moment the trustee denied the rights of the appellees it had no power to bind them by any act, except so far as the opposite parties to the foreclosure suit were concerned. It was trustee still to foreclose the mortgage and collect the funds, but for no other purpose. The decree, therefore, of the circuit court, adjudging that the appellees' bonds should not rank with the bonds of the appellants, was a decree in a cause to which the appellees were not parties or represented, and is not binding upon them. *Williams v. Gibbes*, 17 How. 254.

It is further contended that the court erred in rendering a personal judgment against the appellants for the proportionate amount due the appellees upon their bonds, and interest thereon. It is said that Moran Bros. paid, not money, but bonds, for the mortgaged property, and that it is not within the issues presented in this case to enter a personal judgment against them for money, and enforce its payment by execution. In the theory of the law the sale was made for money, and the purchase price was paid in money, and paid into court. The decree ordering the sale directed that the proceeds be brought into court, and held for disbursement according to the further order and decree of the court. Subsequently the order of distribution was made decreeing that the money be paid first to the costs of sale; second, to the complainants' costs of suit; third, to an attorney's fee for complainants; and, fourth, to the payment of the 310 bonds of the complainants. It may be true that the complainants, in making the purchase, paid no money to the master who made the sale, save and except sufficient to cover the costs, and that payment of the remainder of the purchase price was made by the surrender of their bonds; but that fact does not affect the question under consideration. If the complainants, under the terms of the mortgage and the decree, were permitted to pay in bonds, it was for their convenience only. If the circuit court had arrived at a different conclusion concerning the appellees' bonds, and had decreed in the order of distribution that they share equally with the others, Moran Bros. would have been required to pay into court at that time a sum of money sufficient for that purpose. From the decision of the

supreme court it now appears that the order of distribution was erroneous; that the circuit court, instead of directing the payment of \$368,968.89 to Moran Bros., should have ordered that \$33,419.57 of that sum be paid to the appellees herein. In pursuance of the mandate of the supreme court the circuit court had clearly power to order either that Moran Bros. pay into court the sum so received by them erroneously, or that they pay the same directly to the persons who are entitled to receive it. The latter course was pursued, and we find no error therein. The decree is affirmed, with costs to the appellees.

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NORTHERN PAC. R. CO. v. CITY OF SPOKANE et al.

(Circuit Court of Appeals, Ninth Circuit. October 23, 1894.)

No. 138.

DEDICATION—RIGHT TO CROSS RAILWAY TRACKS.

A railroad company to which congress has granted a right of way across the public lands and sections of lands adjoining such right of way, in aid of the construction of its road, has power to dedicate to the public the right to cross its tracks and right of way.

Appeal from the Circuit Court of the United States for the Eastern Division of the District of Washington.

This was a proceeding by the Northern Pacific Railroad Company against the city of Spokane and others to restrain the city from destroying a depot alleged to be an obstruction to a street crossing, and also from preventing the erection of a new depot. A temporary restraining order was dissolved in so far as it forbade the hindering of the railroad company in the erection of a new depot. 52 Fed. 428. On final hearing, the bill was dismissed, 56 Fed. 915. Complainant appeals.

Ashton & Chapman and J. R. McBride, for appellant.  
James Dawson and George Turner, for appellees.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The Northern Pacific Railroad Company brought a suit against the city of Spokane and others to restrain and enjoin the defendants from laying out and extending a certain street known as "Mill Street," over and across the right of way of the complainant's railroad in said city. The bill alleges that by virtue of the act of congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern route," and the several acts amendatory and supplemental thereto, there was granted to the complainant a right of way through the public lands, to the extent of 200 feet in width on each side of its road, wherever it may pass through the public domain, and that there was further granted to the complainant, for aid in the construction of its road, among other lands, section 19,

township 25 N., range 43 W., upon which that portion of Mill street in controversy in the suit is situated; that since the construction of the complainant's road, and for more than eight years prior to August 4, 1889, the complainant maintained its freight station building on that portion of its right of way lying north of its track in said section 19, covering the land in controversy, and that on or about said last-named date the freight sheds and freight station buildings were destroyed by fire, but that within a few days thereafter the complainant rebuilt the same, with the knowledge and acquiescence of said city and its officers; that the said city claims to have some right or interest in the ground, and the right to occupy the same as a street, but that the city has no right thereto, and has taken no steps as required by law to authorize its occupation thereof for any purpose, but that the said city, through its counsel, has declared its intention to summarily tear down and remove said buildings, and to open the said Mill street across the complainant's premises. The defendants answered, in substance, that the complainant had dedicated said strip of land to the public as a street on the 20th day of January, 1881, and that the public had continuously used the same from that time. Upon these issues testimony was taken. Upon the trial the court found that the street had been so dedicated by the complainant and used by the public, and thereupon the bill was dismissed. Upon the appeal the complainant contends—First, that the record contains no competent evidence showing a dedication; and, second, that the complainant had no power to dedicate any portion of its right of way for street or other public purposes.

So far as the facts are concerned, it is reasonably clear that the railroad company dedicated the land in controversy to the public for street purposes. The evidence is that about the year 1880 or 1881, after the town of Spokane had been laid out and platted by the original town-site proprietors, the railroad company laid out what is known as "Railroad Addition," adjacent to the original town, and, by agreement with the original town-site proprietors, made the streets of the addition conform to those of the original town, continuing the streets and the names thereof through the addition and across the right of way, and thereupon filed a plat of the addition, upon which its right of way was designated as "Railroad Street," and certain streets were platted as crossing the same, among which was Mill street. There is no indication upon the plat that it was the intention of the railroad company to close Mill street where the same crosses Railroad street, but, on the contrary, the lines of the plat show Mill street to be open across Railroad street. In the words of dedication which accompany the plat, however, the railroad company used the following language:

"The streets shown upon said plat are dedicated to the use of the public until vacated, except that strip of land, 225.7 feet in width, designated as 'Railroad Street,' which is reserved for the tracks and uses of said railroad company."

It is contended that the words of reservation concerning Railroad street operate to except from the dedication all the land contained within the north and south lines of that street, and to cut in twain

the streets which upon the plat are indicated as crossing the same. It is obvious that the plat and the words of dedication are to be construed together in arriving at the intention of the dedicator. With this rule of construction in view, it is clear that Railroad street is reserved from dedication to public use, so far as it is necessary to be retained for the tracks and uses of said railroad company, but that at the same time, and coexistent with the reservation, the company has granted by its dedication to the public the easement to cross its tracks and right of way at certain fixed and designated points; namely, at the streets which are marked as crossing the same. If it had been the intention of the company to withhold from the public the right to cross its Railroad street by the streets which intersect it at right angles, that intention could have been readily expressed, either in words or by lines drawn in the plat to close the cross streets at their point of intersection with the lines of Railroad street. The action of the company from the time of laying out Railroad addition is in harmony with this interpretation of the dedication. The evidence is, that the cross streets, including Mill street, Post street, Howard street, and others, were used by the public from the time the plat and dedication were filed; that the railroad company expressly admitted the rights of the public in Post street where it crosses Railroad street, by removing therefrom, at the demand of the city, a building then in course of construction, which encroached upon the lines of the street. The company, moreover, sold lots in said addition, fronting upon Railroad street, and accessible only by means of Railroad street.

It is contended, further, that the railroad company had no such interest in the land inclosed within the limits of Railroad street as to authorize it to dedicate to the public the right to cross the same; that its right of way was granted by the United States solely for railroad purposes; and that, although the fee to section 19 passed to the company under section 3 of the granting act, there was, nevertheless, no merger of the right of way in the fee of the land so granted. In the view we take of the law of the case, it is not necessary to consider whether the right of way conferred by congress was merged in the fee of the land over which the same was located, and which was granted to the company in aid of the construction of the road. It clearly was not contemplated by congress that the right of way of the Northern Pacific Railroad Company should not be crossed at innumerable places. There is nothing in the language of the grant to indicate an intention that the grantee should be deprived of the power to permit the public to cross from one side to the other of the granted strip, or that there should be reserved to congress the sole authority to determine at what points and under what circumstances such crossings should be established. The grant was in that respect unrestricted in its terms. Its only limitation was the implied one that the railroad company might not divert the granted strip to other and foreign uses, and might not cede to the public rights and easements so extensive or of such a nature as to interfere with its duties to regularly and properly operate a railroad.

It was known that the railroad would extend through towns and cities then existing, and through others that would spring up along its line, and that the rights of the company in and to its right of way would be subject to the power of the municipal corporations through which it passed to extend public streets across the same. That power which is implied in the general authority conferred by city charters for that purpose is conceded to have been vested in the municipal authorities of the city of Spokane; but it is said that, while the easement to cross the right of way might have been wrested from the company by proceedings in invitum, it had no authority to voluntarily cede the same. We see no valid ground on which to base this distinction. The nature of the right of way over the public lands which the railroad company obtained by the grant was not different from that which it acquired over private lands by purchase or by condemnation proceedings, under the laws of the several states through which it passed. Whether the company acquired the fee to the lands covered by its right of way or not, no reason is apparent why it may not dedicate public easements over and across the same, and by its own act grant to the public all the rights which the latter might obtain by the exercise of its right of eminent domain. Of course, the railroad company could confer upon the public no greater estate than it possessed, and, in any view of the case, the dedication could not affect the reserved rights of the United States, whatever they might be. The public easement, so dedicated, is undoubtedly subservient to the exigencies of railroad use, and the public take the dedicated crossing subject to the inconveniences which may result from the increase of traffic and transportation along the line of the road, and the possible necessity of laying more tracks thereupon; but the company, after such dedication, and after rights have been acquired thereunder, may not close up the street with a building, and may not say, as in this case, that because it is convenient to have a warehouse at this point, and because there is no place within the city so desirable for that purpose, it will revoke the rights which it has conferred upon the public by the dedication. One of the objects of congress in making the grant was to upbuild and develop the country through which the road was to pass, and it is in harmony with this purpose, as well as in line with the adjudicated cases, so far as they have approached the question under consideration, to hold that such public use is not inconsistent with or subversive of the railroad use, which was intended by congress. It has been held that trustees holding lands for public uses, and corporations having public duties, may dedicate to public use for highways, when such use is not inconsistent with the purposes for which the lands were vested in trust, or incompatible with the duties required (*Rex v. Leake*, 5 Barn. & Adol. 469; *Canal v. Hall*, 1 Man. & G. 392); and that a railroad company may dedicate a highway across land already dedicated to public use as a railroad (*State v. City of Bayonne*, 52 N. J. Law, 503, 20 Atl. 69); and that railroad corporations have the same rights to dedicate their lands to public use as any other proprietors, unless it is contrary to the provisions of their charters, or amounts to a breach of

their duty to their stockholders (*Green v. Canaan*, 29 Conn. 157; *Williams v. Railroad Co.*, 39 Conn. 509). The appellant cites the case of *Illinois Cent. R. Co. v. City of Chicago* (Ill. Sup.) 30 N. E. 1036, where the court said:

"It is plain that, under the act of congress donating lands for the construction of a railroad and the charter of the railroad company, the strip of land—the right of way—is devoted to a certain specified purpose, and cannot be diverted from that purpose."

The language so quoted from the decision in that case must be considered in the light of the question then before the court. It was a case of a special assessment against the right of way of the Illinois Central Railroad to pay for the improvement of a street, upon the theory that the right of way was benefited by the street improvement. The court held that the right of way granted by congress for a special purpose was not chargeable with such an assessment; that the strip so devoted to public use was not land which could be laid off into lots and blocks, and sold by the railroad company for its own advantage, or used as private property is used by individuals; and that, therefore, its value, for the purpose for which it was dedicated, was not capable of being enhanced by the improvement of an adjacent street. This is far from holding that a railroad company may not, in recognition of public interests, and for the promotion of the public welfare, dedicate to the public an easement over its right of way which does not interfere with its own use of the same for a railroad. The decree is affirmed, with costs to the appellees.

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HEWITT v. STORY et al.

(Circuit Court of Appeals, Ninth Circuit. November 1, 1894.)

No. 102.

IRRIGATION—ABANDONMENT OF WATER RIGHTS—IRRIGATING DITCHES.

R. and others, in 1869, located a ditch appropriating, for the purpose of irrigating their lands, the waste water of the A. river, remaining after the N. F. and S. F. ditches, previously located, had been supplied. Such ditch was called the "B. R. Ditch." The water appropriated by it being insufficient for their lands, the owners of the B. R. ditch purchased shares in the S. F. ditch, and diverted the water so acquired through the B. R. ditch. Subsequently, by their consent, other owners of shares in the S. F. ditch diverted their water through the B. R. ditch, and in and after 1874 all the water belonging to the owners of the S. F. ditch was taken by them through the B. R. ditch, with the consent of the owners thereof, on condition of contributing to the expense of enlarging and repairing that ditch. Subsequently, the route of the B. R. ditch was twice changed, and the water belonging to the owners of the S. F. ditch was for more than five years conducted through such changed B. R. ditch, and all the water received through such ditch was allotted according to the interests of the owners of such S. F. ditch, who took complete possession, use, and control of the B. R. ditch, adversely to any right or claim under the original location. Complainant and his predecessors in title, the owners of the land originally supplied by the B. R. ditch and the locators of such ditch, knew of and acquiesced in such use, and shared in the water only according to their shares in the S. F. ditch, without objection to such use, and contributed to the alteration and repair of the B. R. ditch only in proportion to their shares in the S. F. ditch. In 1887 complainant



brought suit to establish a right to a specific quantity of the water of the A. river, in virtue of the appropriation by the B. R. ditch. *Held*, that the use of the waste water in the B. R. ditch was abandoned through nonuser on the part of complainant and his predecessors in title. Knowles, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern District of California.

This was a suit in equity by Isaac L. Hewitt against Warren Story and 66 others to establish a right to certain waters for irrigation purposes. A motion to dismiss was denied (39 Fed. 158), and the cause was next heard on objections by certain of the defendants to the amended bill of complaint. The objections were disallowed. 39 Fed. 719. Subsequently, on further hearing, the bill was dismissed (51 Fed. 101), and complainant now appeals.

This is a suit in equity. The bill of complaint alleges the wrongful and unlawful diversion of certain waters by the appellees, 67 in number, including certain corporations, companies, associations, and individuals, using and claiming water by appropriation from the Santa Ana river, in San Bernardino county, Cal. It prays for a decree entitling appellant to a specific quantity of water, and for an injunction, etc. The bill was filed in January, 1887. Appellant claims to be the owner in possession, and entitled to the possession and use, of 333 $\frac{1}{4}$  inches, under a 4-inch pressure, of the waters of the Santa Ana river, which he alleges were appropriated by his predecessors in interest through and by means of a certain ditch known as the "Berry Roberts Waste-Water Ditch." The Santa Ana river is an unnavigable stream of running water, flowing through sundry wild cañons and ravines in the San Bernardino mountains, and emerging therefrom into the San Bernardino valley through the mouth of a steep ravine near the eastern boundary of the valley; and the waters thereof have been and are held and owned, for many miles above and below the entrance to the Berry Roberts ditch, exclusively by right of appropriation, and used generally for the purpose of irrigation. Long prior to the location of the Berry Roberts ditch, two appropriations had been made of the waters of the Santa Ana river,—one by means of the North Fork ditch, owned by the North Fork Water Company, a corporation, which taps the river near the point where it debouches from the mountains into the valley; the other by means of the South Fork ditch, owned by an association of individuals designated in the bill of complaint as the South Fork & Sunnyside Division of the Santa Ana River, which takes water from the river some distance lower down. The owners of these ditches have, at all times since acquiring their water rights, kept these ditches in repair. Prior to 1860 there were but few people using the water from the ditches, but, before the Berry Roberts ditch was located, the number had been largely increased. The ditches have since been enlarged, and many thousands of dollars have been expended thereon. The actual extent of the appropriation by the North Fork and South Fork ditches, prior to the location of the Berry Roberts ditch, is not clearly defined, and, under the views hereinafter expressed, the precise amount of water which each ditch is entitled to need not be determined. Subsequent to the location of the Berry Roberts ditch, two appropriations of water from the Santa Ana river nearer its head have been made: One, the Brown and Judson ditch, owned by the Redlands Water Company, a corporation, which was located in the spring of 1881, and conveys water to the town of Redlands for irrigation and domestic purposes. Every year since its construction, extensions and improvements, involving large expenditures of money, have been made. The other, the Bear Valley dam and reservoir, owned by the Bear Valley Land & Water Company, a corporation, was located in June, 1883. This corporation, in the spring of 1883, bought three or four thousand acres of land situated in the lower portion of Bear valley, and constructed a dam at the point where the lower edge of the valley adjoins the head of Bear cañon, for

the purpose of obtaining, above that dam, the water that would otherwise have run to waste in the winter and spring months. This dam is of granite masonry, 20 feet thick at its base, about 60 feet high, and 300 feet long, forming a lake about 5 miles long and over one-half of a mile wide, of an average depth of about 13 feet. Bear creek is fed by small tributaries which come into it, at different points, all of the way from where it leaves Bear valley down to its junction with the Santa Ana river. The construction of the dam does not appear to have affected the flow of water down Bear creek during the irrigating season. The Berry Roberts ditch was located in 1869, by Berry Roberts, Henry Suverkrup, and George A. Craw, as a waste-water ditch appropriating "the waste water of the Santa Ana river" remaining therein after the North Fork and South Fork ditches should be fully supplied. The locators of the Berry Roberts ditch, at the time of its location, occupied, possessed, and claimed separate and distinct portions of land situated in section 16, township 1 S., range 3 W. of the San Bernardino meridian. Roberts claimed 160 acres, and Suverkrup and Craw, in the aggregate, 240 acres. The ditch constructed by them, and through which they appropriated the waste water, tapped the river on the south side between the head of the North Fork and the South Fork ditches. At the time the Berry Roberts ditch was located, and for many years thereafter, there existed in San Bernardino county a board of water commissioners, created by an act of the legislature of the state of California, whose duties were to regulate the distribution of water in accordance with the rights of the parties in interest, and they were invested with authority to appoint water overseers, etc. In the records kept by this board appears the following entry: "By request of Henry Suverkrup, Berry Roberts, and G. A. Craw, W. T. Morris and E. Kerfoot, water commissioners for San Bernardino county, California, located a water ditch to be known as the 'Berry Roberts Ditch.' The water claimed by the aforesaid parties for this ditch is the waste water of the Santa Ana river, taken out in the southeast bank of said river about four miles northeast from section sixteen (16), township No. 1 south, range No. 3 west, San Bernardino meridian, running thence nearly a southwest direction to the said sixteenth (16) section, and to be used for irrigating, and to be equally apportioned among said parties on the land of the said sixteenth (16) section owned by said parties; and also Berry Roberts was appointed overseer for the aforesaid ditch for the present year. Done on the 19th day of February, A. D. 1870. W. T. Morris. E. Kerfoot." Roberts thereupon took charge of the Berry Roberts ditch, and with Suverkrup and Craw conducted the waste water running therein to their respective lands, in section 16, for irrigation and domestic purposes. The lands which they then had under cultivation amounted, in the aggregate, to not exceeding 100 acres, about 50 acres thereof being in grain, and the balance in fruit trees and vegetables. They permitted one or more of their neighbors to participate in the use of the water on condition that they should contribute to the necessary repairs of the ditch. In 1870, Roberts conveyed his interest in the 160 acres of land claimed by him, together with his interest in the Berry Roberts ditch and the waste water, to one Ball, who thereupon succeeded Roberts as water overseer. In 1872, Craw conveyed his interest in 160 acres of land claimed by him to Suverkrup, and also his interest in the Berry Roberts ditch and in the waste water. During the years 1870, 1871, and 1872, the then owners of the Berry Roberts ditch used the waste water running therein, at all times when they could get any water, for the irrigation of the lands which they then had under cultivation; but the waste water running in said ditch was wholly insufficient to supply their needs.

There is more or less confusion in the testimony as to the name of the South Fork ditch. It is sometimes called "South Fork," sometimes "Sunny-side Division of South Fork," but more frequently, in relation to its connection with the Berry Roberts ditch, it is designated as the "Timber Ditch," by which name it will hereafter be called. Upon ascertaining the fact that no reliance could be placed in the supply of waste water from the Berry Roberts ditch during the irrigating season, Ball purchased 40 shares in the Timber ditch and in the water appropriated therein, and Suverkrup

purchased 30 shares in the Timber ditch and in the water flowing therein. The quantity of water thus acquired by them was diverted through the Berry Roberts ditch to their respective tracts of land in section 16. Subsequently, by the consent of Ball and Suverkrup, various other owners of shares in the Timber ditch appropriation diverted and conducted the quantity of water to which they were respectively entitled, by virtue of their interests in the Timber ditch, through and by means of the Berry Roberts ditch. The Berry Roberts ditch continued in charge of the water overseers appointed by the board of water commissioners. In June, 1874, Suverkrup conveyed his interest in the 240 acres of land then claimed and possessed by him, together with his interest in the Berry Roberts ditch and in the waste water, and also the 30 shares in the Timber ditch, to one Borron, the immediate predecessor of appellant. During the year 1874, while Ball and Borron were diverting and using the water belonging to them as share owners in the Timber ditch through the Berry Roberts ditch, some of the other owners of shares in the Timber ditch applied to them for permission to divert and conduct the water belonging to their shares in the Timber ditch through the Berry Roberts ditch. Permission was given upon the condition that the parties should contribute and aid in enlarging and repairing the Berry Roberts ditch, which condition they complied with. After the year 1874, no water was taken from the river through the Timber ditch; but all of the water theretofore diverted through and by means of the Timber ditch was thereafter diverted through and by means of the Berry Roberts ditch, and the owners of shares in the Timber ditch appropriation (with but few, if any, exceptions) continued to use the water, to which they were entitled by virtue of that appropriation, through the Berry Roberts ditch. It is not shown that permission to make this change was granted to any considerable number of the shareholders in the Timber ditch appropriation; but it does affirmatively appear that the shareholders in the Timber ditch took actual possession and control of the Berry Roberts ditch, and through it diverted and conducted the water that had theretofore been diverted and conducted by means of the Timber ditch. As early as 1877, if not before, all of the water diverted through the Berry Roberts ditch was distributed by the water overseer in charge, and was used by the respective claimants of it, including Ball and Borron, in proportion to the number of shares held by them in the Timber ditch appropriation. The Berry Roberts ditch was enlarged and kept in repair by the parties so using it, and during the year 1877, upon application to the board of water commissioners, a change was made in its route, and in the place of its diversion of the water from the river, in order to avoid a sand wash which caused a loss of water. The board of water commissioners then directed that the ditch should thereafter be known as the "South Fork of Santa Ana." In 1878 another change was made, by the construction of what is designated by some of the witnesses as the "Stone Ditch," and referred to by others as the "South Fork Sunnyside Division Ditch." After this change was made, the water running in the Santa Ana river during the irrigating season was all absorbed and taken in nearly equal quantities by the North Fork and South Fork ditches. The Sunnyside Division of the South Fork ran into the old Berry Roberts waste-water ditch about one mile from where the water was taken out of the river. The water diverted and conveyed by means of the South Fork or Timber ditch, with its divisions and systems of conducting the water, continued to be allotted to the respective claimants therein in the proportion of the number of shares held by them. It was so allotted, diverted, and used for more than five years during Borron's ownership, and during all that time Borron in person, or by his authorized agent, Col. Tolles, acquiesced in and accepted such allotment of the waters flowing in the ditch. In October, 1881, Borron contracted to sell his land and water rights to appellant, and the sale was perfected, and the deed therefor was executed and delivered in the spring of 1882; and the water was continuously thereafter allotted, diverted, and used the same as before the sale. It appears from the testimony that an inch of water is sufficient to irrigate from five to six acres of land, and is considered to be of the value of \$1,000 for the purposes of irrigation.

The circuit court, upon a review of the facts, found, as a conclusion of law, "that there was an abandonment by the immediate grantor of the complainant, as well as by the complainant himself, of the water embraced by the appropriation upon which the suit is based," and upon this ground, without any consideration of the other points involved in the case, dismissed the bill of complaint, and rendered judgment in favor of appellees for their costs. *Hewitt v. Story*, 51 Fed. 101.

W. F. Herrin and H. L. Gear, for appellant.

R. E. Houghton, for appellees.

Before McKENNA, Circuit Judge, and KNOWLES and HAWLEY, District Judges.

HAWLEY, District Judge (after stating the facts). The argument of this case extended over a very wide range, embodying within its scope nearly every principle that has ever been enunciated by the courts, touching in any manner upon the question of the rights of appropriation of water from the public streams or upon private lands,—the incipency of such rights, the manner of their acquisition, how they may be kept up and maintained, and in what manner and under what circumstances such rights may be lost. We consider the law to be well settled that the right to water flowing in the public streams may be acquired by an actual appropriation of the water for a beneficial use; that, if it is used for irrigation, the appropriator is only entitled to the amount of water that is necessary to irrigate his land by making a reasonable use of the water; that the object had in view at the time of the appropriation and diversion of the water is to be considered in connection with the extent and right of appropriation; that if the capacity of the flume, ditch, canal, or other aqueduct, by means of which the water is conducted, is greater than is necessary to irrigate the lands of the appropriator, he will be restricted to the quantity of water needed for the purposes of irrigation, for watering his stock, and for domestic use; that the same rule applies to an appropriation made for any other use or purpose; that no person can, by virtue of his appropriation, acquire a right to any more water than is necessary for the purpose of his appropriation; that, if the water is used for the purpose of irrigating lands owned by the appropriator, the right is not confined to the amount of water used at the time the appropriation is made. He would be entitled, not only to his needs and necessities at that time, but to such other and further amount of water, within the capacity of his ditch, as would be required for the future improvement and extended cultivation of his lands, if the right is otherwise kept up; that the intention of the appropriator, his object and purpose in making the appropriation, his acts and conduct in regard thereto, the quantity and character of land owned by him, his necessities, ability, and surroundings, must be considered by the courts, in connection with the extent of his actual appropriation and use, in determining and defining his rights; that the mere act of commencing the construction of a ditch with the avowed intention of appropriating a given quantity of water from a stream gives no right to the water unless this purpose and intention are carried out by the reasonable, diligent, and

effectual prosecution of the work to the final completion of the ditch, and diversion of the water to some beneficial use; that the rights acquired by the appropriator must be exercised with reference to the general condition of the country and the necessities of the community, and measured in its extent by the actual needs of the particular purpose for which the appropriation is made, and not for the purpose of obtaining a monopoly of the water, so as to prevent its use for a beneficial purpose by other persons; that the diversion of the water ripens into a valid appropriation only where it is utilized by the appropriator for a beneficial use; that the surplus or waste water of a stream may be appropriated, subject to the rights of prior appropriators, and such an appropriator is entitled to use all such waters; that, in controversies between prior and subsequent appropriators of water, the question generally is whether the use and enjoyment of the water for the purposes to which the water is applied by the prior appropriator have been in any manner impaired by the acts of the subsequent appropriator. These general principles are of universal application throughout the states and territories of the Pacific coast. They have, in one form or another, been declared, upheld, and maintained by the courts by a uniform current of decisions in California ever since the decision in *Eddy v. Simpson*, 3 Cal. 249. We cite a few of the many cases upon this subject: *Kelly v. Water Co.*, 6 Cal. 106; *Kimball v. Gearhart*, 12 Cal. 28; *Ortman v. Dixon*, 13 Cal. 34; *Weaver v. Lake Co.*, 15 Cal. 274; *McKinney v. Smith*, 21 Cal. 374; *Hill v. Smith*, 27 Cal. 476; *Water Co. v. Powell*, 34 Cal. 109; *Nevada Co. v. Kidd*, 37 Cal. 283; *Mitchell v. Mining Co.*, 75 Cal. 482, 17 Pac. 246; *Peregoy v. McKissick*, 79 Cal. 572, 21 Pac. 967; *Civ. Code Cal.* § 1410 et seq. The same rules prevail in Nevada: *Lobdell v. Simpson*, 2 Nev. 274; *Ophir S. M. Co. v. Carpenter*, 4 Nev. 534; *Proctor v. Jennings*, 6 Nev. 83; *Barnes v. Sabron*, 10 Nev. 218; *Simpson v. Williams*, 18 Nev. 432, 4 Pac. 1213. In Colorado: *Wheeler v. Irrigation Co.*, 10 Colo. 583, 17 Pac. 487; *Platte Water Co. v. Northern Colorado Irrigation Co.*, 21 Pac. 711; *Coombs v. Ditch Co.*, 28 Pac. 966; *Ft. Morgan L. & C. Co. v. South Platte Ditch Co.*, 30 Pac. 1033. In Idaho: *Conant v. Jones*, 32 Pac. 250. See, also, *Atchison v. Peterson*, 20 Wall. 507; *Basey v. Gallagher*, 20 Wall. 670; *Broder v. Water Co.*, 101 U. S. 276; *Gould, Waters*, § 228 et seq.; *Kinne, Irrigation*, § 150 et seq. In the light of these principles and authorities, it is evident that neither appellant nor his predecessors in interest ever acquired any right by appropriation to the extent of water now claimed by him.

But the contention of appellees is that appellant is not entitled to any amount whatever, under or by virtue of any appropriation that was made of the waste water flowing in the Berry Roberts ditch upon which this suit was brought; that such rights as were ever acquired by such appropriation were either abandoned or lost by nonuser, by the statute of limitations, which is specially pleaded, and by the prescriptive rights acquired by a portion of the appellees, and that appellant is estopped, by the line of conduct and action of himself and his predecessor in interest, from asserting any right or claim to such waters for the purpose of irrigating his lands.

Grouping these questions together for the brevity of discussion, it may be said that, if any of them are well founded in fact, the judgment of the circuit court in dismissing the bill should be sustained. The legal principles in regard thereto are well settled. The general principles pertaining to an abandonment of water rights, which are applicable to this case, are clearly summed up in Black's Pom. Water Rights, § 96, where it is stated that the previous sections—

"Recognize the fact that there may be an abandonment of the exclusive right to divert and use water acquired by, or resulting from, a prior appropriation; that such an abandonment may be made either after the prior appropriation has become perfect and complete, and the right under it vested, or while it is yet imperfect and incomplete, and the right under it remains inchoate; and, finally, that an abandonment may be express and immediate, by the intentional act of the appropriator, or may be implied from his neglect, failure to use due diligence in the construction of his works, nonuser of them after completion, and the like. The general doctrine concerning the effect of such an abandonment, at whatever time or in whatever manner made, is well settled. The prior appropriator thereby loses all of his exclusive rights to take or use the water which he had acquired, or might have acquired, by his appropriation; and he cannot, after an abandonment, reassert his original right to the same, or the same amount of water, as against a second or other subsequent claimant, who has taken proper steps to effect an appropriation thereof."

In *Water Co. v. Crary*, 25 Cal. 509, the court said:

"The right of the first appropriator may be lost in whole, or in some limited portions, by the adverse possession of another; and when such person has had the continued, uninterrupted, and adverse enjoyment of the water course, or of some certain portion of it, during the period limited by the statute of limitations for entry upon lands, the law will presume a grant of the right so held and enjoyed by him."

In *Davis v. Gale*, 32 Cal. 34, the court said:

"A party acquires a right to a given quantity of water by appropriation and use, and he loses that right by nonuse or abandonment. Appropriation, use, and nonuse are the tests of his right."

In *Smith v. Logan*, 18 Nev. 154, 1 Pac. 678, the court said:

"The findings show that from the year 1861 until 1867, inclusive, Logan irrigated from ten to thirty-five acres of land. During the years 1868, 1869, and 1870 he made no use of the waters, and in 1871 and 1872 he irrigated but five acres. During these five years plaintiff and his predecessors in interest used the waters of the creek under their appropriations adversely to Logan. They therefore acquired the right to so much of the waters appropriated by Logan as he failed to use during the period limited by the statute of limitations."

Section 1007 of the Civil Code of California provides that:

"Occupancy for the period prescribed by the Code of Civil Procedure is sufficient to bar an action for the recovery of the property, confers a title thereto, denominated a title by prescription, which is sufficient against all."

Section 1411, under the title of "Water Rights," declares that:

"The appropriation must be for some useful or beneficial purpose, and when the appropriator and his successor in interest cease to use it for such a purpose, the right ceases."

The acts and conduct of appellant and of his predecessors in interest, relative to the use of the Berry Roberts ditch by the owners of the South Fork Company as part of their system for conveying the water which belonged to the South Fork ditch by right of prior

appropriation, are inconsistent with the claim made in the bill of complaint. In order to avoid the force and effect of this evidence, appellant contends that the original right of appropriation, as acquired by the locators of the Berry Roberts ditch, has been preserved and maintained by the assertions of Borron and appellant at various times during their respective ownership of the land, and during the time they were exclusively using the 30 inches of water from the South Fork or Timber ditch, "that they were entitled to the water embraced by the waste-water appropriation." Such declarations by words of mouth, unaccompanied by any act or deed in vindication and maintenance of them within the period prescribed by the statute of limitations, is wholly insufficient to keep alive the rights they had previously acquired by the appropriation and use of the waste water in the Berry Roberts ditch for the purpose of irrigation during the irrigating season. In *Cox v. Clough*, 70 Cal. 347, 11 Pac. 732, the court said:

"If the defendants used and held the water adversely for five years next before suit was brought, the mere disputing their right to such possession by the plaintiff would not prevent the bar of the statute. \* \* \* The seventh finding might be literally true,—that is, defendants and their grantors might have 'claimed the right to the exclusive use of all the waters,'—and yet they may never have been for a moment in the possession of such waters."

No heed was ever given—no attention ever paid—to the asserted claim of ownership made by Borron or appellant. The asserted claim was never recognized nor in any manner respected by any of the appellees, nor by any of the parties using the Berry Roberts ditch for the purpose of conveying the water of the South Fork ditch therein. The contention of appellant that the use of the Berry Roberts ditch was consented to by appellant and his grantor, and only amounted to a temporary license, which was revocable at their will and pleasure, is not sustained by the facts. The suit is without merit, and devoid of any equity whatever. Appellant's rights to water for the purpose of irrigation have not been impaired. Whatever rights he or his grantor ever had to the waste water during the irrigating season have been lost by their conduct and by their nonuse of the water, and appellant is not in a position to complain of the use of the waters of the Santa Ana river by other parties.

To recapitulate: The locators of the Berry Roberts ditch claimed the waste water of the river to irrigate their lands situate in section 16. After a few years they discovered that such waters were wholly insufficient for such purpose; that said ditch and the water rights acquired by its construction could not be relied upon to furnish water during the dry or irrigating season; that, to quote the language of one of the witnesses, the water was so scarce that the land was liable to "dry up and blow away." The locators then, for the purpose of obtaining the necessary quantity of water to irrigate their lands which were fit for cultivation, procured, by agreement and purchase, certain interests in the waters flowing in the South Fork or Timber ditch, which, with the North Fork ditch, had a prior right to the waters of the Santa Ana river, as against the

**Berry Roberts ditch.** After acquiring the waters of this ditch, they and their grantees stopped using any of the water they had formerly appropriated. They succeeded in making an agreement with some other owners of the South Fork to convey the waters from said ditch over into the channel of the Berry Roberts ditch, and prior to 1877 all the owners consented to this change of the waters, and united in its use. The owners of the South Fork ditch took absolute, complete, and exclusive possession, use, and control of the Berry Roberts waste-water ditch,—whether rightfully or wrongfully, by consent or otherwise, need not be here determined. They appointed overseers, or “water masters,” as they are sometimes called, who issued time cards to the shareholders, and upon such cards allotted and distributed to the owners in the South Fork or Timber ditch all of the water which was taken and conveyed through the Berry Roberts waste-water ditch, to the entire exclusion of any and all other waters and water rights. After a few years’ use of the water in this way, it was discovered that a great saving of water could be made by changing the course of the ditch, and taking the water out at a point further up the river, so as to avoid sandy places in the river bed. This change did not give the full relief anticipated, and another change was made. From the year 1874 up to the time of the commencement of this suit, in 1887, all of the water used upon the 240 acres of land now owned by appellant, for the purpose of irrigating the same, was water represented by the 30 shares in the Timber ditch owned by appellant and his predecessors in interest, and this amount of water is sufficient to irrigate said lands. The diversion and use of this water in the way and manner stated were with the knowledge, consent, and acquiescence of Borron, the immediate predecessor of appellant, and were claimed by the other owners of the South Fork ditch to be adverse to any right or claim under the original location and appropriation of the waste water in the Berry Roberts ditch. The testimony shows that the use of the waste water in the Berry Roberts ditch was abandoned, in so far as it had, prior to 1873, been used as a source of water supply during the irrigating season; that in 1874 the Berry Roberts ditch was taken possession of and used by the South Fork Ditch Company; that ever since that time the South Fork Company has had the sole and exclusive possession, use, management, and control of it; that all the water which has run through it has been the water actually appropriated by the South Fork Company; that during the full time of Borron’s occupancy of the land, from June, 1874, to the fall of 1881, he never questioned the right of the South Fork Company to the waters flowing in the Berry Roberts ditch, onto any part or portion thereof; that during all this time he only received water to irrigate his land through the Berry Roberts ditch on his 30 shares from the South Fork Ditch Company. Substantially the same state of facts continued to exist after appellant purchased the land, in 1882. One witness, the son of appellant, testified that he protested, on behalf of appellant, against the use of the Berry Roberts waste-water ditch being taken by the South Fork Company, and that appellant occasionally used such water for irrigating his lands; but this use of the waters, it is admitted, was con-



fined to the nonirrigating season in the early spring or late fall of the year. Col. Tolles testified that the expense of constructing what was called the "South Fork" of the Santa Ana ditch in 1877 was paid upon the basis of the shares in the waters of the South Fork ditch; that the original Berry Roberts ditch was thereafter used to convey the waters of the claimants in the South Fork of the Santa Ana continuously, so far as he knew, until the injunction which was issued in this proceeding; that the South Fork or Timber ditch water filled the Berry Roberts ditch to its full capacity; that repairs were subsequently made upon the Berry Roberts or South Fork ditch pro rata, according to the ownership of the respective parties; that Mr. Borron and appellant paid their proportionate share; that the water was apportioned pro rata on the basis of ownership of the South Fork shares; that there was no distribution of waste water, to his knowledge, to either Borron or Ball, other than during the rainy season, at which time it was not the custom to confine distribution to the water tickets, but each party was then allowed to continuously use the water; that during the irrigating season no waste water was used or distributed in the Berry Roberts ditch. All the testimony of the several water overseers or water masters and time-keepers and others was substantially to the same effect. The waste-water rights of the Berry Roberts ditch location, having been lost by nonuser upon the part of Borron prior to the time when appellant acquired the land, could not be reasserted so as to acquire thereafter any right therein, except by the continued and adverse use of such rights for the period of five years, or by a new and valid appropriation of the water. In *Cannon v. Stockmon*, 36 Cal. 540, the court, in relation to this subject, said:

"A party who has been in the continued, exclusive, adverse possession for five years is entitled to the benefit of the statute of limitations, although the five years are not next preceding the commencement of the action."

As against the appellees who have acquired rights to the waters of Bear creek and the Santa Ana river subsequent to the location of the Berry Roberts ditch, the question here is, as stated in *Hill v. Smith*, *supra*:

"Has the plaintiff's use and enjoyment of the water for the purpose for which he claims its use been impaired by the acts of defendant?"

This suit, it must continuously be borne in mind, is exclusively founded upon the alleged rights of appellant of water for irrigating purposes during the irrigating season, and not for any deprivation of water during the rainy season, or the waste waters then flowing in the Santa Ana river, or through any of the many ditches or canals that have been mentioned. It is therefore necessary for appellant, in order to sustain this action as against the subsequent appropriators, to affirmatively show that his right to the waste waters of the Berry Roberts ditch for use during the irrigating season has been impaired by the wrongful and unlawful acts of the appellees to his injury. This he has not done. No injury has been shown. The absorption of the right to flow water into the Berry Roberts ditch by the South Fork Company, and the use of said ditch for the conveyance of the water were really beneficial, instead of detri-

mental, to appellant. Instead of the uncertain and insufficient quantity of water which then flowed in the Berry Roberts ditch, he has, under the agreements and changes in the condition, as before stated, obtained a valuable right amply sufficient to supply his wants, and to enable him to cultivate, irrigate, and improve his land. It cannot, in the light of all the facts and circumstances set forth in the voluminous record on file herein, be consistently claimed that his rights have in any manner been injured or impaired by the acts of appellees. In *Sharp v. Hoffman*, 79 Cal. 406, 21 Pac. 846, the court said:

"The gravamen of plaintiff's action being the deprivation of water for irrigation during the irrigating seasons in the years 1883, 1884, and 1885, whereby he suffered loss, it is incumbent on him to show by satisfactory evidence (Code Civ. Proc. § 1835) a right to the use of the waters of the creek during each of such seasons, and interference with such right and a consequent injury."

The same general principles are announced by the supreme court in *Atchison v. Peterson*, 20 Wall. 514. Mr. Justice Field, in delivering the opinion of the court, after citing and reviewing certain cases in the courts of California and Nevada, said:

"What diminution of quantity or deterioration in quality will constitute an invasion of the rights of the first appropriator will depend upon the special circumstances of such case, considered with reference to the uses to which the waste water is applied. \* \* \* In all controversies, therefore, between him and parties subsequently claiming the water, the question for determination is necessarily whether his use and enjoyment of the water to the extent of his original appropriation have been impaired by the acts of the defendant."

Upon a review of the evidence, and of the principles of law applicable thereto, we are of opinion that the conclusion reached by the circuit court is correct. The judgment of the circuit court is affirmed, with costs.

KNOWLES, District Judge (dissenting). The first question presented for consideration is as to the jurisdiction of the court in which the suit was instituted. The suit was commenced in the circuit court of the United States for the Southern district of California. The first bill was filed on January 10, 1887. To this bill, answers were filed, and issue joined. Subsequently, considerable evidence was taken in the case. On the 5th day of November, 1888, complainant came into court, and asked to be allowed to withdraw his original bill of complaint, and to file an amended bill, which request was granted. On March 7, 1889, it was stipulated that the respondents in the suit might amend their answers to the amended bill of complaint on or before the 18th of that month. Other matters were also provided for in said stipulation. On the said 18th day of March, one of the respondents, named Brown, filed, instead of an amended answer, a plea in abatement to the jurisdiction of the court. The matters alleged were (1) that the complainant was a citizen of the state of California, and not of New York, as alleged in the bill, and that respondents were all citizens of the first-named state; (2) that other persons claiming, under the same title with complainant's, interest in

the property which is the subject of this suit are citizens of the state of California, but are not made parties complainant or defendant to said bill, and it is not in said bill made to appear that such other persons, or any of them, were requested to and refused to join with said complainant in bringing his said bill of complaint; (3) that such suit or bill does not really and substantially involve a dispute or controversy properly within the jurisdiction of said honorable court, in this: that parties have been improperly or collusively made and joined as defendants for the purpose of creating a case cognizable by said court. Complainant moved to strike out this plea as improperly filed, subsequent to the filing of an answer by said Brown, to the merits in the cause, and as a pleading not authorized by the stipulation in the case. The court sustained this motion, and the plea was stricken out. The cause was tried, and judgment entered for respondents. Complainant alone has appealed the cause to this court. This ruling of the court is not assigned as error; there was no hearing as to the facts presented in this plea. Had the motion to strike out been overruled, complainant would have had the right to have joined issue upon the facts set forth in the same. This court cannot consider any alleged error in this ruling of the court in striking out said plea. It is now urged that this court must consider the allegations set forth in said plea on account of the provisions of the act of March 3, 1875 (18 Stat. 472); that by virtue of that act, the practice as to pleas in abatement involving jurisdiction have been changed. The practice which has heretofore prevailed in the federal courts is that any plea in abatement should be filed and heard before any answer is made to the merits of the bill. It seems to be urged that this plea can be made at any time during the progress of the suit. The provisions of said act which it is urged have this effect are as follows:

"That if in any suit commenced in a circuit court or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court or that the parties to said suit have been improperly or collusively made or joined either as plaintiffs or defendants for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no farther therein, but shall dismiss the suit, or remand it to the court from which it was removed as justice may require."

There is nothing in this statute which would show that there was any intention of changing the order in which a defendant or respondent may make his pleadings. It does seem, however, that this statute has changed the mode in which the objection to the jurisdiction of the court may be made. Formerly the practice was to make it by plea; now it may be made in different ways. In the case of *Morris v. Gilmer*, 129 U. S. 315, 9 Sup. Ct. 289, the supreme court says:

"The statute does not prescribe any particular mode in which such fact may be brought to the attention of the court. It may be done by affidavits, or the depositions taken in the cause may be used for that purpose. However done, it should be upon notice to the parties to be affected by the dismissal."

In the case of *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 136 U. S. 356, 10 Sup. Ct. 1004, it was held that the rule requiring the question of jurisdiction to be raised by demurrer or plea had been changed by said act of March 3, 1875. In the case of *Anderson v. Watt*, 138 U. S. 701, 11 Sup. Ct. 449, the supreme court again considered this point, and said:

"Under the act of March 3, 1875, determining the jurisdiction of circuit courts of the United States (18 Stat. 470, 472), the affection to the jurisdiction upon a denial of the averment of citizenship is not confined to a plea in abatement or a demurrer, but may be taken in the answer; and the time at which it may be raised is not restricted."

I think, upon a review of these decisions, it will be seen that the mode in which the objection to the jurisdiction may be made is changed by the statute, but not the order in which a plea in abatement to the jurisdiction may be filed. Except so far as the matters were presented in the discussion of this plea in abatement, the jurisdiction of the circuit court was not raised. There cannot be much doubt as to the ruling of that court as the case was presented. There does not seem to be any doubt but that the very questions sought to be presented by the said plea in abatement may be raised in this court without such plea. In the case of *Morris v. Gilmer*, supra, the supreme court said:

"At the present term, it was held that whether the circuit court has or has not jurisdiction is a question which this court must examine and determine, even if the parties forbear to make it, or consent that the case be considered upon its merits." *Metcalf v. Watertown*, 128 U. S. 586, 9 Sup. Ct. 173.

To the same effect is the case of *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, supra.

About the same questions as were presented in the plea in abatement were presented in the answers of respondents. It is proper that they should be considered. It is urged that the evidence shows that complainant was not a citizen of New York, but of the state of California, when suit was commenced. This is the evidence adduced to establish this fact. Harvy Hewitt, son of complainant, said, in giving in his evidence:

"Q. Where has your father resided since he returned to the state? A. A greater portion of the time he has resided on the ranch in section 16. Q. Is he a married man? A. My father? Q. Yes, sir. A. Yes, sir. Q. Has he had a family with him? A. Why, I should say he had."

There is some other evidence bearing upon this point. In speaking of a deed desired to be introduced in evidence, the complainant, in giving in his evidence, said:

"Q. Mr. Hewitt, since the taking of the testimony last fall, have you made any search for that deed? A. Yes, sir. Q. Where did you make that search for that deed? A. I have made it during— I made it among my home papers at New York."

The evidence shows that the complainant had been engaged in the mercantile business in Cleveland, Ohio, for 25 years, and that for the 18 years previous to his coming to California he had been in business in New York City. In speaking about his taxes he said he paid taxes on a house and lot in New York and on a house and lot in Cleveland. He made a contract to purchase the ranch, irrigated, from

time to time, by the water in dispute, in 1881. At that time complainant was in California for a short time, from two weeks to a month. In the spring of 1882 he was again in California for a time. In the fall of 1881 he placed a son, Harvy Hewitt, upon the said ranch, and entered into a partnership agreement with him for the cultivation of the same, and for a sale of one-half thereof. This was to continue for five years. In October, 1885, he came to California, and seems to have remained there most of the time until the bringing of this suit. At times, it would appear from the evidence, before and after the bringing of the suit, he went to New York for some purpose. The partnership agreement with his son was terminated in the month of July, 1886. On the 10th day of January, 1887, this suit was commenced. It should be observed that there was no evidence introduced which seems to have been intended for this issue of citizenship. The evidence came out casually when examining the witnesses upon other points. The evidence bears only upon the point of residence, and not upon that of citizenship. "Residence" and "citizenship" are not synonymous terms. *Robertson v. Cease*, 97 U. S. 646. In the case of *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. 207, the supreme court said of the plaintiffs: "They may be doing a business in, and have a residence in, New York, without necessarily being citizens of that state." There are numerous cases which show that a man may reside with a family in a place, and not be a citizen of the place. Citizenship rests very much in intention coupled with acts. There is perhaps a serious question arising in considering this point, owing to the fact that citizenship in New York is alleged in the bill and denied in the answer, and an allegation that complainant "was and is a citizen of the state of California." Upon whom does this cast the burden of proof as to citizenship,—the complainant or respondents? Before the act of March 3, 1875, above referred to, the rule in the federal courts was well established that, whenever the jurisdictional facts were averred in the bill or declaration, it should be taken as *prima facie* true upon this point, and the objection thereto should be taken by plea in abatement, and the burden of proof was upon the party making the plea. *Sheppard v. Graves*, 14 How. 505, 512; *De Sobry v. Nicholson*, 3 Wall. 420. I see no objection to continue this rule. As the matter now stands I apprehend it would not be sufficient to simply deny that complainant was a citizen of New York. That would not show a want of jurisdiction. Complainant might be a resident of some other state, where none of the respondents reside. The allegation that he was a citizen of California at the date of the suit is an affirmative allegation, and material. If the denial of the averment in the bill of citizenship casts the burden of proof on complainant, then all the former rules upon this point have been reversed, and it cannot be told whether or not a court has any jurisdiction of a cause until that question is established. Really, in an action at law, the question would be left to a jury. It could not be considered that a court had, *prima facie*, any jurisdiction to make any order in a case until this question of jurisdiction was settled. Holding, as I do, that the burden of proof is cast upon the respondents to establish, under the circum-

stances, want of jurisdiction in the circuit court, it must be held that they have failed upon this issue.

It is urged that the bill should be dismissed for the further reason that one Story, who, it appears, owns one-third of the Berry Roberts ditch, and the waste-water right used through the same, should have been made a party complainant in the suit. If he was a necessary party complainant in the bill, then this point may be well taken. It appears that Story was a citizen of the state of California, and was not only interested in the Berry Roberts ditch, but claimed some interest in the South Fork ditch of the Santa Ana river, Sunnyside Division. In the bill it is charged that the parties owning in this ditch had diverted, with others, water to which complainant was entitled. If the respondent Story was associated with the owners in that South Fork ditch, and had co-operated with them and others in diverting the water to which complainant was entitled, he was a proper party respondent. It seems to be urged, however, that, because Story was a one-third owner in the Berry Roberts ditch, complainant could not proceed without making him a party complainant, or showing some reason for not doing so. This presents the question, could the rights of Hewitt be determined, as far as the Berry Roberts ditch is concerned, without making Story a party, so that his rights would also be determined therein? This point was presented in the Mining Debris Case, 8 Sawy. 628, 638, 16 Fed. 25. In rendering a decision upon demurrer to the bill in that case, Judge Sawyer said:

"I am satisfied, also, that the complainant is entitled to maintain the suit without joining his cotenant or making him a defendant. His interest—his estate—is several. There is but a unity of possession. His interest or estate is capable of being injured, and he is entitled to have it protected from irreparable injury, whatever course his cotenant may see fit to pursue. He claims nothing against his cotenant. The cotenant is not an indispensable party to a determination of his rights. In this state, both before the Code, under the common-law rules, and after the adoption of the Code, by express provision carrying the former rule into it, it was settled that tenants in common could sue alone."

When a tenant in common is given the privilege, by a state statute, to sue alone to protect his rights, I do not see but this comes within the rule recognized by the federal courts,—that, where a right is given by a state statute, a federal court may be called upon to enforce it. The following cases maintain that one tenant in common can sue for an injury to his estate or interest: *Goodenough v. Warren*, 5 Sawy. 494, Fed. Cas. No. 5,534; *Himes v. Johnson*, 61 Cal. 259; *Lytle Creek W. Co. v. Perdew*, 65 Cal. 447, 4 Pac. 426. The diversion of water from one entitled thereto is in the nature of a private nuisance. *Parke v. Kilham*, 8 Cal. 79; *Water Co. v. Chapman*, Id. 392. All the rights of Hewitt in the Berry Roberts ditch can be adjudicated without joining with him his cotenant Story. It does not seem to me necessary that he should have been made a party complainant.

But it is also urged that certain parties who were owners in the South Fork and Sunnyside Division ditch, and whose names were suggested by the answers of respondents, were not made parties re-

spondent; that these parties were necessary parties, and therefore the bill should be dismissed. The claim is that the cause cannot proceed to judgment without these parties. This action is one in the nature of a suit to abate a nuisance. The nuisance is one that has existed, and is threatened to be continued. It is for the diversion of water from complainant's ditch and land, to which he is entitled, and the threatened continuation of this diversion. Complainant asks for an injunction to restrain and prevent this diversion. This being the nature of the suit, then the rule is that only those persons can be made parties respondent against whom an action at law can be maintained for damages for creating such a nuisance. Wood, Nuis. § 795. If we turn to the law, we find that, in an action for damages for the creation and maintenance of a nuisance, the persons who create and maintain the same are jointly and severally liable, and an action can be maintained against one or any number of the offending parties. Pom. Rem. & Rem. Rights, § 281. The creating of a nuisance is in the nature of a tort. It is difficult to see upon what ground an injunction could be asked against any one who it did not appear was engaged in the diversion of the water, although he might be an owner in the ditch into which the water was diverted. In the Mining Debris Case, *supra*, Judge Sawyer said:

"I can perceive no sound reason, in the established principles of equity jurisprudence and practice, why two or more of the parties injured by the common nuisance should not be permitted to unite, and two or more of those co-operating to commit it should not be joined in one suit to redress the injury, and to enjoin a continuance or increase of the nuisance thus in common inflicted."

The respondents, in their several answers to the bill, made certain denials of having diverted the waters of the Santa Ana river so as to prevent any of them from flowing down to the Berry Roberts ditch and to complainant's land; but these denials involve what is termed a "negative pregnant," and, as a fact, they admit such diversion. They are to the effect that they have not diverted, appropriated, or used any quantities of the water of the Santa Ana river in excess of the quantities lawfully belonging to any prior or subsequent appropriators, or any other waters than such as said respondents are entitled to as appropriators. They deny that they threaten to divert, appropriate, or use any waters of said Santa Ana river, except such as they are legally entitled to divert. They deny that the said respondents prevent any water flowing to the complainant's land to which he is legally entitled, or in any manner entitled. Now, as to all these parties, there can be no doubt they were made respondents properly, as they admit, as I have said, the diversion complained of. Whether, in doing so, they have interfered with any of the rights of complainant, is the matter to be determined in this action. I do not see how any statement in the answers as to the other parties show that they are necessary parties in this action, but that without them the case cannot proceed to judgment. Considering all these matters, I do not think the respondents have shown any lack of jurisdiction in the circuit court or in this court.

We come now to the merits of the case. It appears that the first appropriators of any of the waters of the Santa Ana river constructed

a ditch commencing at a point about three miles below the ditch of complainant. This ditch was called the "Timber Ditch," and was divided into two forks,—one called the "North Fork," and the other the "South Fork." The persons taking out water in what was known as the "North Fork" changed their point of appropriation to a point near the mouth of the cañon at which the Santa Ana river comes into the San Bernardino valley. They enlarged a ditch, which had the name of the "Cram and Van Leuven Ditch," or the "Van Leuven Ditch." This was done some years before the Berry Roberts ditch, in which complainant claims a two-thirds interest, was dug. In about 1869, Berry Roberts, George A. Craw, and Henry Suverkrup constructed the Berry Roberts ditch. In 1870 they had a record made by what are termed "water commissioners" of their location of a water right. This record shows that the appropriation was of the waste waters of the Santa Ana river. The evidence tends to prove the same fact,—that it was the waters that were not then appropriated by those who had constructed the Timber ditch, and the North Fork ditch that were thereby secured. These parties used these waste waters through this ditch for some time. Their grantees used them at times, certainly up to 1874. Prior to 1874, parties who owned in the South Fork of the Timber ditch began to sell out their interest in the waters appropriated thereby. The sale was of so many shares in the waters of the South Fork of that ditch. A Mr. Borron, who had become the owner of some 240 acres of the land for the irrigation of which this Berry Roberts ditch was constructed, with one Ball, who also owned an interest in this ditch, and some land, irrigated therewith, obtained some of the shares of this Timber ditch water, and began to divert in the dry season, in the summer, their share of the Timber ditch water through this ditch. In 1874 certain other parties, owners in the Timber ditch water, desiring to do the same thing, but not owners in the Berry Roberts ditch, made an agreement with the Berry Roberts ditch that upon certain conditions, to be hereafter stated, they were to be allowed to run their shares of water in the Timber ditch through this Berry Roberts ditch. In 1877 or 1878 the owners of the Timber ditch constructed a new ditch, commencing about three miles above the Berry Roberts ditch on the said Santa Ana river, called the "South Fork Ditch." Most of those who owned Timber ditch water, and who had been using the same through the Berry Roberts ditch, had their water interests turned into this new ditch. Since that time other ditches have been dug, which take out more or less of the waters of the said river.

It is, I think, well established that up to 1874, when the owners of the Timber ditch water began to divert their water through the Berry Roberts ditch, there was a waste-water right used through that ditch; that is, the water left in the stream after the South Fork and the North Fork or Van Leuven ditches were filled. Unless abandoned, two-thirds of that right has been vested in complainant through proper conveyances. The right of complainant in this waste water and the Berry Roberts ditch is now denied, and the use thereof prevented, by some of the respondents at least. It is contended that this right was lost by abandonment. The decision and judgment in



the circuit court was based upon this finding. Abandonment takes place of a water right when one having the right to use the same, and who is the owner thereof, gives the same up without any intention of using the same or exercising any ownership over or concerning it. *St. John v. Kidd*, 26 Cal. 264; *Bell v. Red Rock T. & M. Co.*, 36 Cal. 214; *Judson v. Malloy*, 40 Cal. 299. The law does not presume abandonment; it must be established by the party alleging it. There has not been shown in evidence a declaration on the part of any owner in the Berry Roberts ditch showing an intention of abandoning the same. While it was held by Justice Field, in the case of *Keane v. Cannovan*, 21 Cal. 291, 303, that an abandonment might be inferred from lapse of time, and the delay of the first occupant in asserting his claim to the possession against parties subsequently entering upon the premises, he qualified this rule by the following:

"But in such cases the leaving of the premises must have been voluntary, and without any express intention of resuming the possession."

In that case the claimant of the premises left an agent in charge; and in regard to the effect of this he said:

"This circumstance is of itself sufficient to rebut the presumption of abandonment arising from the fact that he ceased to occupy them."

In this case, Borron, the grantor of claimant, left Col. Tolles as his agent in charge of his property, including his water rights. The fact of the owners of Timber creek water getting into possession of the Berry Roberts ditch appear to be about these: According to the evidence of Col. Tolles, a respondent in this case, an agreement was made between the parties, which he says was as follows:

"The agreement, in substance, was that, if (they having first forbid our use of water in that ditch by putting in a dam to shut it off from our use) we would contribute to the enlargement and the repair of the ditch, we could then divert our interest, and receive our water pro rata from the Timber ditch."

He stated also that it was in contemplation, at the time this agreement was made, that a new ditch should be constructed to convey the water of the South Fork or Timber ditch to the different owners. Witness Glover, called as a witness for complainant, said of this agreement:

"Mr. Ball was acting as water master, and he asked a question,—the parties were all together,—if this was a permanent thing. The answer given was that, as soon as the new ditch was built, they would have no more use for this Berry Roberts ditch. Well, under that understanding, the water went in, and no objection was made."

The evidence shows that the ditch was enlarged to double its former capacity, and the Timber ditch water owned by certain parties put into it. For the first year there seems to have been no regular apportionment of the water to different claimants. The next year (1875) there was, and the water tickets took notice of this waste-water right. Mr. Borron was there that year, and looked after the matter, it is presumed, himself. In 1877 or 1878 the new ditch was built, called the "South Fork Ditch," and most of those who had owned water in the Timber ditch took their water out of the Berry

Roberts ditch, and into this new ditch. Borron left his place, in 1875, in the hands of his agent, Tolles, one of the respondents. Borron writes to him to look after his waste-water right. In 1880, or before that time, there is a talk, it would appear from letters in evidence in the case, of bringing a suit to determine his rights in regard to this waste water. Tolles, his agent, and one of the respondents, writes him his waste-water right is in about the same condition as when he left. We find from the evidence of Glover that after the new ditch was built, in 1878, and the Timber ditch water turned into the same, there arose some dispute about this waste-water right, and that it was then used on the Hewitt place. The evidence is that at all times Borron was a great stickler for his waste-water right. Col. Tolles, a witness for respondents, said:

"He was particular to advise me to maintain intact all his water rights and interests, referring also to his claim in the waste-water right."

Again, Col. Tolles, in regard to certain language in a letter he wrote to Borron in 1880, said, when a witness:

"Q. In your letter to Borron, dated November 22, 1880, which you have identified as being your handwriting, you speak of the waste-water right of Borron being retained the same as when he was there? A. Yes, sir. Q. Now, what right did that have reference to, and right in what ditch? A. Well, the right was one which he always maintained after his purchase of the Suverkrup property, and the use of it through the Berry Roberts ditch."

On redirect examination he again testified:

"Q. You have just stated, in answer to the gentleman, that the waste-water right referred to there was one that had been maintained, as I understood you, by Mr. Borron. Maintained in what way, do you mean? What do you mean by the word 'maintained'? A. I meant to convey the idea that he had claimed such a right and interest, not strictly as maintaining it by its use, but by setting up that claim."

Again, Col. Tolles, upon cross-examination, after having testified that Borron had employed him as his agent, said, in response to the following questions:

"Q. You accepted that employment, and he left you as his agent in charge of the property, did he not? A. Yes, sir. Q. To protect his rights? A. Yes, sir. Q. In this matter that you are testifying to, as the privilege of putting in the water which you claim from the Timber ditch, Mr. Borron didn't propose to re-lease you any rights which he may have had, did he? He did not intend to give you any of his rights, did he, as you understood it? I mean to water. A. Not to water. Q. He did not intend to create in you any ownership of water, did he? A. No, sir. Q. It was simply as to whatever water you might have the right to bring from Timber ditch? A. Yes, sir. Q. So that substantially it was this: Whatever water you have a right to of the Timber ditch water you may put into our canal or our ditch? A. Yes, sir. Q. That, and nothing more, was it? A. That was all. Q. Provided you keep up the repairs as stated? A. Yes, sir. Q. That was the substance of it? A. Yes, sir."

This sort of questions and answers might be referred to for some time.

When Borron conveyed his property to Hewitt, he conveyed this waste-water right. The agreement for a conveyance was made in 1881, but the deed does not appear to have been signed until 1882. In 1881, Hewitt went into the possession of the property. The evidence of Harry Hewitt is that he used this waste-water right on

claimant's place in 1881, 1882, 1883, and 1884. Valdez, a witness for respondent, states that, in 1884 and 1885, Hewitt used the waste water in the Berry Roberts ditch whenever he wished to, and it was not used on time tickets. Water in South Fork ditch was generally used on time tickets. The witness said that Harvy Hewitt, who was acting for his father, the complainant, always claimed that waste water, and used it whenever he wanted it. The evidence of both Borron and Hewitt is that they never at any time did anything looking to the abandonment of that water right. Tolles, as the agent of Borron, certainly had no authority to abandon that water right. I do not see how it can be maintained that either Borron or Hewitt ever intended to abandon that water right. But it is claimed that they lost it because they allowed the owners of the Timber ditch to use the Berry Roberts ditch for more than five years for running their water through the same. If I understand the claim, it is that these parties obtained the right to the Berry Roberts ditch by adverse possession. Mr. Borron, as has been stated, owned a two-thirds interest in that ditch in 1874 by purchase from one Suverkrup. Ball owned one-third by purchase coming from one of the locators and constructors of the Berry Roberts ditch. They had segregated the interest they had in the Timber ditch water, and diverted it through this Berry Roberts ditch. They were the legal owners of that ditch and that water. Tolles and other parties owning other interests in the same Timber ditch water were allowed, as has been sufficiently detailed, to put their water also into that ditch. But I do not see how it can be maintained, under the evidence stated, that they acquired any interest in the Berry Roberts ditch by virtue of that agreement. That ditch was to be used until New South Fork ditch was constructed, when the use of it was to be relinquished. Certainly, under the evidence, Borron used that ditch to carry his Timber ditch water up, until 1878. It should be borne in mind that the South Fork Water Company was not a corporation, but an association. Whatever titles or rights they acquired was as individuals in their individual capacity, and not in an associated capacity. As to this Timber ditch water they were tenants in common. They acquired their rights generally by purchase, and in their several names, as appears in evidence. The respondents have been particular to prove that, whenever required, Borron paid his share of all improvements and repairs on the Berry Roberts ditch; that through Tolles he paid his pro rata share of the building and maintaining the New South Fork ditch, and keeping that in repair. Under these circumstances, no adverse possession could arise in any of the South Fork ditch claimants, for certainly, with the others, Borron must have had possession of the Berry Roberts ditch and the New South Fork ditch all the time.

Under the statute of limitation it was held by the supreme court, in the case of *Doswell v. De La Lanza*, 20 How. 29, that the possession "must be, in the language of the authorities, actual, continued, adverse and exclusive for the space required by the statute." Could this possession be said to be exclusive when Borron and Ball were holding possession with the other claimants of water in the timber

ditch? "To render possession adverse, so as to set the statute of limitations in motion, it must be accompanied with a claim of title, and exclusive of every other right." *McCracken v. City of San Francisco*, 16 Cal. 594, 636, 637. At what time the respondents made a claim of title to the Berry Roberts ditch, I think it will be difficult to determine, and at no time was Borron or Hewitt denied the right to use it for Timber ditch water. It is said that the water was used under the supervision of a water master. He was no more than an agent of the parties holding these water rights. His possession of these ditches was their possession, if he ever had what is called "possession" of them. He was as much an agent of Borron as of the other parties. His duties, I think, only pertained to the apportioning of water by virtue of an agreement between the parties. There were certain parties—Tolles, Bates, and Dr. Barton—who went into the possession of the Berry Roberts ditch under an agreement with the owners. Their possession was that of the owners until they commenced to hold adversely. When did they commence to hold adversely? I am unable to tell from the evidence. But under the circumstances under which they went into the possession, before they could claim to be holding adversely, they would have to give Borron some notice that they were holding adversely. It is said that this notice was given to Col. Tolles, his agent. But Col. Tolles is one of the parties claiming adversely, according to the contention of respondents. I hardly think a court ought to consider a notice to him a notice to Borron. He was a man trusted and employed, according to his own evidence, to look after and preserve Borron's property, and yet he joined in with others to take away from him, according to the claims of respondents, without compensation, a valuable property interest Borron intrusted to his keeping. He was always a prominent member of the South Fork Ditch Company. I do not think that a court ought to hold that notice to him was notice to Borron. There is no other kind of notice claimed. "A silent possession accompanied with no act which can amount to an ouster, or give notice to his cotenant that his possession is adverse, ought not, we think, to be construed into an adverse possession." *McClung v. Ross*, 5 Wheat. 116, 124.

Taking into consideration that Borron must have been in possession of the Berry Roberts ditch to the extent that he used it for Timber ditch water, and we reach another point in the case that I think is conclusive, as far as the adverse possession of this ditch is concerned. "The rule is that, where there is a mixed possession,—that is, where there are two or more persons in possession, each under a separate conveyance or color of title,—the possession will be treated as being in him who has the better title, upon the ground that the seisin is in him who has the best title, and, as all cannot be seised, the possession follows the title." *Wood, Lim. Act. § 261; Langdon v. Potter*, 3 Mass. 215; *Bellis v. Bellis*, 122 Mass. 414. I think the case of *Hunnicut v. Peyton*, 102 U. S. 333, 363–369, supports this doctrine. I do not see how it can be held that the respondents held any distinct and definite part of that ditch as against Borron. As tenants in common of the Timber ditch water, they had a unity of

possession, perhaps, of the Berry Roberts ditch. If there was any possession with Ball and Borron by the other parties using water in the Berry Roberts ditch, it was a mixed one, and hence the above rule must prevail. As I said before, one of the main issues in this case is as to the waste water. When did any of the respondents set up any claim to the waste water? Undoubtedly, that waste-water right was preserved up to 1875. The evidence seems to be conclusive that from that time up to 1878 the ditch was always filled, during the irrigating season, with Timber ditch water. In 1878 most all of those owning Timber ditch water transferred it to the New South Fork ditch. Then we hear again of this waste-water right. Glover, in his evidence, says that in 1878 most of the parties turned their water into this New South Fork ditch, and the question was asked him:

"Q. And did they cease, then, from taking any water through the Berry Roberts ditch? A. Well, no, sir; there was a claim set up then to that water as waste water. Q. Well, what was done about it? A. Well, there were parties, who owned their water in what was called the 'New Ditch,' claimed they had a right in the other ditch, and this was disputed by representatives of the Berry Roberts ditch, and it worked along that way for quite a number of years. Q. Well, what did the owners or claimers of the Berry Roberts ditch do in regard to the water in that ditch, or through that ditch? A. They undertook to use it. Q. Well, did they use it? A. Yes, sir. Q. Now, where was that water used, and who by? A. Well, it was used principally on what is now known as the 'Hewitt Ranch,' and what was known as the 'Berry Roberts Ranch,' or on this section 16."

The Berry Roberts ranch is the same as the Ball ranch. On the 1st day of January, 1882, Borron conveyed his rights to Hewitt. It seems Hewitt had gone into possession of all Borron's ranch, and property connected with his ranch, in San Bernardino county, in the fall of 1881. This was less than four years after we hear of any claim to this waste-water right. This is what Harvy Hewitt says as to his use of this right:

"Q. Now, state what use has been made, if any, of the waters of the Santa Ana river during the years from 1881 down to the present time by your father, if you know, and where has the water been used? A. The water has been used by my father in his place in section sixteen, township one south. Q. Well, how? A. Used for the purpose of irrigation. Q. For the last few years? A. In 1881 it was not used continuously because the ditch did not run the entire year through, but all the time that the water was in the ditch it was used. Q. You mean that the ditch did not run, or that the river didn't run, or that the water didn't run? A. The water didn't run. Q. Well, how in 1882, 1883, and 1884? Go right along. A. In 1882 we used the water with some exceptions. At some times the water was taken. We turned it back, and used it. Q. Well, how about the other years right along? Oh, state generally whether you used it. A. Well, generally in 1883. In the spring of 1884 the ditch— There was considerable water, and the Sunnyside water master took possession of it. Q. With your consent or without? A. Without our consent and under my protest."

The witness Valdez, called by respondents, said, in answer to questions of counsel for them:

"Q. How did you get your water? A. From Mr. Rob Roberts. Q. What is the name of the ditch,—Berry Roberts? A. Berry Roberts ditch and Sunnyside ditch. Q. Were you working there on time cards? A. I don't understand you. Q. Were you working there, having water issued to you then, or delivered to you on time, which was represented by a card? A. Well,

not Berry Roberts ditch. I don't recollect we ever used it in that way. He always claimed that as his water, and we always used it whenever we wanted to."

On cross-examination he testified:

"Q. You said, in your direct examination about this Berry Roberts ditch, he used that water whenever he had a mind to, didn't he? A. Yes, sir. Q. And irrespective of any time tickets, as far as you know? A. Not that I knew that there was any tickets of that water. Q. That was your understanding, was it? A. Yes, sir; that is the way I understood. Q. That there was no tickets? A. Yes, sir. He always claimed that water, and we used it whenever— He seemed to send the water whenever he wanted it."

This evidence pertained to the years 1884 and 1885. His evidence and that of Hewitt is corroborated by that of Glover upon this point.

I cannot find that as to this waste-water right it was definitely contradicted by any other evidence. There was never any location of a waste-water right by the South Fork Ditch Company. The action that was done in 1877 by the water commissioners cannot affect any title to the Berry Roberts ditch or the waste-water right. The recitation that they acted upon a petition of the owners of the Berry Roberts ditch does not prove the fact. This was a location of another ditch to be constructed from another point, and was used to convey these peregrinating water rights of the Timber ditch evidently as understood when they were put into the Berry Roberts ditch. The record says "E. A. Craw and William Curtis met at the mouth of the Santa Ana cañon, and did change the location of the Berry Roberts ditch in the following manner," etc. This is not a location of the Berry Roberts ditch. Its head is near three miles above that of the Berry Roberts ditch, and it covered and ran through different ground for most of its course. It seems, however, these parties claiming to own the Berry Roberts ditch, after they had changed its location, did not seem to want to give up the former location thereof. They now claim both. There is shown no right, as far as Borron is concerned, in these commissioners, to change the location of that ditch. At all events, it cannot be held to be a location of the waste-water right of Borron and Ball.

A contention of some kind seems to be made to the effect that the appropriation of the waste-water right was not valid because an appropriation of water must be for some beneficial purpose, and that it appears that more water was appropriated than would irrigate the land sought to be irrigated thereby. There is evidence that in that locality one inch of water will irrigate seven acres of land, and one witness gave evidence that, in cultivating some fruits, one inch would irrigate ten acres of land. If this would make the Berry Roberts waste-water right void, at the date of its appropriation, for the reason assigned, then the appropriation of water in the Timber ditch was also void. The claim that one inch of water suffices generally to irrigate seven acres or ten acres of land in the San Bernardino valley, where the soil is a sandy loam, and the atmosphere dry, does seem to me to tax even the credulity of one accustomed to irrigation in other sections of country to a considerable extent. When acquired, I do not think there is any doubt but that the Berry Roberts waste-water right was a valid one. The change of notions concerning irriga-

tion and the quantity of water needed for irrigation cannot affect it. It should be observed that the facts constituting an adverse possession are not pleaded. It should be observed that no facts showing adverse possession of either the ditch or water right in dispute are pleaded. The general rule is that the facts constituting the adverse possession should be stated. *McCloskey v. Barr*, 38 Fed. 165. There is no difference between a plea and an answer in this particular. The allegation that the action did not accrue within five years presents the question as to whether the action for the diversion of the water accrued within that time. There is no doubt but that respondents had diverted the water complainant claims within five years. The contention that the ceasing to use any parcel of property in its nature real estate, or an appurtenance thereto, for five years, would constitute abandonment thereof, cannot be sustained. No such arbitrary rule is applied in the consideration of this question. Time may be an element in determining intention, but not alone absolute proof of abandonment. *Partridge v. McKinney*, 10 Cal. 181; *Moon v. Rollins*, 36 Cal. 333; *Judson v. Malloy*, 40 Cal. 300. It devolved upon the respondents to show abandonment, and the rule is that it should be clearly established. Neither for this assigned reason do I find abandonment, and then the evidence does not show a ceasing to use the waste water for any one five years.

There is one further clause in the evidence of Col. Tolles I will recite as bearing upon this question:

"Q. What consideration, if any, has he had in this distribution as to the matter of waste water? A. There was no distribution of waste water, to my knowledge, to the parties mentioned,—Mr. Borron or Ball,—during that time, other than was during the rainy season, when all parties shared alike in the surplus water."

This is followed up by several answers.

Now, if the waste water was used at any time during the year by Ball and Borron, or either, that right was preserved. But, as I think I have shown before, there were no five years when this waste water was not used by some of the owners thereof in the irrigating season. It would seem to me that the act of allowing the owners of Timber ditch water to put their water into the Berry Roberts ditch by Ball and Borron was an act of neighborly kindness and accommodation, and the attempt of those thus favored to use this act to show that the owners thereof had thereby abandoned their right to the same, with the water right connected therewith, and that the respondents herein so accommodated had acquired all of the same, should not appeal with much force to a court of equity and conscience. Considering this case as best I could, I have been unable to reach the conclusion that either the ditch or waste-water right to which complainant asserts title has been abandoned by his predecessor in interest or himself. I will say that the record is an unsatisfactory one. Maps used on the hearing were left out by stipulation. They were needed to explain evidence. The evidence is so mixed up with objections and motions and immaterial evidence as to be confusing.

Complainant also makes claim to certain other water originally used in the Timber ditch. This is urged upon the ground, as I under-

stand, that this water was abandoned by the owners thereof. The Timber ditch was undoubtedly abandoned, and all water used in the same, and not transferred, may be considered perhaps as abandoned. If the equitable title in the same had been conveyed in any manner, undoubtedly this would not occur. But, allowing that it was abandoned, there is no showing that complainant ever appropriated the same. From 1875 to 1878 the Berry Roberts ditch was filled, most of the time, with Timber ditch water. There was no chance, up to that time, to appropriate the same by the user; but, if there was, it would not suffice.

In 1873 the Civil Code of California went into effect. Section 1415 of said Code, upon the subject of irrigation, provides:

"A person desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended diversion stating therein, (1) that he claims the water there flowing to the extent of (giving the number) inches measured under a four inch pressure; (2) the purpose for which he claims it, and the place of intended use; (3) the means by which he intended to divert it, and the size of the flume ditch, pipe or aqueduct in which he intends to divert it. A copy of the notice must within ten days after it is posted be recorded in the office of the recorder of the county in which it is posted."

There are other provisions of the statute not necessary to be here referred to. Then follows this provision:

"Sec. 1419. A failure to comply with such rules deprives the claimants of the right to use the water as against a subsequent claimant who complies therewith."

There were notices of the location of all such water by other parties. Neither complainant nor his grantors complied with this statute in making any appropriation to any of the abandoned waters of the Timber ditch. This claim is therefore not maintained.

The locators of the Berry Roberts ditch claimed a waste-water right. The water commissioner noted this claim. The evidence shows what was meant by this term, "waste water." It was the water that was left after the North Fork and the Timber ditch or South Fork ditches were supplied from the waters of the Santa Ana river. It is not an easy matter to determine from the evidence how much water was in fact appropriated as this waste water through the Berry Roberts ditch. Berry Roberts was of the opinion his ditch would carry about 175 inches of water, miners' measurement. Glover claimed that at one time it would carry about 300 inches, and at another time 200 inches, of water under miners' measurement. Tolles said that, at times Timber ditch water was put into it, it would not carry more than 100 or 150 inches of water, miners' measurement, but that the ditch was then out of repair. The evidence shows that, about the time the Timber ditch water was put in, the ditch was enlarged to double its capacity. There were measurements of the ditch after it was enlarged, that would appear to be reliable, that made the capacity of the ditch about 480 inches, measured as above stated. There is one thing to be noticed concerning the evidence estimating the number of inches of water in any ditch from 1860 to 1878. The early estimates of water were much less than the later, and the actual measurements seem to have shown at all times a much



larger amount of water than the estimates. Hence I think it would be safe to find that the Berry Roberts ditch appropriated 200 inches of water. There is no dispute but that during certain months the Timber ditch and the South Fork ditch took all the water in the Santa Ana river. What was the exact time this occurred cannot be easily determined from the evidence. Some seasons this period was much shorter than others. I find that from about the 15th of June to the 1st of September of each year, as a rule, these ditches took all the water in the river. As I said before, it seems to be admitted by the answers of all the defendants that they did divert this waste water. If the respondents had each set out the amount of water he or it claims, there might have been a determination of the case to show who are the exact parties who diverted the water owned by claimant. As the case stands, the only decree that can be entered is an injunction enjoining all of the defendants from diverting this waste-water right from the 1st of September to the 15th of June of each year. My opinion is that the judgment of the circuit court should be reversed, and the cause remanded, and the circuit court directed to enter a decree according to this view.

This opinion was written with the thought that it might be adopted as the opinion of the court in the case. Finding that the majority of the court do not agree with the conclusions I have reached, I present the same as my individual views, and as a dissenting opinion.

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MERRIMAN et al. v. CHICAGO & E. I. R. CO. et al. (two cases).

(Circuit Court of Appeals, Seventh Circuit. November 27, 1894.)

No. 69.

**1. APPEALABLE JUDGMENT—FINAL DECREE—WHAT CONSTITUTES.**

In an action against a railroad company, one W., and others, for a discovery, to redeem, etc., there was a decree dismissing the bill as to such company, and requiring W. to account for certain bonds. It provided that he was entitled to credit for such sum as might be rightfully due him; and that, it appearing that there was pending in a certain state court a suit in equity in which W. was defendant, touching such bonds, that an accounting had been had in respect to them, and that a special master had made a report, which had not been acted on by such court, execution of the decree should be stayed until final determination of such suit in the state court, or until further order of the court making the decree. *Held*, that the decree, as to W., was interlocutory, and not final, and was not appealable.

**2. EQUITY—PLEADING—ORIGINAL BILL—CONSTRUCTION.**

A bill by judgment creditors of the D. R. Company against such company, the E. I. R. Company, and others alleged in substance, but in great detail, the execution by the D. R. Company of various invalid mortgages and trust deeds, the void foreclosure and sale of the property, and the possession, under such sale and other illegal proceedings and transactions, of the E. I. R. Company; that the latter company acquired no title to such property; and that it was about to issue to the attorneys, officers, and stockholders of the D. R. Company certain bonds, in consideration of a collusive agreement by them to abandon a contest being made by them for such property, etc. The bill prayed for a discovery and accounting; for an injunction restraining the sale or delivery of such bonds; that all

the property in possession of the E. I. R. Company be decreed to be the property of the D. R. Company, subject only to the right of the former to hold it as mortgagees in possession under an unforeclosed mortgage; that the amount due the mortgagees be ascertained; that plaintiffs be allowed to redeem, and be subrogated to the rights of the mortgagees; and that they have general relief. *Held*, that such bill should be treated as a bill to redeem, and not as a creditors' bill.

**8. SAME—MULTIFARIOUSNESS—WHAT CONSTITUTES.**

A bill by a judgment creditor of a railroad company, against such company and another railroad company, to redeem property in possession of the latter company as mortgagee, on the ground that such possession was fraudulently acquired, and also to subject to payment of complainant's judgment certain bonds about to be issued by the latter company to the attorneys, officers, and stockholders of the former company, in order to confirm the title to such property, is self-contradictory and multifarious, and cannot be maintained.

**Appeal from the Circuit Court of the United States for the Northern District of Illinois.**

Two bills heard together,—one by Corydon C. Merriman and others against the Chicago & Eastern Illinois Railroad Company, and the other by the same plaintiffs against the Chicago & Eastern Illinois Railroad Company, Edwin Walker, Joseph E. Young, and the National City Bank of Ottawa, Ill. From the decree, complainants appeal. Affirmed.

The decree from which this appeal was taken was rendered by Mr. Justice Harlan, sitting in the circuit court, on the 18th of June, 1892. It dismissed the original and amended and supplemental bills of complaint as to the appellee the Chicago & Eastern Illinois Railroad Company, hereinafter called the "Eastern Illinois Company," for want of equity, and decreed that the appellees Edwin Walker and Joseph E. Young should account for certain bonds received by them respectively from the Eastern Illinois Company, which were adjudged to have been assets belonging to the Chicago, Danville & Vincennes Railroad Company, hereinafter called the "Danville Company," which the appellants, as judgment creditors of that company, were entitled to have applied in satisfaction of their judgments. The execution of the decree against Walker was stayed until the final determination of a cause pending in the circuit court of Cook county, in the state of Illinois, brought by other parties against Walker and Young, after the commencement of this suit. From this decree two appeals were prayed and allowed. The first is from that part of the decree which dismissed the original, amended, and supplemental bills of complaint as to the Eastern Illinois Company; and the second is from the entire decree. On the hearing of the appeal in this court two errors are pointed out: (1) In staying the execution of the decree as to the appellee Walker; (2) in dismissing the original, amended, and supplemental bills of complaint as to the Eastern Illinois Company.

(1) So far as the appellee Walker is concerned, the decree is as follows: "That the said defendant Edwin Walker, on or about the 6th day of November, 1884, received one hundred and twenty-seven of said bonds, of the par value of one thousand dollars each, together with interest coupons thereon, and that the said defendant Walker should account for the said bonds and coupons so received by him, together with interest thereon. But said Walker is entitled to credit for such sum or sums as may be rightfully due him. It appearing that there is now pending in the circuit court of Cook county, in the state of Illinois, a suit in equity in which one John McNamony is complainant, and said Walker and Young defendants, touching the said bonds in the decree mentioned, which said suit was commenced prior to the filing herein, on the 14th of December, 1875, of the supplemental bill in lieu of the original bill, and it also appearing that an accounting had been had in said case in respect to said bonds, and that a report thereon has been made

by the special master, which report has not been acted upon, it is therefore ordered that the execution of the foregoing decree, settling the rights of the complainants and the defendant Walker in this suit, be stayed until the final determination of said suit in the state court, or until the further order of this court. The court reserves the right to allow such further proceedings in this case between the complainants and said Walker as may become necessary or proper by reason of the final determination of the case in the state court." The appellee Walker has moved the court to dismiss this appeal, so far as it concerns himself, on the ground that the decree touching himself is interlocutory, and not final.

(2) The appellants concede that the decree dismissing the original, amended, and supplemental bills of complaint as to the Eastern Illinois Company is correct, unless the original bill of complaint was a creditors' bill which created a lien on \$500,000 of bonds of the Eastern Illinois Company, which it was about to issue to certain officers, agents, and attorneys of the Danville Company, and which it did issue before the filing of the amended and supplemental bills of complaint.

The original bill of complaint, after stating the parties plaintiff and defendant, and their respective citizenship, and that the complainants had severally recovered judgments against the Danville Company for certain amounts named, and had severally caused executions to be issued on their respective judgments, which executions had been severally returned nulla bona, alleges, in substance:

That the indebtedness merged into said several judgments was all incurred by the Danville Company and existed prior to, and has existed ever since, the year 1873, and that said judgments, since their rendition, have been and still are liens upon the property, or some portion thereof, of the said Danville Company. That the Danville Company was heretofore the owner of a line of railroad extending from Dalton, Cook county, Ill., southerly to Danville, in Vermillion county, a distance of about 108 miles, and a branch line from Bismarck, in said Vermillion county, southeasterly to the east line of the state of Illinois, a distance of 4.5 miles, with right of way, station and other grounds, grading, bridges, culverts, tracks, shops, tools, fixtures, station buildings, structures, fences, and supplies for the use and operation of said road, and terminal tracks, sidings, and switches along said road, and in and near the city of Chicago, and certain lots and leaseholds, rights, and contracts by it acquired for use in connection with said line of railroad, and engines, cars, and machinery and equipments pertaining to said line of railroad, and certain franchises to it belonging, in that regard, together with other property in the state of Illinois; and also a line of road connecting with said lines in the state of Illinois and the state of Indiana to a point near Covington, Ind., with certain franchises and other property connected therewith. That on or about March 10, 1869, the Danville Company executed a purported deed of trust conveying to William R. Fosdick and James D. Fish, defendants herein, as trustees, the road and property of said company in the state of Illinois, extending from its terminus in Chicago to a point on the state line of Indiana, and including all property between said terminal points which said party of the first part "now has or possesses, or may hereafter acquire," and purporting to be its entire property and assets in the state of Illinois, to secure a pretended issue of bonds of said railroad company, of even date with said trust deed, amounting to \$2,500,000, payable April 1, 1909, with interest at the rate of 7 per cent. per annum, payable semiannually, as evidenced by certain coupons issued with and attached to said respective bonds. That said trust deed was not acknowledged and recorded as required by the laws of the state of Illinois, and was not a valid conveyance of said property for the purposes therein stated, the property thereby sought to be conveyed being largely personal property thereby left in the possession of the mortgagor, and said mortgage or trust deed not being acknowledged before a justice of the peace in the town where said property or any part thereof was situated, and said personal property was sought to be conveyed contrary to the laws of the state of Illinois. That, as your orators are informed, said bonds to the amount of \$2,500,000 were issued, and a large part of them was sold or hypothecated soon thereafter and passed into the possession of holders thereof,

and afterwards, by transfer, or under the conditions of certain agreements hereinafter mentioned, into the possession and ownership, or under the control, of certain of the defendants hereto, as representatives of the owners thereof, as hereinafter stated. That on March 4, 1872, the Danville Company became consolidated into one corporation, by the same name, with the Ross-ville & Indiana Railroad Company, and on March 9, 1872, a further consolidation was effected, by the same name, with the Western Railroad Company, an Indiana corporation, whereby the consolidated company was empowered to build and operate a railroad from the state line, in Warren county, to Brazil, in Indiana; and on March 12, 1872, the consolidated company, for the alleged purpose of raising means wherewith to construct its Indiana Division, issued its bonds to the amount of \$1,500,000, bearing interest at the rate of 7 per cent. per annum, payable 40 years after date, to secure which, on the same day, was executed a pretended mortgage to said Fosdick and Fish, defendants herein, covering its Indiana Division and a branch road extending from a point three miles south of Covington to the village of New-berg, being about 80 miles in all, and being all the property of said company in the state of Indiana; all the bonds secured by this mortgage were issued, and some part of them was sold or hypothecated soon thereafter. That said mortgage was not properly executed, acknowledged, or recorded, and was in- valid, and said issue of bonds was never properly authorized by said com- pany, and was for an amount largely in excess of the cost of the property conveyed by said trust deed. That the Danville Company, on April 24, 1872, executed another mortgage to Fosdick and Fish, purporting to convey the Indiana Division as security for the first issue of bonds on the Illinois Di- vision, and purporting to convey the Illinois Division as security for the bonds originally issued on the Indiana Division; but whether or not said mortgage was ever acknowledged or recorded the complainants are not cer- tainly advised, but are informed and believe that the said mortgage was not properly acknowledged and recorded in the state of Illinois, and in this state said mortgage was not valid, and was never properly authorized and exe- cuted by said company, and was wholly without consideration in Illinois, and was void under the laws of Illinois, for that it sought to create an indebted- ness wholly in excess of the cost of said property conveyed, and for other reasons. That on or about December 16, 1872, said Danville Company exe- cuted a pretended deed of trust purporting to convey to James D. Fish and James W. Elwell, as trustees, all of its property in the states of Illinois and Indiana, to secure an issue of bonds to the amount of \$1,000,000, payable, with interest semiannually at the rate of 7 per cent., on February 1, 1893, and all of said bonds, except about \$45,000 thereof, were issued. That said mortgage was never properly acknowledged or recorded in the state of Illinois, and was never properly authorized or executed by said company, and was void and invalid under the laws of the state of Illinois, for that it sought to create an indebtedness of said company and make it a lien on all its property largely and wholly in excess of the cost of said property, and without any new consideration therefor moving to said company, and for other reasons. That a small part of said bonds were afterwards sold, and some part thereof hypothecated for small sums, and a part thereof was given to holders of first mortgage bonds of said company on account of coupons maturing for interest on said first mortgage bonds, but that said coupons were not thereby paid, were not canceled, and are still held and insisted upon by said holders as in- debtedness, and liens upon said road under said first mortgage, as hereinafter set forth. That the entire amount of said bonds ever actually sold was not to exceed \$170,000 thereof, and that all the remainder were merely used to dupli- cate, and in many instances to triplicate or quadruple, the indebtedness of said company, and cannot lawfully be enforced as valid liens on said prop- erty as against or prior to the claims and liens of complainants. That some time in 1875 a pretended chattel mortgage conveying certain personal rolling stock and personal property of said company was attempted to be made to defendant R. Biddle Roberts, and a further issue of bonds to the amount of \$800,000 was sought to be saddled upon said property as a further lien thereon, and some part of said bonds were hypothecated or pledged in like manner as in the case of the second mortgage bonds, but that said chattel

mortgage and bonds were wholly void; unauthorized, contrary to law, without consideration, and no part thereof has ever passed into the hands or possession of actual bona fide holders or purchasers, and all holders thereof had full notice of their void and fraudulent character.

That on or about February 27, 1875, Fosdick and Fish filed an original bill in the circuit court of the United States for the Northern district of Illinois, as such trustees under such mortgages or trust deeds wherein they were made trustees, praying, among other things, for a decree of foreclosure and sale of the property conveyed by said trust deed of March 10, 1869, in consequence of certain alleged defaults in the conditions of said trust deed, and that on March 10, 1875, the Danville Company was served with process issued upon the filing of said bill. That on May 17, 1875, Elwell, acting as trustee in said purported mortgage of December 16, 1872, appeared in said cause and filed a cross bill therein, setting out the terms of said mortgage, the issuing of the bonds secured thereby, and craving certain relief therein prayed. That on May 20, 1875, by the order and decree of the circuit court of the United States for the Northern district of Illinois, one Adna Anderson was appointed receiver in said cause, to take possession of the money and assets, real and personal, roadbed, road, iron, ties, lands, rights of way, mines, rolling stock, leases, franchises, and all other rights and property of whatever nature and kind of the Danville Company, wherever the same might be found within the state of Illinois, with power to manage and control and exercise all the franchises, and control the property of the said railroad company, within said state, and to have full power and authority to inquire for, receive, and take possession of all said property, debts, equitable interests, things in action, and other effects, and to manage and control all said property and affairs of said company, until the further order of said court in the premises, upon giving bond as thereto required. That on May 31, 1875, said receiver having given bond and qualified as required, it was further ordered and decreed that said receiver be and was invested with all the duties in said decree mentioned, and was authorized and directed immediately to enter upon the discharge of his duties as aforesaid, and to take possession of all and singular the property, rights, and franchises in said decree mentioned, which said receiver immediately proceeded to do, and, acting in that capacity as an officer of the court, he did take possession of all said property, and he, or a successor duly appointed and qualified, with like rights and powers, has ever since continued and is still acting in said capacity under said order and decree, which are still in full force, and has never been discharged, and is still in possession of all the property of said Danville Company, except as hereinafter set forth. That by such proceedings said court obtained and assumed, and still retains by said receiver, the possession and control of all the property and assets of said railroad company within the state of Illinois, save as hereinafter specified, and that by reason thereof complainants have been and still are delayed, restrained, and enjoined from selling or in any manner realizing upon the executions issued on their said judgments, or otherwise, the amounts of their respective judgments, or any part thereof, and that the only property of the Danville Company, within the state of Illinois or elsewhere, so far as complainants have been able to discover, from which they could realize payment of any portion of their respective judgments, is now in the possession and under the control of the court by its receiver, except as hereinafter specified; and complainants know of no other means whereby they can obtain payment of any portion of their said judgments than as hereinafter set forth, and by obtaining relief under this bill as hereinafter prayed. That on July 12, 1875, the Danville Company filed its answer in said cause to said original bill, denying the defaults in said bill alleged. That on September 14, 1875, said Fosdick and Fish filed in said cause an amended bill against the Danville Company and James W. Elwell and R. Biddle Roberts, craving certain relief therein prayed. That on October 23, 1875, the Danville Company filed a demurrer to so much of the amended bill of Fosdick and Fish as charged that it would be impossible for said company to fulfill the conditions of certain funding agreements in said amended bill mentioned, and that the holders of certain funding certificates mentioned had the right to rescind said agreements, being the agreements under which said

holders became possessed of said second mortgage bonds hereinafter stated, and to other portions of said amended bill, and on the same day filed its answer to the remainder of said amended bill. That on January 6, 1876, an intervening petition was filed by leave of court in said cause by certain persons who are named as defendants thereto, as holders and owners or representatives and agents of the holders and owners of said first mortgage and other of said bonds, adopting fully the averments and prayers of said original and amended bills of said Fosdick and Fish, and asking to be, and by the leave and order of said court making themselves, co-complainants with said Fosdick and Fish, and parties to said suit, and, in fact, assuming and taking the real control and conduct of said cause, and thereafter continuing and maintaining such direction and control, as the real complainants, and soon after, on or about February 1, 1876, an agreement in writing was entered into between the holders of said Illinois Division first mortgage bonds, whereby said interveners or some of them were appointed the agents and attorneys in fact of all said Illinois Division first mortgage bondholders to act for them in said suit; and that, in accordance with the provisions of said agreement, said interveners, and more particularly Frederick W. Huidekoper, Thomas W. Shannon, and John M. Denison, continued to act as the representatives and attorneys in fact of said Illinois Division bondholders throughout the entire progress of said suit, and, acting in that capacity, in fact controlled said litigation on the part of the complainants and the Illinois Division first mortgage bondholders; and, acting under and in accordance with the provisions of said agreement, they afterwards purchased the property of said Danville Company in the state of Illinois, at the sale thereof hereinafter set forth, and did other acts after said sale in regard to said property hereinafter stated. That complainants are unable to state the precise terms of said agreement, or the subsequent modifications thereof, for reasons set forth. That such proceedings were had in said cause that on December 5, 1876, what purported to be a decree of said court was entered in said cause, requiring said Danville Company, within 20 days, to pay the said Fosdick and Fish, as trustees under said trust deed of March 10, 1869, the full amount of said bonds thereby secured, and certain sums of interest in said decree recited, and, in default thereof, that all of said railroad property in said trust deed described, and all the right, title, interest, and equity of redemption of the Danville Company therein, be sold as an entirety by Henry W. Bishop, one of the masters in chancery of said court, in the manner provided in said decree; but complainants show that said decree was not valid, said court not having proper jurisdiction to enter the same under the pleadings and proofs in said cause, and it was void, and has since the entry thereof been reversed and annulled by the supreme court upon an appeal prosecuted therefrom. That thereafter, on February 7, 1877, said Bishop, acting under said void decree, made a pretended sale of the property therein specified to Huidekoper, Shannon, and Denison, as trustees and representatives of the Illinois Division bondholders of the Danville Company, who, acting in that capacity and no other, bid in said property at said master's sale for and on behalf of said bondholders, and on April 12, 1877, said master executed and delivered to said Huidekoper, Shannon, and Denison what purported to be a conveyance of said entire property for and in consideration of the bid so made by them at said sale, the greater portion of said bid being paid by a partial surrender of bonds, and that thereafter the receiver in said cause, acting under the order of the court, delivered to said purchasers the possession of said property; but complainants charge that said sale and conveyance were wholly dependent upon said void and invalid decree, and were utterly null and void, and passed no title to said property to said supposed purchasers, and that the delivery of the possession of said property to said purchasers placed them in possession of said property as mortgagees in possession under an unforeclosed mortgage and trust deed, with full notice that said decree, sale, and conveyance were void and of no effect, and that said order of the court directing the delivery of such possession was of no force or effect, being entirely dependent upon said void decree, and has been so declared by the opinion and mandate of the supreme court; and that the only effect of said supposed sale and delivery was to place said Huidekoper, Shannon, and Denison in possession of

said property, as the representatives of the holders of said Illinois Division bonds, as mortgagees in possession under an unenclosed mortgage or trust deed.

That thereafter Huidekoper, Shannon, and Denison, being in the possession of said property, together with George Gill, Chandler Robbins, and William Hickok, caused to be recorded in the office of the recorder of deeds of Cook county, Ill., a pretended certificate of articles of organization of the Chicago & Nashville Railroad Company, purporting to be a railroad corporation organized under the laws of Illinois, with a capital stock of \$500,000; and afterwards, on or about August 28, 1877, Huidekoper, Shannon, and Denison executed to said pretended corporation a quitclaim deed of said property for and in consideration of the issuance and delivery to them of said \$500,000 of capital stock, being the entire capital stock of said pretended corporation, and that all of said stock was issued to and thereafter held by said Huidekoper, Shannon, and Denison as trustees for and representatives of the Illinois Division bondholders of the Danville Company, and not otherwise. That said corporation was not properly organized under the laws of Illinois, and was not and never became a valid and legal corporation, and said pretended conveyance to it was utterly void, and of no force or effect in law, and passed no title to said Chicago & Nashville Railroad Company to said property, and that said pretended incorporation and conveyance thereto was solely for the purpose of clouding the title to said property. That on or about September 8, 1877, Huidekoper, Shannon, and Denison, as holders of all the capital stock of said Chicago & Nashville Railroad Company, and acting as trustees and representatives and attorneys in fact of the Illinois Division bondholders of the Danville Company, caused to be recorded in the office of the recorder of deeds of Cook County, Ill., a pretended certificate of articles of consolidation between the Chicago & Nashville Railroad Company and the State Line & Covington Railroad Company, a pretended railroad corporation purporting to have been organized under the laws of Indiana, thereby pretending to form a consolidated corporation called the Chicago & Eastern Illinois Railroad Company, and by said articles of consolidation to vest in it the title and possession of all of said property of the Danville Company, the capital stock of said pretended consolidated corporation being fixed at the sum of \$500,000, divided into 5,000 shares of \$100 each. That in said articles of consolidation, as recorded, was the following:

"And all and singular the debts, liabilities, and contracts of every kind of said two original companies shall become the debts, liabilities, and contracts of the consolidated corporation hereby created, which shall in all respects pay, discharge, and perform the same in all respects as either of said original corporations were bound by law to do." "It is further expressly agreed and understood, as one of the conditions of this consolidation, that the said corporation hereby created shall, with all convenient dispatch, in all things keep and faithfully perform the trusts of two certain written agreements, one between the Illinois Division bondholders of the Danville Company, dated December 1, 1876, and as modified, under which the said Illinois Division was purchased on February 7, 1877, by Huidekoper, Shannon, and Denison, and the second being an agreement in writing, dated July 13, 1877, between a committee of said Illinois Division bondholders and a committee of the Indiana Division bondholders; and to carry out such trusts it is agreed that the consolidated corporation hereby created shall with all convenient speed make an issue of bonds to the amount of \$3,000,000, payable in currency, to bear interest at 6 per cent., and be indorsed with privilege and payment of the same secured by a first mortgage on all the railroad equipments, property, and franchises of said consolidated corporation, except the incomplete portion of railroad between Coal Creek and Brazil, Indiana, and will also make an issue of income bonds not to exceed in the aggregate the sum of \$1,000,000 currency." "That \$375,000 of the first mortgage bonds of said consolidated corporation shall be used to pay and satisfy the said Indiana Division bondholders represented by a committee executing the said agreement of July 13, 1877, who are to receive the said \$375,000 of bonds as and for their full distributive share and interest in said consolidated property." "All the remainder of said first mortgage bonds and all of such issue

of income bonds shall be held, used, and transferred by said consolidated company solely for the use and behoof, and to be distributed in accordance with the trusts of said written agreement between said Illinois Division bondholders of the Danville Company, and the consolidated company are to assume the title and possession of said railroad and property charged with the trusts of said two agreements to be by it performed according to the true intent thereof."

That said Huidekoper, Shannon, and Denison, as holders of the entire capital stock of the Chicago & Nashville Railroad Company, and F. H. Story and D. R. Mangan, as holders of the entire capital stock of the State Line & Covington Railroad Company, assented to said consolidation. That all the capital stock of the Eastern Illinois Company, and all of its bonds which were ever issued, were issued and delivered to said Huidekoper, Shannon, and Denison as such trustees and representatives of the bondholders of said Danville Company. That Huidekoper, Shannon, and Denison thereby transferred to themselves, by their new name of the Eastern Illinois Company, or as the sole and only stockholders and bondholders thereof, the possession of all the property of the Danville Company, and the said Eastern Illinois Company has ever since continued in possession thereof; but complainants aver that said articles of consolidation were illegal, invalid, and void, and that said Eastern Illinois Company never was and is not now a valid, legal, and subsisting corporation, and has never in any wise complied with the requirements of the state of Illinois regarding organization and consolidation of railroad companies or corporations. That the said bonds and stock of said corporation were illegally issued, being for an amount largely in excess of the actual cost of said railroad property, and contrary to the laws of the state of Illinois, and that by said actions said Eastern Illinois Company succeeded to the rights and liabilities of said bondholders of the Danville Company, and acquired no greater rights than said bondholders or their representatives had in and to said property, viz. the right of mortgagees in possession under an unrecorded mortgage or trust deed; and that all stockholders, bondholders, and purchasers of the bonds and stock of said Eastern Illinois Company had full notice thereof, from the record of said articles of consolidation, and from the contents of said contracts therein referred to, and from the record of said cause in the United States circuit court and supreme court, and with full notice that the sole and only title of said Eastern Illinois Company to said property of the Danville Company, if it had any title thereto whatsoever, was merely the title of a mortgagee in possession, without power to convey or incumber said property, or to pass any title thereto, save and except that of a mortgagee in possession. That ever since the possession of said property was delivered to said mortgagees by their representatives, which was on or about April 12, 1877, and during all the time they have been so in possession, first by their said trustees or attorneys in fact, Huidekoper, Shannon, and Denison, and later by said trustees under the name of the Chicago & Nashville Railroad Company, and thereafter until the present time under the name of the Eastern Illinois Company, said property has been producing a large income and earnings, the gross income thereof having been more than \$9,000,000 during said time, and very largely in excess of all proper expenses and charges of operating and maintaining said property, for all of which earnings and income said mortgagees in possession are bound in law and equity to fully and justly account, and that if such accounting with said mortgagees in possession should be closely watched and fairly conducted the net earnings and income by said mortgagees received would, in a large measure, if not entirely, extinguish said first mortgage debt, and complainants have a right to a hearing and representation upon such accounting which fixes the amount of the indebtedness due said mortgagees, and as security for the payment of which they now hold possession of said property. That said property has all the time been, and still is, very valuable, being of the value of \$4,000,000 and upwards. That said mortgagees in possession as aforesaid have never paid any consideration for said property, other than the sums paid by them for and on account of the bonds of the Danville Company, and a large part of said bonds were never sold, but were only pledged to the holders thereof for small sums in comparison with the



amount of the bonds so pledged, and have never been sold for the amount of such pledges or otherwise. That all operating expenses and costs of maintenance and improvements or betterments of said railroad property, while in the hands of said mortgagees in possession, have been paid out of the earnings and income received from said property.

That at the October term, 1881, of the supreme court, on appeal therefrom, said decree of December 5, 1876, was reversed and annulled for the reason that this court was without jurisdiction to enter the same, said bill having been filed without proper authority under the provisions of said trust deed, and said mortgage bonds not being due at the time of the entry of said decree, and thereafter, at the October term, 1882, of said supreme court, it was adjudged that all subsequent decrees and proceedings had and taken in carrying out the provisions of said decree of December 5, 1876, were vacated and annulled by the vacating of said prior decree of foreclosure and sale, and the said supposed sale to and purchase by Huidekoper, Shannon, and Denison were thereby rendered void and of no effect. That thereafter, on July 7, 1882, said complainants in said proceeding, Fosdick and Fish, filed therein their supplemental bill, wherein they set up substantially the foregoing proceedings, and that after the orders and decrees of the supreme court, viz. on June 27, 1882, they, as trustees under said trust deed of March 10, 1869, and the supplemental trust deed of April 24, 1872, in pursuance of notice and demand upon them to that effect by the said bondholders, or their representatives, had declared due all of said bonds secured by said trust deed of March 10, 1869, and praying for a decree in their favor declaring the trust deed of April 24, 1872, was a valid and subsisting lien on the Illinois Division property for about \$1,400,000, and interest thereon from April 24, 1872, of the Indiana Division bonds, subject only to the prior lien of Fosdick and Fish, as complainants, under the trust deed of March 10, 1869, and for a foreclosure of all said property, being the entire property of the Danville Company in the state of Illinois. That on December 6, 1882, Fosdick and Fish filed in said cause their amendment to said supplemental bill, wherein they further set up certain allegations regarding the said purchase of said Huidekoper, Shannon, and Denison, and the connection therewith of the Eastern Illinois Company, and making them parties defendant to said amended supplemental bill; and, further, that in the meantime the receiver in said cause have charge of said property, and that an account of the gross earnings and operating expenses of said railroad company from April 18, 1877, be taken by the master and be reported to the court, and the net income thereof ascertained and taken into consideration in the ascertainment of the amount to be found by the decree to be due on said mortgage bonds, and for other relief; and also making Elwell, acting as trustee in said so-called second mortgage, and Roberts, as acting trustee in said chattel mortgage, and also as representative of a large amount of the Indiana Division mortgage bonds, defendants to said supplemental bill, and requiring them to answer the same. That thereafter said defendants in said cause filed their answers to said supplemental and amended supplemental bills, and replications were thereafter filed thereto. That at or about the time of the filing of said amended supplemental bill the Eastern Illinois Company, by leave of court, filed in said cause a cross bill setting up that it was a bona fide purchaser and owner of said property, and asking affirmative relief on said cross bill, and the confirmation of its title to such property, and denying the right of said complainants or said Danville Company or its creditors to any account of the income and expenses of said property after the delivery thereof by the receiver in said cause, under the order of said court, to Huidekoper, Shannon, and Denison, on April 12, 1877. That Fosdick and Fish and other defendants in said cross bill thereafter filed their answers thereto, and replications were filed to said answers. That thereafter an order was entered referring said cause to a master to take proofs and report the same to the court. That a large amount of proof was taken, and during the early taking of proofs close attention was given thereto by the Danville Company and its officers and agents, and proper efforts were made to have its rights protected. That said supplemental and amended supplemental bills were in legal effect an original proceeding to foreclose said trust deed, the former

proceedings to that effect having been premature and invalid. That the judgments of complainants were and are liens on the property, or some part thereof, sought to be foreclosed, and became and were, some of them, such liens, prior to the filing of said supplemental and amended supplemental bills to foreclose, and some of them prior to the pretended sale of said property on February 7, 1877, but all subsequent to the execution of the trust deed on March 10, 1869. That under the laws of Illinois complainants had and have the right to redeem the said property from said mortgages, or to pay the amount of said mortgages or any decree found in said cause before a foreclosure or sale of said property thereunder, and had a right under the law to be heard before the entry of any decree therein determining the amount due under said mortgages, or disposing of said property, and that they were proper parties defendant to said supplemental and amended supplemental bills to foreclose. That they were not made parties to any of said proceedings, and had not until recently appeared therein, for the reason that it was the duty of the Danville Company to defend its property and protect and save the same from any unjust claim and demand of Fosdick and Fish, or said bondholders, or their creditors or mortgagees, and that said railroad company had been and was until very recently making a very vigorous and bona fide defense of its rights, and protecting the same and its property in said proceeding. That recently the Danville Company, combining and confederating with the Eastern Illinois Company and other of said defendants, neglects and refuses to pay the amount due the complainants, and to apply for that purpose any property or assets to them belonging, and has been for some time past negotiating and arranging, and has arranged and agreed upon, and is now aiding and carrying out, a secret and fraudulent scheme to allow said Eastern Illinois Company to keep and retain said property in its possession permanently and absolutely, and through the medium of a decree to be procured in said cause by consent or agreement, or in some way by default or connivance, of said Danville Company, its officers, attorneys, or agents, and which decree shall be a final adjudication upon all said matters in controversy in said suit, and thereby to waive and annul all its rights and equities in and to said property. That complainants did not learn of said fraudulent and improper conduct on the part of the Danville Company until very recently, and immediately upon learning the same, on or about June 4, 1884, they prepared their intervening petition, and asked to be allowed to intervene and become a party to said cause, and to assert and protect their rights in the premises, and made application to the court for leave to file the same, which was denied. That thereafter complainants prepared and presented their petition asking to be made defendants to said supplemental and amended supplemental bills, which was denied.

That, as complainants are informed and believe, the Danville Company and the Eastern Illinois Company and other defendants therein recently, for the purpose of carrying out the fraudulent schemes by them so made, caused further testimony to be taken, at which taking of further testimony no real contest was made on behalf of the Danville Company, and no effort was made on its part to present such testimony as would give the court a fair showing of its rights in the premises, and a large amount of testimony was allowed to be introduced by the Eastern Illinois Company and other parties in like interest which properly should have been excluded, but was allowed to be introduced without objection or contest, and really by collusion, and that thereby the true facts in regard to the matters covered by said reference were not properly shown. That thereafter, and very recently, the master, at the request of said parties, and in compliance with the order of reference, made his report and returned the testimony and evidence introduced on the reference, and thereafter said cause was submitted to the court and the entry of a final decree without argument or presentation of the facts therein, other than the submission to said court of the unfair and incomplete testimony taken before the master, and certain printed briefs which had been before that time used before said court upon the hearing of certain motions in said cause, and that said cause was not fairly or properly presented to said court. That such neglect and improper conduct in that regard of the Danville Company and its officers, attorneys, and agents has been in consequence of said

fraudulent agreement with the Eastern Illinois Company and other defendants to this bill, whereby the Eastern Illinois Company has agreed to pay the said officers, attorneys, and agents of the Danville Company, and to certain of its stockholders and others, a large amount of money, or in bonds of the Eastern Illinois Company to be issued for that purpose. That said Eastern Illinois Company has caused to be prepared, and is about to issue, its bonds to the amount of \$500,000, which it proposes and has agreed to distribute among the officers, agents, attorneys, and stockholders of the Danville Company in consideration of the abandonment of all actual contest in said cause. That about \$100,000 of said bonds, or the proceeds thereof, are to be given to or used in satisfying the claims and demands of certain holders of the second mortgage or chattel mortgage bonds of the Danville Company, who had previously been assisting the officers, attorneys, and agents of said company in the prosecution of its defense in said cause. That the remaining \$400,000 of said bonds, or proceeds thereof, are to be paid, or the proceeds distributed among, the attorneys, officers, agents, and stockholders of the Danville Company. The exact distributive shares, or the persons to whom the same are to be distributed, or the manner of such distribution, complainants are unable to state, but are informed and believe that certain persons named, or some of them, are to receive some portion of them. That the judgments of complainants are a lien upon said property, or the proceeds thereof, prior to the rights or liens of said officers or stockholders of said railroad company, or any other of said defendants, and that before any distribution of said effects should be made to said parties, or to any of them, complainants' judgments should be paid or satisfied out of said funds, or otherwise. That on or about June 30, 1884, said court entered a final decree in pursuance of the submission to the court theretofore made, finding that the equities in the cause were against all parties except the Eastern Illinois Company, in whose favor the equities were found on its cross bill against all the defendants thereto, and dismissing the cross bill of Elwell, acting trustee under said second mortgage, and of Roberts, trustee under said chattel mortgage, with costs, and finding to be due complainants, Fosdick and Fish, trustees under the first mortgage, the sum of \$4,795,416.66, for the use of the holders of the Illinois Division first mortgage bonds and coupons of said Danville Company, which was found to be a first lien on all of said property of the company in Illinois, and also finding to be due Fosdick and Fish, as trustees under the Indiana Division mortgage, the sum of \$2,980,296.19, being for a supposed balance of a decree and interest of the United States circuit court for the district of Indiana entered for the unpaid portion of the Indiana Division bonds of the Danville Company, which was decreed to be a second lien upon the Illinois Division of the Danville Company, and also dismissing the supplemental and amended supplemental bills of Fosdick and Fish as to the Eastern Illinois Company, upon whose cross bill it was decreed that by virtue of the original deed to Huidekoper, Shannon, and Denison, and the confirmation thereof, and by the subsequent conveyance by them to the Chicago & Nashville Railroad Company, and the consolidation of that railroad company and the State Line & Covington Railroad Company, the Eastern Illinois Company acquired a perfect and indefeasible title to the Illinois Division property of the Danville Company, free and clear of all title or claim of the Danville Company, or any of its creditors or bondholders. That in the ascertainment of the amounts found due by said decree, and other matters thereupon adjudicated, complainants have had no hearing, and have been allowed no opportunity to present or insist upon their rights in the premises. That said Eastern Illinois Company and said other defendants to this bill are now proceeding, or about to proceed without delay, to a distribution of said money or bonds according to said fraudulent agreement heretofore made, and that unless complainants are allowed relief in the premises, as herein prayed, their judgments will be utterly valueless, and will be hereafter utterly uncollectible.

Prayer, that all of the defendants set forth and discover the nature and situation, amount, and value of all the property, interest, and effects of the Danville Company including all things in action, with all the particulars relating thereto, and that they make answer and state whether, at the time

of filing this bill, they or any of them had in their hands or possession, or under their control, any property or assets of the Danville Company, or held in trust for it, or in which it had some beneficial interest, and, if so, that they may state and set forth a full, true, and particular account thereof, and the nature and value of its interest therein; and that said defendants may state and set forth, each for themselves, the particulars of said agreement or arrangement for the distribution of said \$500,000, or whatever sum was to be paid, in money or in bonds of the Eastern Illinois Company, to whom such bonds have been or are to be delivered, or to whom the proceeds thereof are to be paid or distributed, and what has been done with the same, or with the proceeds and avails thereof; and that the Danville Company, or some other of the defendants, may be decreed to pay to complainants the amount due to them respectively on their respective judgments, with costs and charges, and may be decreed for that purpose to apply any money or property, real or personal, in law or in equity, debts, choses in action, or equitable interests belonging to the Danville Company, or held in trust for it, or in which it or its officers or stockholders or agents are in any way or manner beneficially interested, and that the defendants, and each of them, may be enjoined from selling, assigning, transferring, delivering, negotiating, discharging, concealing, collecting, incumbering, or in any manner disposing of or intermeddling with any debts or demands due to the Danville Company, or its officers, agents, attorneys, or stockholders, or any property belonging to the company, whether in its possession or held by some other of said defendants or other persons in trust for it, or to its use and benefit, and from paying to it, or any of its agents, officers, stockholders, or any other person, any of said bonds, or proceeds thereof, issued or about to be issued by the Eastern Illinois Company, or any other property, real or personal, things in action, or chattels real held by it or by any other person for it, or in which it has any interest whatever; and that said property of the Danville Company, as heretofore specified, now in the possession or under the control of the Eastern Illinois Company and said defendants, as mortgagees in possession, may be decreed to be the property of the Danville Company, subject only to the rights of said other defendants to hold possession thereof, as mortgagees in possession under an unexpired mortgage or trust deed, until their just and equitable demands for which said property is holden are paid, and that an accounting may be had of what amount is due to said mortgagees for principal and interest upon the Danville Company bonds owned by or pledged to them, and which were valid and bona fide debts of said company, and liens upon its property, and what amounts the defendants, or any of them, have received, or are properly chargeable with, from the earnings and income of said property, and what credits they are entitled to for operating expenses and maintenance of said property, and what amount, if any, they are entitled to upon such accounting; and that upon payment thereof by complainants, all of which sums they are ready to pay, and now here offer to pay, they may be allowed to redeem said property, and may be subrogated to the rights of said mortgagees as against the Danville Company, its privies and creditors; and for such further, other, or different relief as the nature of complainants' case shall require, and as shall be agreeable to equity and good conscience.

C. M. Osborn, S. A. Lynde, C. B. McCoy, and C. E. Pope, for appellants.

Edwin Walker, W. H. Lyford, J. S. Sleeper, and Ball, Wood & Oakley, for appellees.

Before WOODS, Circuit Judge, and BAKER and SEAMAN, District Judges.

After making the foregoing statement, the opinion of the court was delivered by BAKER, District Judge:

This court, by the organic act creating it, is vested with power to exercise appellate jurisdiction to review by appeal or by writ of

error final decisions of the district courts and of the existing circuit courts in all cases other than those provided for in the fifth section of the organic act, unless otherwise provided for by law. 26 Stat. 828, § 6. The limitation upon the appellate jurisdiction of this court provided for in section 5 has relation to certain classes of causes wherein the right of appeal from final decisions of the district and circuit courts to the supreme court is preserved. In addition to the exercise of appellate jurisdiction to review final decisions of the district and circuit courts, this court is vested with authority to review, by appeal, certain interlocutory orders or decrees made during the progress of a cause. *Id.* § 7. This section provides:

"That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals: provided, that the appeal must be taken within thirty days from the entry of such order or decree."

It is thus made apparent that the determination of the motion to dismiss the appeal as to the appellee Walker hinges on the question whether or not the decision of the court below against him was final or interlocutory. A final decree or judgment is one which puts an end to the controversy between the parties litigant. If the decision or judgment leaves some matter involved in the controversy open for future hearing and determination before the ultimate rights of the parties are conclusively adjudicated, it is interlocutory, and not final. The authorities are uniform to the effect that a decree or judgment, to be final for the purposes of an appeal or writ of error, must leave the case in such a condition that if there be an affirmance here the court below will have nothing to do but to execute the decree or judgment it has already entered. *Bostwick v. Brinkerhoff*, 106 U. S. 3, 1 Sup. Ct. 15; *Grant v. Insurance Co.*, 106 U. S. 429, 431, 1 Sup. Ct. 414; *St. Louis, I. M. & S. R. Co. v. Southern Exp. Co.*, 108 U. S. 24, 28, 2 Sup. Ct. 6; *Ex parte Norton*, 108 U. S. 237, 242, 2 Sup. Ct. 490; *Mower v. Fletcher*, 114 U. S. 127, 5 Sup. Ct. 799; *Dainese v. Kendall*, 119 U. S. 53, 54, 7 Sup. Ct. 65. Tested by the principle above stated, the decree against the appellee Walker is not final, and the motion to dismiss the appeal must be sustained. The decree fixes the liability of the appellee Walker to account for 127 bonds, of the par value of \$1,000 each, together with interest on the coupons thereon; but it is expressly decreed that he is entitled to credit thereon for such sum or sums as may be rightfully due him. The sum or sums rightfully due him, and to which he is adjudged to be entitled to credit, is left wholly undetermined by the decree of the court, so that it is impossible, without a further hearing, to determine the extent of his liability, if any. Until such sum or sums as may be rightfully due him shall be ascertained and credited upon the fund with which he is charged, the extent of his liability remains undetermined. It is found by the court that in a suit, in which the appellee Walker

is a party, pending in a state court touching the bonds here in controversy, an accounting has been had, and a report thereof has been made to such court, but has not been acted upon; and it is thereupon ordered that the execution of the decree fixing his liability be stayed until the final determination of the suit in the state court, and until the further order of the court. And the court below expressly reserved to itself the right to allow such further proceedings in the cause between the appellants and the appellee Walker as may become necessary or proper by reason of the final determination of the case in the state court. These facts conclusively demonstrate that there has been no final decree rendered against the appellee Walker, and that the final settlement and determination of the question of his liability, if any, are reserved for further hearing after final judgment in the state court.

The appellants contend that the court erred in dismissing for want of equity the original, amended, and supplemental bills against the Eastern Illinois Company. Counsel for appellants, in their elaborate briefs, have pointed out only one alleged error in the decree. They earnestly contend that the court erred because it did not charge the Eastern Illinois Company with liability to account for and pay over to the appellants the value of the 500 bonds, of \$1,000 each, issued by it to certain agents, attorneys, officers, and stockholders of the Danville Company after the filing of the original bill in this cause. The court below decided that these bonds, or their proceeds, belonged to the Danville Company, and that the parties to whom they were issued held them in trust to the use of that company, and subject to the paramount rights of the appellants as judgment creditors. It is claimed by appellants that their original bill was a creditors' bill, and that from the time of its filing and the service of process it operated as an equitable attachment of these bonds in the hands of the Eastern Illinois Company, and that, having issued them to other parties while thus impounded, it ought to have been decreed to account to the appellants for their full value, or for so much, at least, as would satisfy their respective judgments. Neither the amended bill nor the supplemental bill is material to the determination of this question. Both of these bills were filed after the Eastern Illinois Company had issued these bonds, and therefore, unless the original bill operated as an equitable attachment of them while in the hands of that company, the appellants acquired no interest in or lien upon them or their proceeds, and consequently have no right to complain of their transfer to other parties. In view of the fact that the court decreed that these bonds, or their proceeds, belonged to the Danville Company, it is apparent that it dismissed the original, amended, and supplemental bills on the ground that the original bill created no lien upon the bonds in controversy in the hands of the Eastern Illinois Company, and that no lien upon them could be acquired by the amended or supplemental bills, because when they were filed that company had ceased to own or control them. It seems to us the decision is right upon either of two grounds. A careful consideration satisfies us that, in its true scope and purpose, the original

bill is one to be let in to redeem the property of the Danville Company in the hands of the Eastern Illinois Company as a mortgagee in possession under an unforeclosed mortgage. The allegations in the bill touching the bonds in controversy, and the prayer for an injunction to restrain the Eastern Illinois Company from issuing them, are peculiarly appropriate in a bill to redeem, because if such bonds were issued, and came into the hands of bona fide holders for value, they would create an additional incumbrance on the property sought to be redeemed. It is true that there is a prayer for the discovery of assets, and for an injunction to restrain their transfer, and a general prayer that the appellants' claims be decreed to be paid out of any assets and property of the Danville Company. But the specific relief asked for is that they be permitted to redeem all the property of whatever sort belonging to the Danville Company in the possession of the Eastern Illinois Company as a mortgagee in possession under an unforeclosed mortgage. The bill of complaint is devoted almost exclusively to setting forth facts entitling the appellants to redeem the entire property of the Danville Company from the Eastern Illinois Company, to the end that it may be subjected to the satisfaction of their judgments. The allegations touching the bonds in controversy occupy but an inconsiderable part of the bill of complaint. It seems evident that it was framed on the theory that the mortgages or trust deeds mentioned in the bill were invalid, and that the proceedings resulting in the foreclosure and sale of the property of the Danville Company did not divest its title, and that its property in the hands of the Eastern Illinois Company was held by it as a mortgagee in possession under an unforeclosed mortgage. The claim of a right to redeem is inconsistent with the claim to recover the bonds in controversy or their proceeds. The first claim proceeds upon the theory that the Eastern Illinois Company acquired no title under the proceedings resulting in a foreclosure and sale of the property of the Danville Company, while the other proceeds upon the theory that a valid title was acquired thereby, authorizing the former company to issue bonds secured by a valid mortgage of the property. The one theory affirms, and the other disaffirms, the title of the Eastern Illinois Company. The appellants cannot succeed in the same case on such antagonistic theories. If they are entitled to a decree admitting them to redeem upon the theory that the Eastern Illinois Company has acquired no title to the property of the Danville Company, and that its only right is that of a mortgagee in possession under an unforeclosed mortgage, they cannot claim the right to have the bonds in controversy or their proceeds applied to the satisfaction of their judgments. Besides, treated as a bill to reach and appropriate the bonds in controversy to the satisfaction of their judgments, the greater part of its allegations would become irrelevant, immaterial, and surplusage, and, in fact, inconsistent. That construction ought to be given to the bill which appears to best harmonize with its apparent scope and purpose, and which will not lay it open to the charge of stating antagonistic and conflicting grounds of relief. And it seems to us that the only theory upon

which the allegations of the bill can be substantially harmonized is to treat it as a bill to redeem, and that the averments touching the bonds in controversy were incorporated in it to procure an injunction, and thus prevent their issue, thus preserving the status of the property pending the litigation. The bill unquestionably states in great detail a cause of action for redemption, and in clear and unambiguous terms it prays that the property of the Danville Company now in possession of the Eastern Illinois Company may be decreed to be the property of the former company, subject to the right of the latter company to hold possession of it as a mortgagee in possession under an unforeclosed mortgage; that an accounting may be had of the amount due to the latter company, which the appellants offer to pay; and that upon payment they be allowed to redeem said property and be subrogated to the rights of the mortgagees. If the bill is to be treated as a creditors' bill, and as stating a good cause of action to reach and appropriate the bonds in controversy, then we have in the same bill—First, a cause of action to redeem and take from the Eastern Illinois Company all the property obtained by it from the Danville Company; and, second, a cause of action to acquire and appropriate bonds issued by the Eastern Illinois Company to secure and confirm its title to the property so sought to be taken from it. Thus construed, the bill states two inconsistent causes of action; and the right to recover upon one theory is destructive of the right to recover upon the other. Such a bill cannot be maintained. It would be multifarious and self-contradictory.

"By multifariousness in a bill is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill." Story, Eq. Pl. § 271.

The objection of multifariousness ought ordinarily to be taken by demurrer, but the court may, however, take the objection at the hearing, *sua sponte*; for the court is not bound to allow a bill of such a nature, although the party may not take the objection in season. *Greenwood v. Churchill*, 1 Mylne & K. 559; Story, Eq. Pl., *supra*. The bill might, therefore, have been properly dismissed at the hearing by the court *sua sponte*, for multifariousness.

It is urged by counsel for appellants that a bill is not multifarious, and may well be maintained, where, upon a given case, there is a prayer for consistent alternative relief. The rule is undoubtedly well settled that upon a given case there may be prayers for consistent alternative relief; but we do not understand that alternative and inconsistent cases may be stated in the bill, coupled with prayers for alternative and inconsistent relief. If the appellants' case was solely that the Eastern Illinois Company has no title to the property of the Danville Company, they might pray for various forms of alternative relief consistent with that case; but they cannot in the same bill make a case that it has no title, and also a case that it has a title, and then ask for inconsistent relief according to the different cases thus made. Such course of



procedure we do not understand is warranted by the doctrine of alternative relief. Such are alternative cases, and not cases of alternative relief. They are inconsistent, for a decree of one of these forms of relief would proceed upon a theory fatal to the other form of relief.

In the case of *Shields v. Barrow*, 17 How. 130, the original bill prayed that a certain agreement, made by way of compromise, should be set aside as having been fraudulently and improperly procured. Afterwards, the bill was amended by adding a prayer that if the court should be of the opinion that the agreement was valid, and ought not to be set aside, it would decree its specific performance. The court said:

"The court allowed the above amendment. So that the bill thereafter presented, not only two aspects, but two diametrically opposite prayers for relief, resting upon necessarily inconsistent cases; the one being that the court would declare the contract rescinded for imposition and other causes, and the other that the court would declare it so free from all exceptions as to be entitled to its aid by a decree for specific performance. Whether this amendment be considered as leaving the bill in this condition, or as amounting to an abandonment of the original bill for a rescission of the contract and the substitution of a new bill for a specific performance, it was equally objectionable. A bill may be originally framed with a double aspect, or may be so amended as to be of that character. But the alternative case stated must be the foundation for precisely the same relief, and it would produce inextricable confusion if the plaintiff were allowed to do what is attempted here. *Story*, Eq. Pl. 212, 213; *Welf*, Eq. Pl. 88; *Edwards v. Edwards*, Jac. 335. Nor is a complainant at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment. We apprehend that the true rule on this subject is laid down by the vice chancellor in *Verplanck v. Insurance Co.*, 1 Edw. Ch. 46."

In the case before us the alternative cases stated cannot be the foundation for precisely the same relief, because, as we have already seen, a decree to be let in to redeem is not only inconsistent with, but absolutely destructive of, the right to a decree awarding the bonds in controversy to the appellants.

The case of *Williams v. Jackson*, 107 U. S. 478, 2 Sup. Ct. 814, was a suit in the supreme court of the District of Columbia by the holder of a debt secured by a deed of trust, the main purpose of which was to set aside a release negligently executed by the trustee to the grantor, and to satisfy the plaintiff's debt out of the land. The judge who heard the case refused to set aside the release, and adjudged that *Stickney*, as trustee, had fraudulently and negligently executed the same, and decreed that he should personally pay the debt. The court at general term reversed that part of the decree which declined to set aside the release, and also that part which adjudged that the plaintiffs recover against *Stickney* the amount of their debt. On appeal from the judgment of the general term, the court said:

"But that decree, so far as it refuses relief against *Stickney* personally, is right. The main purpose of the bill is to set aside the deed of release, and to satisfy the plaintiffs' debt out of the land. The attempt to charge *Stickney* with the amount of that debt, by reason of his negligence in executing the release, is wholly inconsistent with this. The one treats the release as void; the other assumes that it is valid. In the one view, *Stickney* is made a party in his capacity of trustee only; in the other, it is sought to charge him per-

sonally. The joinder of claims so distinct in character and in relief is unprecedented and inconvenient. *Shields v. Barrow*, 17 How. 130, 144; *Walker v. Powers*, 104 U. S. 245."

The case of *Micou v. Ashurst*, 55 Ala. 612, contains an equally clear and explicit discussion of this doctrine. The court say:

"But we concur with the chancellor that the bill is not filed for redemption, nor could a decree be founded on it that the complainant be let in to redeem. The averments of the bill are adapted only to a decree for the cancellation of the mortgage, because the debt is founded on an illegal consideration. As a general rule, a bill may be framed in a double aspect, or in the alternative, when either of the aspects or alternatives entitles the complainant to the same relief. But we do not understand that when a bill is filed for a distinct purpose, which wholly fails, whether on the facts stated, or on the proof, that it can be converted into a bill for another purpose. Nor do we understand that a bill may aver either one or the other of two alternatives is true when they are repugnant to and inconsistent with each other, and, if the one is true, entitling the party to relief wholly distinct from and repugnant to that which would be granted if the other was true. Now, if the consideration of the mortgage debt was illegal, violative of positive law, and offensive to public policy, a court of equity would not entertain a bill for redemption, nor foreclosure. The cancellation of the mortgage, as a cloud on the title of the mortgagor, would be, perhaps, the only ground on which the court would intervene. Averring the illegality of the debt, and the consequent invalidity of the mortgage, the appellant cannot then aver that he may be mistaken in this, and affirm their validity, and claim to redeem, especially when there is no averment of ignorance of the facts and of a necessity of a discovery. Suppose a bill of this character should be confessed by the defendant, what relief would the court grant? Which of the repugnant and inconsistent statements would be adopted? The averments of the bill not authorizing the specific relief prayed,—the cancellation of the mortgage, and of the evidences of the mortgage debt, which was its primary purpose, and the specific relief prayed,—it should have been dismissed. *Cresy v. Bevan*, 13 Sim. 354; *Shields v. Barrow*, 17 How. 130."

See, also, *Sneed v. McCoull*, 12 How. 407; *Allen v. Spring*, 22 Beav. 615; *Maynard v. Green*, 30 Fed. 643; *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 33 Fed. 440, 448; *Electric Accumulator Co. v. Brush Electric Co.*, 44 Fed. 602, 607; *Rollet v. Heiman*, 120 Ind. 511, 22 N. E. 666.

This last case was a creditors' bill to set aside a conveyance and to reach assets. Speaking of the rule of construction applicable to such a bill, the court, by Mr. Chief Justice Elliott, say: "A pleading, as we have often held, is to be judged from its general scope and tenor, and so this complaint must be judged." In the case before us, as in the case last cited, we are disposed to construe the bill as one for redemption, rather than to construe it as a bill stating two inconsistent alternative cases. But whether construed in the one way or in the other, it is equally objectionable, and the court committed no error in dismissing it.

The motion of the appellee Walker to dismiss the appeal, so far as it concerns himself, is sustained; and the decree dismissing the original, amended, and supplemental bills against the Chicago & Eastern Illinois Railroad Company is affirmed,—both at the costs of the appellants.

## AMERICAN MORTG. CO. OF SCOTLAND, Limited, v. HOPPER et al.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1894.)

## No. 154.

## 1. STARE DECISIS—RULE OF PROPERTY.

Decisions of a circuit court of the United States, from which no appeals were taken, cannot be regarded as establishing a rule of property to which it is the duty of the circuit court of appeals to adhere under the doctrine of stare decisis.

## 2. PUBLIC LANDS—PRE-EMPTION—CANCELLATION OF ENTRY.

The issuance to a pre-emptor of a final receipt or certificate of payment by a receiver of a local land office does not deprive the land department of control over, or the United States of title to, the land; and such department may cancel the entry at any time before a patent is issued, when its officers are convinced that the entry was fraudulently made, subject to the right of the pre-emptor to have the action of the department reviewed by the courts.

## 3. SAME—ISSUANCE OF PATENT TO THIRD PERSON—ACTION BY PRE-EMPTOR TO RECOVER LAND.

Where the land department cancels an entry by a pre-emptor, after issuance to him of a final certificate of payment, on the ground that the entry was fraudulent, and issues a patent to another, the burden is on such pre-emptor, or those claiming under him, in an action to recover the land of such patentee, to show that the department erred in adjudging the title to defendant, and that plaintiff was entitled to a patent, by proof that the entry was valid as against the government.

## 4. SAME—VESTED RIGHT TO LAND—ENTRY PROCURED BY FRAUD.

A pre-emptor who makes his payment and receives his final certificate acquires no vested interest in the land, where his entry and certificate are procured by fraud.

## 5. SAME—BONA FIDE PURCHASER—WHAT CONSTITUTES.

A pre-emptor who has his final receipt and certificate of purchase has only acquired the right to a patent, provided his acts were legal, and such as to warrant the issuance of a patent to him; and one who purchases from him is not entitled to protection as a bona fide purchaser. 56 Fed. 67, affirmed.

Appeal from the Circuit Court of the United States for the District of Oregon.

Action by the American Mortgage Company, of Scotland, Limited, against Thomas R. Hopper and others, to recover land. From a judgment dismissing the bill (56 Fed. 67), complainant appeals. Affirmed.

This is a suit instituted by appellant to have the appellees decreed to hold the legal title to the S. W.  $\frac{1}{4}$  of section 4, township 2 N., of range 31 E. of the Willamette meridian, acquired by him under a patent from the United States in trust for appellant, and to compel the appellees to convey to it such title, and to surrender to it the possession of said premises. Appellant's claim is based upon a pre-emption entry made by one George Waddel. The claim of the appellees is under a homestead title. The facts are stipulated, and the essential points are as follows: On October 10, 1882, Waddel, being a qualified pre-emptor, made a cash entry under the pre-emption laws of the United States of the land in controversy. He paid thereon \$400, and received a duplicate receiver's receipt therefor, which was duly recorded in the records of deeds of Umatilla county, where the land in question was situated. On October 11, 1882, Waddel obtained a loan from the Oregon & Washington Mortgage Savings Bank for \$850, and executed his note and mortgage upon the property in question to secure the loan. In effecting this loan the bank acted as the agent of appellant, to which it duly assigned the note and mortgage on

October 25, 1882; the mortgage and assignment thereof being both duly recorded on the respective dates of their execution. On September 10, 1885, appellant brought suit against Waddel and his successors in interest to foreclose the mortgage. A decree of foreclosure was entered February 13, 1886, and the property was sold to appellant May 1, 1886, for \$1,250. The sale was thereafter confirmed, and on October 24, 1887, the sheriff executed his deed to appellant, and the deed was then duly recorded. On May 5, 1885, the appellee Thomas R. Hopper made application in the local land office to enter the land in dispute under the homestead laws of the United States, and filed a contest against the entry of Waddel, charging that such entry was made by Waddel for the use and benefit of another, and that thereby the entry had been effected in violation of the pre-emption laws of the United States. The commissioner of the general land office ordered a hearing as to the validity of Waddel's entry, and the result of this hearing was that on November 30, 1885, Waddel's entry was canceled in the local land office; and thereafter such cancellation was approved by the commissioner of the general land office, and Hopper was permitted to make his homestead entry. In the regular course of the proceedings had under this homestead entry, a patent was issued to Hopper for the land on June 12, 1891, which patent was duly recorded in the proper records of Umatilla county on August 4, 1891. The money paid by Waddel is still retained by the government. The cancellation of Waddel's entry was on the ground that it was fraudulently made for the benefit of another person. Neither the savings bank nor appellant was made a party in the proceedings to contest the Waddel entry, and neither had actual knowledge of any failure by Waddel to comply with the laws of the United States under which the entry was made, nor was appellee Hopper made a party defendant in the foreclosure suit, although he was in possession of the premises at the time. Prior to the commencement of this suit, appellant brought suit in ejectment against appellees, and the circuit court held that ejectment would not lie, and that the only remedy was in equity. *Mortgage Co. v. Hopper*, 48 Fed. 47. In this suit the circuit court dismissed the bill of complaint, and entered judgment in favor of appellees for their costs. 56 Fed. 67.

Snow & McCamant, for appellant.

Stott, Boise & Stott, for appellees.

Before McKENNA, Circuit Judge, and HAWLEY, District Judge.

HAWLEY, District Judge (after stating the facts). 1. Preliminary to any consideration of this case upon its merits, it becomes necessary to notice the contention of appellant that, under the decisions of the circuit court of the United States for the district of Oregon, in *Smith v. Ewing*, 23 Fed. 741, and *Wilson v. Fine*, 40 Fed. 52, a rule of property has been established which it is the duty of this court to adhere to upon the doctrine of stare decisis, and that the judgment herein should be reversed upon this ground, without any review of the suit upon its merits. An adherence to the doctrine of stare decisis, in a proper case for its application, is undoubtedly necessary to preserve certainty and uniformity in the stability and symmetry of our jurisprudence. When the courts of last resort have announced principles affecting the acquisition of title to real estate, and the principles thus announced have been long established, frequently recognized and conformed to, and property rights have been acquired thereunder, it has generally been held that such decisions should not be overturned, although the principles announced therein might otherwise be questioned; but our attention has not been called to any decided case directly upon the question here involved, and, from

the diligence of counsel in citing cases upon other points, it is extremely doubtful if any could be found where the doctrine of stare decisis has been applied to the decision or decisions of a circuit court of the United States from which no appeal was taken. There are seven districts in this circuit, and it would be a strange doctrine to advance, if the decisions in the different districts were not uniform, that this court would be bound to adhere to such decisions in each district, because a rule of property was involved, without regard to the merits of the case. The contention of appellant upon this point cannot be maintained. In *The Madrid*, 40 Fed. 677, Justice Lamar said:

"The decisions of the circuit courts of the United States not being uniform upon the general question at issue in this case, it can hardly be said that any of them has become a rule of property, within the principle of the doctrine of stare decisis."

2. The merits of this case present several important questions. In *Smith v. Ewing* the court proceeded upon the theory that when a certificate of purchase is issued to a pre-emptor in due form, and no appeal is taken, the land described in the certificate becomes the property of the pre-emptor. "He has the equitable title thereto, and has a right to the legal one as soon as the patent can issue in the due course of proceeding." If it be true that the issuance of a final receipt or certificate of payment by the receiver of a local land office absolutely ends the control of the land department over the land, and deprives the United States of the title thereto, then it would necessarily follow that the act of the commissioner in this case in setting aside and canceling the entry of Waddel would be null and void. But is this principle correct? How stand the decisions of the various courts upon this subject? What are the conclusions to be drawn therefrom? The authorities are too numerous to be singly reviewed. The facts too variant to be stated. We are of opinion that the general trend and logical effect of the decisions of the supreme court of the United States virtually establish the following propositions concerning the disposition of the public lands of the United States, viz.: (1) That the land department of the government has the power and authority to cancel and annul an entry of public land when its officers are convinced, upon a proper showing, that the same was fraudulently made; (2) that an entryman upon the public lands only secures a vested interest in the land when he has lawfully entered upon and paid for the same, and in all respects complied with the requirements of the law; (3) that the land department has control over the disposition of the public lands until a patent has been issued therefor and accepted by the patentee; and (4) that redress can always be had in the courts where the officers of the land department have withheld from a pre-emptioner his rights, where they have misconstrued the law, or where any fraud or deception has been practiced which affected their judgment and decision. *Bell v. Hearne*, 19 How. 252; *Gaines v. Thompson*, 7 Wall. 347; *Litchfield v. Register and Receiver*, 9 Wall. 575; *Secretary v. McGarrahan*, Id. 298; *Johnson v. Towsley*, 13 Wall. 72; *Myers v. Croft*, Id. 291; *Yosemite Val. Case*, 15 Wall. 77; *Shepley v. Cowan*, 91 U. S. 330; *Moore v. Robbins*,

96 U. S. 538; *Marqueze v. Frisbie*, 101 U. S. 473; *Quinby v. Conlan*, 104 U. S. 420; *Smelting Co. v. Kemp*, Id. 636; *Lee v. Johnson*, 116 U. S. 48, 6 Sup. Ct. 249; *Steel v. Refining Co.*, 106 U. S. 447, 1 Sup. Ct. 389; *Cornelius v. Kessel*, 128 U. S. 456, 9 Sup. Ct. 122. The same principles have been announced in the circuit court of appeals (*U. S. v. Steenerson*, 1 C. C. A. 552, 50 Fed. 504; *Germania Iron Co. v. U. S.*, 7 C. C. A. 256, 58 Fed. 334; *Mill Co. v. Brown*, 7 C. C. A. 643, 59 Fed. 35), and in several of the state courts (*Swigart v. Walker* [Kan.] 30 Pac. 162, and numerous authorities there cited). In *Cornelius v. Kessel* the supreme court of the United States said:

"The power of supervision possessed by the commissioner of the general land office over the acts of the register and receiver of the local land offices in the disposition of the public lands undoubtedly authorizes him to correct and annul entries of land allowed by them, where the lands are not subject to entry, or the parties do not possess the qualifications required, or have previously entered all that the law permits. The exercise of this power is necessary to the due administration of the land department. If an investigation of the validity of such entries were required in the courts of law before they could be canceled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department. But the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property, and a right to a patent therefor, and can no more be deprived of it by order of the commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation, in that way, of such interest, will be corrected whenever the matter is presented so that the judiciary can act upon it."

The commissioner of the general land office had the power to supervise the action of the register and receiver of the local land office, and to annul the entry made by Waddel, if in his judgment the proofs showed that such entry was fraudulently made, and was attempted to be sustained upon false testimony. But such action of the commissioner is not conclusive, and Waddel or his grantee would still be entitled to establish his right to the land in question in any court of competent jurisdiction, by proving that his entry was legal and valid, and that he had fully performed all the acts required of him by the law to perfect and complete his pre-emption entry. The finding of the commissioner of the general land office that the entry was made for the benefit of another was without notice to Waddel or appellant. Appellant was entitled to have its day in court. This it had in the present suit. The opportunity was afforded it to prove, if it could, that the entry made by Waddel was in all respects valid. It made no attempt to show that this entry was not fraudulent. It rested its case upon the fact that the entry was regularly made by a qualified pre-emptor; that the land was paid for, and the receipt of the register and receiver of the local land office given therefor,—and upon these facts contended, and still insists, that the commissioner had no power to cancel the entry on the ground that it was fraudulently made. The appellees relied upon the patent from the government of the United States. The suit is brought to obtain a decree declaring that appellant is entitled to the patent which was issued to appellee Hop-

per. To entitle it to this relief it was essential for it to affirmatively show that, if the law had been properly administered, the title would have been awarded to it. The suit cannot be maintained simply upon a showing that the land department erred in adjudging the title to the patentee. These principles are well settled, both in this court and in the supreme court of the United States. *Mill Co. v. Brown*, 7 C. C. A. 643, 59 Fed. 35; *Bohall v. Dilla*, 114 U. S. 47, 5 Sup. Ct. 782; *Lee v. Johnson*, 116 U. S. 48, 6 Sup. Ct. 249. In *Lee v. Johnson*, the court, upon this subject, said:

"The defendant in the court below (the plaintiff in error here) is the holder of a patent of the United States for a parcel of land in Michigan issued to him under the homestead laws, and the present suit was brought to charge him as trustee of the property, and to compel a conveyance to the plaintiff. The patent having been issued by officers of the land department, to whose supervision and control are intrusted the various proceedings required for the alienation of the public lands, all reasonable presumptions are indulged in support of their action. It cannot be attacked collaterally, but only by a direct proceeding instituted by the government or by parties acting in its name and by its authority. If, however, those officers mistake the law applicable to the facts, or misconstrue the statutes, and issue a patent to one not entitled to it, the party wronged can resort to a court of equity to correct the mistake, and compel the transfer of the legal title to him as the true owner. The court, in such a case, merely directs that to be done which those officers would have done if no error of law had been committed. The court does not interfere with the title of a patentee when the alleged mistake relates to a matter of fact, concerning which those officers may have drawn wrong conclusions from the testimony. A judicial inquiry as to the correctness of such conclusions would encroach upon a jurisdiction which congress has devolved exclusively upon the department. It is only when fraud and imposition have prevented the unsuccessful party in a contest from fully presenting his case, or the officers from fully considering it, that a court will look into the evidence. It is not enough, however, that fraud and imposition have been practiced upon the department, or that false testimony or fraudulent documents have been presented. It must appear that they affected its determination, which otherwise would have been in favor of the plaintiff. He must in all cases show that, but for the error or fraud or imposition of which he complains, he would be entitled to the patent. It is not enough to show that it should not have been issued to the patentee."

In the present case there is no pretense that any fraud, deception, or imposition was practiced upon the officers of the land department in obtaining the patent issued to appellee Hopper. There was no proof offered tending to show that Waddel's entry was valid, or that it was made in good faith. The stipulated facts show that his original entry was canceled by the commissioner of the general land office for the reason that it was made upon false testimony, and was not for his own benefit, but was for the benefit of other persons. The burden of proof was upon appellant to show that it was entitled to a patent, and it was essential for it to prove that Waddel's entry was valid, as against the government of the United States. The conclusions of the land department upon the invalidity of Waddel's entry, having been arrived at apparently within the scope of its authority, are *prima facie* correct, and, appellant having assailed their correctness, it devolved upon it to affirmatively show that the conclusions were illegal and unauthorized. It cannot fairly be said that Waddel had acquired any vested right to the

property, if it be true that his entry upon the lands was secured by fraud. In *U. S. v. Steenerson*, 1 C. C. A. 552, 50 Fed. 507, the method whereby vested rights to public lands are acquired is clearly and correctly stated. There the circuit court held that the entry made by one Hanson, and the issuance to him of a certificate of final payment by the receiver of the local land office, regardless of the question of fraud in such entry, conveyed, as against the United States, the title and right of possession of such realty to the pre-emptor in such cause; that the United States, in order to revest the title in itself, must institute judicial proceedings to set aside the apparent or defeasible title vested in the pre-emptor and his grantees. The court of appeals, upon this point, said:

"In support of this view, many decisions of the supreme court are cited by counsel, in which it is held that, when the right to a patent for lands has once become vested in a purchaser or pre-emptor, the same are segregated from the public domain, are no longer subject to entry, and the vested right to the patent thereto is equivalent to a patent actually issued. See *Carroll v. Soffard*, 3 How. 441; *Witherspoon v. Duncan*, 4 Wall. 210; *Stark v. Starrs*, 6 Wall. 417; *Myers v. Croft*, 13 Wall. 291; *Wirth v. Branson*, 98 U. S. 118; *Simmons v. Wagner*, 101 U. S. 260; *Deffeback v. Hawke*, 115 U. S. 405, 6 Sup. Ct. 95; *Cornellus v. Kessel*, 128 U. S. 456, 9 Sup. Ct. 122. The principle on which these decisions are based is that when a homesteader or pre-emptor has in good faith performed all the acts which, under the provisions of the statutes of the United States, are necessary to complete his right to the land, then he becomes equitably the owner of the same, and the United States holds the naked legal title as a trustee for his benefit. For the protection of his rights thus acquired, it is held that, in a contest involving the title of the land, an established right to a patent will be deemed to be the equivalent of a patent. This rule, however, has been adopted solely as a means for the protection of those who have in good faith established a right to a patent by performance of the requisite conditions. The final certificate or receipt acknowledging payment in full, and signed by the officers of the local land office, is not in terms nor in legal effect a conveyance of the land. It is merely evidence on behalf of the party to whom it is issued. In a contest involving the title to land, wherein a person claims adversely to the United States, it is open to such claimant, notwithstanding the legal title remains in the United States, to prove that by performance on his part of the requisite acts he has become the equitable owner of the land, and that the United States holds the legal title in trust for him; but as the claimant in such case has not received a patent or formal conveyance, and has not become possessed of the legal title, he is required to show performance on his part of the acts which, when done, entitle him under the law to demand a patent of the land. When evidence of this kind is offered on behalf of the claimant, it is open to the United States to meet it by proof of any fact or facts which, if established, will show that the claimant has not become the real owner of the realty. If it be true, in a given case, that the entry of the land was not made in good faith, but in fraud of the law, certainly it cannot be said that the claimant has become the equitable owner of the land, and that the United States is merely a trustee holding the legal title for his benefit. Fraud vitiates any transaction based thereon, and will destroy any asserted title to property, no matter in what form the evidence of such title may exist. *The Amisted*, 15 Pet. 518; *League v. De Young*, 11 How. 185."

Several of the authorities cited by appellant have relation to entries made in good faith, in strict conformity with the law. The distinction between such cases and entries made in fraud of the law, although otherwise regular in form and procedure, should be constantly kept in view. In the former cases, vested rights may



be said to accrue upon performance of the conditions required by law. In the latter, no vested rights can be acquired by the fraud of the entryman, however regular the proceedings may have been. The conflict in the decisions upon this subject have chiefly arisen upon the ground that this distinction has either been overlooked or ignored, and the general observations of the courts have been applied without special reference to the facts, or the particular character of the suit, or manner in which the questions were presented. It is conceded that in all cases where the pre-emptor has acted in good faith, has fully complied with the provisions of the statute, has not been guilty of any fraud, and has done no act inconsistent with the law, he has acquired a right of which he cannot arbitrarily be deprived by the act of the commissioner of the general land office. Why? Because, as tersely stated by the court in *Myers v. Croft*, supra, "the object of congress was attained when the pre-emptor went, with clean hands, to the land office, and proved up his right, and paid the government for his land." This doctrine is fully recognized; but it would be a perversion of the law, and of all the cardinal principles of interpretation, to declare that such authorities support the views so earnestly contended for by appellant. It would open wide the door for the perpetration of numerous frauds of various kinds in the sale and disposition of the public lands. It may be true, as claimed by appellant, that virtuous indignation, under a mistaken belief that there had been a wholesale commission of such frauds, led the commissioner of the general land office to go to unwarranted extremes in the other direction, and resulted in the reversal of many of his acts by the judicial authorities. But this only proves the soundness and stability of the rules we have announced in protecting the rights of all parties concerned. If the commissioner, in any given case, has exceeded his authority or denied to a pre-emptor his legal rights, the remedy is by application to the courts. A pre-emptor who has acted in good faith has nothing to fear. He cannot complain as long as he has the opportunity to have his day in court, and to there establish the fact that he has complied with the law, and has not been guilty of any fraud.

3. Appellant claims that it is a bona fide purchaser for value, and that it is entitled to protection upon this ground. The law is well settled that the purchaser of an equitable title takes only such interest in the property as his grantor had at the time of his purchase. Waddel, by his certificate of purchase, only obtained the right to a patent for the land provided his acts were legal, and in all respects such as to warrant the issuance of a patent to him. His rights were in a measure dependent upon the subsequent action of the land department, within its legitimate authority, of ascertaining whether he had complied with all the prerequisites prescribed by law, and whether he was lawfully entitled to the land in question. His purchase of the land was subject to the rules and regulations of the land department. It is true that his entry was sufficient to satisfy the register and receiver of the local land office; but it was subject to the control

and supervision of the commissioner of the general land office, and the action of the register and receiver was liable to be reversed upon appeal. When appellant purchased the land, it took it subject to the final action of the land department, and to such proceedings as might thereafter be had in the courts to affirm or set aside the rulings of the officers of such department in regard thereto. It purchased the land before the issuance of a patent. The legal title was still in the government. It therefore obtained, by its purchase, only an equitable interest in the land, and is not, for the reasons stated, entitled to protection as a bona fide purchaser. *Shirras v. Caig*, 7 Cranch, 34; *Vattier v. Hinde*, 7 Pet. 252; *Boone v. Chiles*, 10 Pet. 177, 210; *Smith v. Custer*, 8 Dec. Dep. Int. 269; *Root v. Shields*, Woolw. 341, Fed. Cas. No. 12,038; *Randall v. Edert*, 7 Minn. 450 (Gil. 359); *Shoufe v. Griffiths* (Wash.) 30 Pac. 93. In *Smith v. Custer*, supra, Secretary Vilas clearly enunciated the principles applicable to this case. He said:

"The pre-emption purchaser takes, by his final proofs and payment and his certificate of purchase, only a right to a patent for the public lands in case the facts shall be found by the general land office and the interior department, upon appeal, to warrant the issuance of it. Whatever claim to patent he possesses by virtue of his payment and certificate is dependent upon the further action of the department, and its future finding of the existence of the conditions, and his compliance in fact with the prerequisites prescribed by law to the rightful acquisition of the public lands he claims. This being so, it is plain that the purchaser can acquire from the entryman no greater estate or right than the entryman possesses."

The judgment of the circuit court is affirmed.

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**AMERICAN MORTG. CO. OF SCOTLAND, Limited, v. CROW et al.**

(Circuit Court of Appeals, Ninth Circuit. October 2, 1894.)

No. 155.

Appeal from the Circuit Court of the United States for the District of Oregon.

Snow & McCamant, for appellant.

Stott, Boise & Stott, for appellees.

Before McKENNA, Circuit Judge, and HAWLEY, District Judge.

HAWLEY, District Judge. This case presents the same questions, upon substantially the same facts, as the case of *Mortgage Co. v. Hopper*, 64 Fed. 553; and, upon the authority of that case, the judgment of the circuit court is affirmed.

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**HARGADINE-MCKITTRICK DRY GOODS CO. v. REYNOLDS et al.**

(Circuit Court, E. D. Missouri, E. D. November 27, 1894.)

**1. CONTRACT OF SALE—ACCEPTANCE OF OFFER—WHAT CONSTITUTES.**

Plaintiff sent to defendants an order for certain cotton warp, at prices named, on board cars at N. Defendants accepted the order, conditioned that the colored warp be accepted on board cars at L. Defendants declined to give any better terms or ship otherwise than as proposed by

them, but stated that they thought they could secure a certain rebate if the goods were shipped via Erie Despatch. Plaintiff directed them to send a specified amount of a certain kind of warp by Erie Despatch, and also to ship a certain quantity of Eureka warps, saying: "If it suits your convenience better, ship the Eureka warps by Erie Despatch, and can make a fair rate, we would be perfectly willing to have you ship the goods that way." *Held*, that plaintiff's last letter was not a positive acceptance of defendants' offer in their last letter, and that no contract was consummated.

2. SAME—UNREASONABLE DELAY IN ACCEPTING OFFER—WHAT CONSTITUTES.

Plaintiff ordered of defendants certain goods. Several letters passed between the parties as to terms, etc., when defendants sent plaintiff their ultimatum. Prior thereto both parties had made prompt replies to letters received, so that at no time more than one day intervened between the receipt of a letter and the posting of a reply. *Held*, that a delay by plaintiff of six days after the receipt of such ultimatum before posting an acceptance of its terms was unreasonable, and defendants were not bound to fill the order.

Action by the Hargadine-McKittrick Dry Goods Company against James E. Reynolds and others to recover damages for breach of contract, in which there was a judgment of nonsuit. Plaintiff moves to set aside the nonsuit. Motion denied.

Eben Richards, for plaintiff.

Seddon & Blair, for defendants.

PRIEST, District Judge (orally). This is an action for damages for breach of contract. The defendants deny the consummation of an agreement. If it exists, it is by virtue of a proposal by the defendants and an acceptance by the plaintiff. On September 14, 1892, the plaintiff, at St. Louis, submitted to defendants at New York an order for certain cotton warp of white and colored variety, at named prices on board the cars at New York. This order was accepted with the modification that the colored warp should be accepted on board the cars at Little Falls, N. J., where the defendants' dyehouses were located. Over this amendment quite an extensive correspondence ensued, in which there appeared an effort upon the part of the defendants, while adhering tenaciously to the modification, to make the burden of the change fall as lightly as possible upon the plaintiff, and urging upon it the advantages of the trade as proposed by them. This correspondence showed, up to and including the defendants' letter of the 26th of September, great promptness of answer upon both sides. The exchange of mail between New York and St. Louis occupied two days. On September 26th the defendants wrote the plaintiff as follows:

New York, Sept. 26th, 1892.

The Hargadine & McKittrick D. G. Co., St. Louis, Mo.—Gentlemen: Your favor of 24th inst. is before us, and we regret to say that it will be impracticable to ship this lot of warp except as indicated in ours of the 17th inst. The price which we there make is an exceedingly low one, and we cannot sacrifice any more of our commissions than we then stated. Our dyehouse is located along the Erie R. R., and the expense of bringing the goods to New York, and shipping via Kanawha Despatch, is more than we could stand. We think if you would permit us to ship via Erie Despatch we could secure a rebate of 10c. per cwt. from tariff rate. Please understand, gentlemen, that we have already made so low a price on these goods that there is

no room for us to assume any part of the freight whatever. Please answer. The cost to us of shipping via Kanawha Despatch will be about 1/8c. per lb.

[Signed]

Yours, truly, Jas. E. Reynolds & Co.

This letter reached St. Louis and was received by plaintiff on the 28th of September. No reply was made until October 4th, a delay of six days, when the plaintiff's vice president, through whom the order was first given, and by whom the correspondence had been maintained, wrote as follows:

St. Louis, October 4th, 1892.

Messrs. James E. Reynolds & Co., New York—Gentlemen: Please ship us as soon as possible, of the cheap grade of warp, on order given Mr. Smith, the following assortment of 60 bales: 15 White, &c. Send by Erie Despatch, and get us the best freight rate you can. We would prefer to have these goods put up in blue papers, without tickets, in the style that you generally put up the Peerless warps. This is the way we have been having the goods which we have been running, and would like to put them right into the same line. Will send the other order for the balance of the goods in time for shipment November first, as agreed. Also please ship us in Eureka warps, 10 White, &c. Please hurry the delivery of these goods as much as possible. If it suits your convenience better, ship the Eureka warps by Erie Despatch, and can make a fair rate, we would be perfectly willing to have you ship the goods that way.

Very respectfully

[Signed]

Hargadine-McKittrick D. G. Co.,

Thos. H. McKittrick, Vice President.

To this the defendants replied on October 6th in substance that the acceptance came too late. From the unusual delay in answering their communication of the 26th September they were led to suppose their conditions were unsatisfactory, and hence had made other arrangement for the disposal of the goods offered to plaintiff. Mr. McKittrick, in accounting for the tardiness in answering the defendants' communication of the 26th of September, stated that one of the intervening days was Sunday, and one day he was away from business, and the remainder of the time he had set on foot an investigation, and was awaiting information, as to the best possible rates via the Erie Despatch. The answer of October 4th was given without gaining further knowledge of the rates.

Unless a contract exists by virtue of the two letters of September 26th and October 4th, none has been shown. It is apparent from the most casual reading of the plaintiff's letter replying to the defendants' of September 26th that its terms are susceptible of a double meaning; that is, not a frank, clear, and positive acceptance of the offer contained in the defendants' of the 26th. There is much plausible ground for the contention, had the shipments called for in it been made, that they were made under the terms of the original order of September 14th,—a contention which the later correspondence hinted at. In addition to this, the letter indicated that if the shipments were made via the Erie Despatch the fairness of the rate would be a matter for future adjustment. It does not accept positively, unequivocally, and definitely the terms offered. It concludes: "If it suits your convenience better, ship the Eureka warps by Erie Despatch, and can make a fair rate, we would be perfectly willing to have you ship the goods that way." This is not such an acceptance, even if timely, as would or ought to bind the defendants.

The defendants insist more strongly that the acceptance was not within a reasonable time, and I am of the opinion that this defense is well taken. Up to this time the correspondence had been prompt. Both parties had been ready with and made replies upon receipt of each other's letters. Never more than three days had intervened between the mailing of a letter and the posting of its reply. The defendants had the right, therefore, to presume, inasmuch as their proposal of 26th contained their ultimatum upon the subject, from the unusual delay, that the plaintiff concluded to negative their offer. They would not have been justified in holding goods then ripe for an opening market to await the uncertain action of the plaintiff beyond that time usually and reasonably necessary for the formation and transmission of a rejoinder. *Hare*, Cont. 340; *Pars*. Cont. (Ed. 1873) 483; *Averill v. Hedge*, 12 Conn. 424. Aside from the fact that the parties themselves by their previous correspondence had fixed a reasonable time within which reply should have been made, the plaintiff, by the testimony of Mr. McKittrick, emphasizes the unreasonableness of the delay by preferring invalid excuses. What is a reasonable time must be determined by circumstances and situation of both parties. The defendants were not concerned with, nor could they know of, Mr. McKittrick's absence from business; neither did his inquiry as to the freight rates in the least effect their offer. An excuse that he was hunting a purchaser for the goods the defendants were offering to sell him would have been just as good as the one tendered, and certainly it could not be contended that the defendants' proposition should remain open until the plaintiff could ascertain whether it could profitably dispose of the merchandise they had offered to sell. There are cases and circumstances in which the question of "reasonable time" is one for the determination of a jury, but this, in my opinion, is not one of them. Motion to set aside nonsuit overruled.

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NORTHERN PAC. R. CO. v. BEATON.

(Circuit Court of Appeals, Ninth Circuit. October 23, 1894.)

No. 159.

1. INJURY TO EMPLOYE — RIDING ON ENGINE — CONTRIBUTORY NEGLIGENCE — RULES OF COMPANY — INSTRUCTION.

In an action by an employé of a railroad company for injuries received while riding on an engine by the falling of a rock from the roof of a tunnel, caused by a projection on a car in front of the engine, the exclusion of a book of rules prescribing the persons who should be allowed to ride on the engines is not ground for complaint, where the court instructed that there could be no recovery, whether or not there was any rule prohibiting plaintiff riding on the engine if the engine was obviously and necessarily a dangerous place to ride, and plaintiff voluntarily placed himself there, and was in the discharge of no duty, and if he would not have been injured had he been in the caboose, as the rules could have been material only on the ground that the engine was a dangerous place to ride, and the instruction gave defendant all the benefit he could claim from the rules.

**2. SAME—LIABILITY OF MASTER—EMPLOYING INCOMPETENT SERVANT—INSTRUCTION.**

An instruction that if defendant was careless in employing or retaining an incompetent conductor, and, on account of his incompetency, plaintiff was injured, defendant would be liable, does not authorize a recovery though defendant had no notice of his incompetency.

**3. SAME—FELLOW SERVANTS—CONDUCTOR AND BRIDGE BUILDER.**

A foreman of a railroad's bridge carpenters, who has, by the order of his immediate superior (the superintendent of the bridge-building department), gone on a train, to be transported to his place of work, is not, while being transported, a fellow servant of the conductor.

Error to the Circuit Court of the United States for the District of Montana.

Action by Archie Beaton against the Northern Pacific Railroad Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Cullen & Toole, for plaintiff in error.

Henry N. Blake, Henry C. Smith, D. P. Carpenter, and George F. Shelton, for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The Northern Pacific Railroad Company brings this writ of error to review the judgment of the circuit court of the district of Montana in an action brought by Beaton, the plaintiff, against the railroad company, for damages for personal injury. The plaintiff was in the employment of the railroad company as foreman of bridge carpenters in the bridge and building department of the company. Under the direction of the supervisor of said department, he got upon a train of the defendant at Garrison, in the state of Montana, for the purpose of being transported to a bridge six miles east of there, where he was to perform work in taking out drift bolts of the bridge. The train was in charge of the conductor, Romick. There was upon the train a derrick car, which had been shipped to the roadmaster, Russell, who had charge of the track department, and was being used by the men in that department in their work. The derrick car, being a part of the train, was in charge of the conductor thereof, and he was responsible for seeing that it was in a position to clear the bridges and tunnels. He took charge of the train on the morning of October 21, 1891. Prior to that time he had been acting as brakeman. He had not been examined as to his competency or qualification to act as conductor. He had no knowledge of the height of the tunnels above the track, or of the height of the cars, or of the height of the derrick above the track. He took charge of the train that morning in response to a dispatch from the chief train dispatcher, and he saw the derrick car in the train. When the train started, Romick went into the caboose; he paid no attention to the derrick. The arm of the derrick car was at that time raised, so that it would not go through the tunnels; but the conductor did not notice that fact, although it was his duty to see that it would clear the bridges and tunnels. The der-

rick car was next to the engine, and the engine, instead of pulling the train, was pushing it. The plaintiff was sitting in the cab of the engine, on the fireman's seat, where, as he testified at the trial, he had the right to be. The arm of the derrick struck the top of the tunnel, crushed the timbers of the roof and loosened a rock, which fell and struck the plaintiff where he was sitting, in the cab, and inflicted the injuries for which he brought his action.

It is first assigned as error that the court excluded from the evidence a certain book of rules, prescribing the persons who should be allowed to ride upon engines of the Northern Pacific Railroad Company. The objection to this evidence was that it was a system of rules governing engineers only, and intended for their guidance, and not for the direction of employes in other branches of the defendant's service. The contents of the book of rules are not set forth in the bill of exceptions, and it is impossible for the court to know that they were material to the issues in the case. If they were material, it must have been upon the ground that the engine was a dangerous place upon which to ride. This question, and that of the plaintiff's contributory negligence, were properly referred to the jury by the court, in the following instruction:

"If the jury believe from the evidence that the engine upon which the plaintiff rode was obviously and necessarily a dangerous place for the plaintiff to ride, and that he voluntarily placed himself in that position, and was in the discharge of no duty, and that if he had been in the caboose provided for him and other persons he would not have been injured, the plaintiff cannot recover, whether there was or was not a rule prohibiting plaintiff from riding thereon."

This instruction gave to the defendant all the benefit it could justly claim from the book of rules, had they been admitted in evidence. The reason why engineers were not permitted to allow others to ride upon engines is not stated, but it may be assumed to be the greater danger incident to riding in that position. That danger, according to the evidence, arose from the liability of the machinery to break, and the steam pipes to burst. It may be admitted that the plaintiff, in choosing to ride upon the engine, assumed all the risks peculiar to that position. The danger from a rock falling from the roof of a tunnel, however, was not one of those risks. That was an accident quite as likely to happen upon any other portion of the train, and there is nothing in the evidence to indicate the contrary. We find no error, therefore, in the exclusion of the book of rules from the evidence, nor in the charge of the court concerning the subject of the plaintiff's contributory negligence in riding upon the engine.

It is next assigned as error that the court instructed the jury as follows:

"You are further instructed that if the defendant was careless either in employing or retaining in its service a reckless, incompetent, or careless conductor on said train, and on account of the recklessness, incompetency, or carelessness of such conductor, in failing to see that the boom of the derrick was properly lowered before he started the train, and that through such negligence on the part of said conductor, Romick, the plaintiff was injured, without fault or negligence on his part, then in such case the Northern Pacific Railroad Company is liable to him for the damage resulting from said injury."

It is urged that this instruction is erroneous because misleading, and because it holds the defendant liable for retaining in its service an incompetent conductor, whether it had notice of his incompetency or not. The charge is not, in our opinion, justly subject to this objection. It holds the defendant liable for retaining an incompetent conductor in its service only when it has been careless in so doing. In order that the defendant should have been found careless in retaining such an incompetent servant, the jury must have found from the evidence a breach of duty upon the part of the company,—a failure to do that which it was legally bound to do. It is necessarily implied in the instruction that the company must have been negligent, and have failed of its duty, either in employing or retaining the conductor. If there were no negligence in the original employment of such officer, negligence in retaining him would not be imputable until after notice of his incompetency should have been brought home to the company, or such facts as would charge the company with knowledge of his unfitness. All of this was clearly implied in the instruction.

The most important assignment of error is that which brings in question the charge of the court to the jury upon the law of fellow service. The court said:

"If you should find from the evidence that the plaintiff belonged to one department of defendant's railroad service, and the said Romick to another department of said service, and at the time of the injury said plaintiff had nothing to do with the running of the work train, and was only being transported thereon to the place where he was to work, then I instruct you that plaintiff and said Romick were not engaged in a common employment, and were not fellow servants."

The correctness of this instruction depends upon whether or not the decision in the case of *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, has been modified or overruled by the more recent decision of *Railroad v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914. In the *Ross* Case the court had under review the charge of the circuit judge to the jury, which was, in terms, that:

"If the company sees fit to place one of its employes under the control and direction of another, the two are not fellow servants engaged in the same common employment."

It was the decision of the court that the charge was not erroneous, as applied to the case of an injury to a locomotive engineer through the personal carelessness of the conductor of the same train. The court said:

"A conductor, having the entire control and management of a railway train, occupies a very different position from the brakemen, the porters, and other subordinates employed. He is in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will insure more care in the selection of such agents, and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilance on their part, and prompt and unhesitating obedience to his orders. The rule which applies to such agents of one railway corporation must apply to all, and many corporations operate every day several trains over hundreds of miles, at great distances apart, each being under the control and direction of a conductor specially appointed for its management. We know, from the manner in which rail-



ways are operated, that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the terms is he a fellow servant with the fireman, the brakeman, the porters, and the engineer. The latter are fellow servants in the running of the train under his direction. As to them and the train, he stands in the place of, and represents, the corporation."

In the Baugh Case it was held that the fireman and engineer of a locomotive engine running alone upon a railroad, with no train attached, were fellow servants, notwithstanding the fact that by the rule of the company the engineer, in such a case, was to be deemed the conductor. The distinct doctrine of the Baugh Case is that to hold the master liable for an injury sustained by one servant through the negligence of a fellow servant, upon the ground that the latter stands in the attitude of a vice principal, the negligent servant must have been either charged with the performance of a personal duty which the master owed to the injured servant, such as providing him a safe place to work in, safe tools to work with, and safe fellow workmen, or he must have had the control or management of a distinct department of the master's service; and while, in the opinion, the court does not attempt to define what shall constitute a distinct department over which the commanding superintendent is, by virtue of his office, to be deemed a vice principal, the view of the court is illustrated by reference to the law department of a railway corporation and the operating department, between which, in the language of the opinion, "there is a natural and distinct separation,—one which makes the two departments like two independent kinds of business, in which the one employer and master is engaged." And by further reference to the manufacturing or repair department and the operating department, which the court said were two departments, "as distinct and separate as though the work of each was carried on by a separate corporation." But, while the distinction between these departments so referred to is obvious and apparent, we do not understand the court to hold that there might not be other subdivisions or departments in the service of a railway corporation, equally distinct, and which, if placed under the charge and control of a superintending or commanding officer, would sustain such relation to the corporation that the superintending servant would be a vice principal. The Ross Case, while left to stand upon ground apparently inconsistent with the general principles announced in the Baugh Case, is nevertheless, in terms, expressly approved in the opinion of the court in the latter case, and the principles upon which it rested are there carefully distinguished. The court said (page 379, 149 U. S., and page 914, 13 Sup. Ct.):

"The regulations of a company cannot make the conductor a fellow servant with his subordinates, and thus overrule the law announced in the Ross Case."

And on page 382, 149 U. S., and page 914, 13 Sup. Ct., the court said, referring to the Ross Case:

"The conductor was, in the language of the opinion, 'clothed with the control and management of a distinct department'; he was 'a superintending officer,' as described by Mr. Wharton; he had 'the superintendence of a department,' as suggested by the New York court of appeals."

In view of these and other expressions of approval of the Ross Case, it must be held that there are divisions of the service of a railroad company into departments, such that the heads thereof are vice principals of the master, other than those mentioned or used for illustration in the opinion of the court in the Baugh Case, and that a train of cars is such a department, and that a conductor of a train is such a representative of the company, and that for his negligence, whereby a subordinate employé upon the same train is injured, the company will be liable. The instruction of the court upon the question whether or not the conductor was the fellow servant of the plaintiff was in harmony with this interpretation of the law. But it is urged that the plaintiff in this case was not an employé upon the train of which Romick was the conductor, but was the foreman of a gang of bridge builders, in another and distinct department of the defendant's service, and that the facts bring the case within the rule of *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322, and *Railroad Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983. In the *Randall* Case, a brakeman working a switch for his own train was held to be the fellow servant of the engineer of another train upon an adjacent track. In the *Hambly* Case, it was held that the helper to a crew of masons engaged in building a stone culvert for the company upon its right of way was the fellow servant of the conductor and engineer of a passenger train, through whose negligence he was injured. In neither of these cases was the injured servant under the direction or control of the negligent servant. In the *Hambly* Case, the conductor of the train, while he was the head of a department, and therefore the vice principal of the railroad company, as to all his subordinates upon the same train, was still the fellow servant of another employé of the company, not upon the train, but engaged in work in another department. The case at bar presents a different state of facts. The plaintiff, Beaton, while he belonged to a department of the defendant's service entirely distinct from that of the conductor upon whose train he was injured, was nevertheless, at the time of the accident, lawfully upon that train, and was subject to the personal control of the conductor. For the time being, he belonged to the train, and was in that department. The head of that department (the conductor) owed to him the same duty of care and safe transportation that he owed to the brakeman, the fireman, and the engineer of the train. It is true that in going upon the train, to be transported to his place of work as bridge carpenter, the plaintiff acted under the order of his immediate superior, the superintendent of the bridge-building department; but that superintendent had no control over the movements of the train, or of the conductor thereof. The train was not subject to his orders, but was in the charge of the conductor. The conductor had assumed charge by the direction of the chief train dispatcher. He occupied the same relation to the train and all on board that was sustained by the conductor of the train in the *Ross* Case. The

reason of the rule of the liability of the master for the servant's negligence, as declared in the Ross Case and interpreted in the Baugh Case, does not consist in the fact that the conductor of the train was the superior officer of the injured servant, but rather in the fact that the latter was in the department of the former; and the conductor was held to be a vice principal, not because he could enforce the obedience of subordinate servants placed under his charge, but because he was clothed with the power to govern the movements of the train which constituted his department. The case of the plaintiff comes within this interpretation of the reason of the rule of those decisions, for he was, at the time of receiving his injury, within the department of the conductor of the train, and subject to his control. The judgment is affirmed, with costs to the defendant in error.

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CHERRY VALLEY IRON WORKS v. FLORENCE IRON RIVER CO.

(Circuit Court of Appeals, Sixth Circuit. October 29, 1894.)

No. 153.

1. CONTRACT OF SALE—RESCISSION BY SELLER.

Defendant contracted to sell to plaintiff a quantity of ore, to be delivered in seven equal parts in each of seven months, the price to be also paid in equal installments in the same months. The contract contained a stipulation that, if plaintiff failed to make any payment for ten days after it was due, defendant should have the right to cancel the contract as to all ore not delivered at the time of such default. Plaintiff made the first three payments, but, not needing all the ore, defendant delivered less than the amount called for by the contract during such three months. Plaintiff failed to make the fourth payment, and defendant refused to ship more ore until the same was made. No more payments were made and no more ore shipped. *Held*, that the refusal to make further shipments was an exercise of the right reserved to defendant by the aforesaid stipulation in the contract; that this did not amount to an absolute rescission of the contract, entitling both parties to be restored to their original positions, but entitled defendant to treat plaintiff's failure to pay as a breach of the contract, justifying defendant in refusing to continue deliveries, and giving defendant the right to claim damages for such breach, while plaintiff was entitled to a return of the sums paid in excess of the price of the ore actually delivered.

2. PAYMENT—BY NOTES.

Plaintiff made the first two payments in notes, which were accepted by defendant, and offered notes for the third payment, which defendant refused to accept, but agreed to hold for a short time, until plaintiff should take them up in cash. Defendant afterwards negotiated the notes. *Held*, that defendant was not entitled to treat plaintiff as in default upon such third payment.

3. SALES—MEASURE OF DAMAGES.

The ore sold having never been separated from the mass in defendant's possession, and appropriated to plaintiff, and the title not having passed, the measure of damages for plaintiff's failure to take and pay for the undelivered ore was the difference between the contract price and the market price at the times when the several installments should have been delivered.

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

This was an action by the Cherry Valley Iron Works against the Florence Iron River Company. Defendant had judgment, and plaintiff brings error.

This action was brought by the plaintiff in error to recover a sum of money claimed to be due from the defendant by reason of an overpayment made by the plaintiff upon a contract of sale between the defendant, as seller, and the plaintiff, as buyer, of a quantity of ore from the defendant's mines. The contract was in writing, bearing date August 20, 1890. By it the defendant, the Florence Iron River Company, agreed to sell to the Cherry Valley Iron Works, and the latter company agreed to buy, 10,000 tons of the Florence Iron River Company's ore, of its standard quality, at the price of \$3.75 per ton, making \$37,500 for the whole purchase. This total sum was to be paid in seven equal payments of \$5,357.14 each, on the 15th day of October, November, December, January, February, March, and April following, respectively, and the ore was to be delivered in equal installments during those months, corresponding to the payments. Other stipulations were contained in the contract, but none of them are material to the present controversy, except the one found at the end, which is in the following words: "And in case said party of the second part fails to make any or either of the above-named payments for the period of ten days after the same becomes due, said Florence Iron River Company shall have the right to cancel this contract for all ore not delivered at the time such default is made."

The plaintiff made the payments due in October and November by its notes, payable in four months after their date, and payment in that mode was accepted by the defendant, and credit given for the amount thereof. In December the plaintiff was again proceeding to make the payment for that month in that way. But while the notes were in the course of transmission to the defendant, the latter notified the plaintiff that it was unwilling to receive that payment by notes, and that it would insist upon payment in cash. It was, however, agreed that the defendants should hold the notes until the end of December, and that plaintiff should take them up with cash in the meantime. They were not so taken up, but were negotiated by the defendant, and paid by the plaintiff on their maturing, four months after their date. The plaintiff, not being ready to receive the ore, did not call for any delivery until November. During that month 731 tons, in December 2,080 tons, and in January 145 tons were delivered.

On the 27th day of January, 1891, the plaintiff requested a resumption of shipment at the rate of five cars per day. But it had not made the January payment, and the defendant, on January 29th, refused to ship any more ore until both the December and January payments should be made. Matters continued in that state until April 29, 1891, when, all the payments having become due, the defendant demanded payment for the unpaid balance of the whole contract price, the balance being \$20,665.40. The plaintiff subsequently offered to pay 25 cents per ton on all the undelivered ore, to be released from the contract. This was refused, the market value of the ore having gone down more than 50 cents per ton below the contract price. After April 29th further correspondence ensued during the month of May, and until the 15th of June. In this correspondence the defendant insisted upon the payment of the contract price, and threatened that unless payment should be made the undelivered ore would be sold for account of the plaintiff, and the difference between the proceeds and the unpaid purchase price would be charged against the plaintiff. On the 12th day of May the defendant wrote the plaintiff, saying: "As our final statement to you, we reiterate what we have heretofore written,—that we propose to sell the ore you refuse to take, at the best market price, for your account, and hold your company for the difference." And by letter of May 14th the defendant repeats this purpose.

On June 15th the following letter was addressed by the defendant to the plaintiff: "Cleveland, O., June 15, 1891. J. H. King, Esq., Prest. Cherry Valley Iron Works, Painesville, O.—Dear Sir: We beg to call your attention to the following clause in the contract for the purchase of ten thousand

tons Florence ore, entered into by the Florence Iron River Co. and Cherry Valley Iron Works, under date of August 20, 1890: 'And in case the said party of the second part fails to make any or either of the above-named payments for the period of ten days after the same becomes due, said Florence Iron River Co. shall have the right to cancel this contract for all ore not delivered at the time such default is made.' As your company is in default on several payments under said contract; as in our letters of May 12 and 14, 1891, we give you notice of what our action would be unless you promptly made the payments then long past due,—we beg to notify you that we have exercised the rights conferred upon us in the contract in accordance with the clause mentioned above, and have canceled the contract for all ore now undelivered. Very truly yours, Tod, Stambaugh & Co., Agts."

Thereupon, the plaintiff demanded of the defendant repayment of the sum which it had paid upon the contract in excess of the sum due for the ore delivered at the contract price; such excess being \$5,146.27. This being refused, the plaintiff, on July 22, 1891, brought this action to recover it. On July 31st, nine days afterwards, the defendant sold the undelivered ore for three dollars per ton, and credited the sum realized to plaintiff's account. The account, with this credit entered, showed a balance against the plaintiff of \$335.83, for which sum the defendant, in its answer, set up a counterclaim.

The case was tried by the court without a jury. The findings of fact were general,—that the plaintiff was not entitled to recover the excess of payment for which it sued to recover, and that defendant was entitled to recover the amount of its counterclaim. An opinion was filed, stating, in part, the facts which the court had found, and its conclusions of law. This opinion was filed on the same day with the filing of the general findings of fact,—August 3, 1894. On the 7th day of September following, a motion for a new trial was overruled, and judgment entered in accordance with the findings, to which the plaintiff excepted. During the trial, objections and exceptions were taken to the admission of each of the several letters above referred to, except that of June 15, 1891. The court, against the plaintiff's objection, received a statement of the account between the parties, as prepared by the defendant's bookkeeper, not to prove the matters therein stated, but as the court's computation, if it should be found correct. The court afterwards adopted the account as correct in the findings in the opinion before referred to, and it appears to form the basis of the judgment. The plaintiff also objected, upon the trial, to the evidence of the resale of the undelivered portion of the ore, but the court received it, and it was treated in the findings as an element in measuring the damages for which the judgment was rendered. The evidence adduced upon the trial is contained in the bill of exceptions.

Henderson, Kline & Tolles (Virgil P. Kline, of counsel), for plaintiff.

Hoyt, Dustin & Kelley (A. C. Dustin, of counsel), for defendant.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

Having stated the case as above, SEVERENS, District Judge, delivered the opinion of the court.

Although the record in this case presents the objections and exceptions of the plaintiff in the court below in a crude and rather defective form, we think they are sufficient to require us to review the principal questions involved in the determination of the correctness of the judgment, and, as their sufficiency for that purpose has not been controverted by the defendant, we shall not go into that subject for discussion in detail.

In order to proceed to a right conclusion upon the matters in difference between the parties, it is necessary to ascertain what

is the proper construction of the contract, mentioned in the foregoing statement, of August 20, 1890, and especially of the stipulation, at the end thereof, whereby the vendor reserved the right to cancel the same as to undelivered ore in case the vendee should fail to make the payments as agreed; for it is upon the construction and effect of that clause in the contract that the controversy mainly turns. It will be convenient to consider, in the first place, what would have been the effect of the contract had that stipulation been omitted. In that case it would have been a contract simply for the sale of 10,000 tons of ore, deliverable in seven equal parts in each of the seven months named, for the price of \$37,500, payable in seven equal installments, payable during those months respectively. The contract would have been entire, and would have bound the vendor to deliver the whole amount, and the vendee to pay the whole price. The fact that there were subordinate stipulations in regard to the dates of delivery and of payment would not break it up into separate contracts for each installment of the ore. It is sufficient to cite, upon this point, the cases of *Iron Co. v. Naylor*, 9 App. Cas. 434, in the English house of lords, and *Norrington v. Wright*, 115 U. S. 188, 203, 204, 6 Sup. Ct. 12. And, the contract being entire, as soon as the parties had entered upon its performance by partial delivery and payment, the mere failure of the vendee to make the subsequent payments would not of itself absolve the vendor from proceeding with the deliveries. It may be that a downright refusal to make payment, or other equivalent conduct evincing a purpose to renounce the contract, would entitle the other party to treat the contract as abandoned, and relieve him from the obligation to proceed further in its execution. *Winchester v. Newton*, 2 Allen, 492. In respect to the obligation of the vendee to accept delivery of the goods under such a contract, where the vendor fails to comply with its stipulations with regard to the time and mode of delivery, it was held in *Norrington v. Wright*, supra, that he was entitled to insist upon a continued adherence to its terms. This was because they were of the substance of the thing contracted for. But the duty of the vendor, notwithstanding a mere failure of the vendee to make payment of money, not evincing a renunciation of the contract, stands upon a different ground, as pointed out in that opinion, and results, also, from a comparison of the actual decision in that case with other cases distinctly involving the vendor's duty in those circumstances, among them the case of *Iron Co. v. Naylor*, which it recognizes as authoritative.

In view of the obligation, which the vendor in this contract would otherwise have assumed, to go on with its deliveries notwithstanding a failure to pay, the clause was added by which it could relieve itself of that duty in case it should find it to its interest to do so. It is somewhat plausibly contended by the defendant that the right reserved to "cancel this contract for all ore not delivered at the time such default is made" was the power to obliterate the stipulations of the parties so far as they applied to the undelivered ore, the exercise of which would untie the obligation of the vendee to answer for the damages produced by his preceding

failure to perform the contract, as well as the obligation of the vendor to make further delivery. But we do not think that this is the just construction of the language of that provision, or that it is the construction intended by the parties. In our opinion, it was intended to give an opportunity to the vendor, in the event of nonpayment, to stand on that breach as a justification for its refusal to deliver the ore then undelivered, and treating the contract at an end, so far as its further performance was concerned. We cannot think that it was intended that the exercise of that right was intended to be followed by the consequence of relieving the vendee from responsibility for the very default which was the cause of the vendor's canceling the agreement to make further delivery. The right of the party without fault to treat the obligation to go further as at an end by reason of the nonperformance of the other party is sometimes spoken of in judicial opinions as a right "to cancel the agreement," whereupon the right would accrue to the party not in fault to sue for his damages. We think that the word must be deemed to have been used in that sense here. But the plaintiff contends that the letter of June 15th was in itself an unequivocal rescission of the contract as far as it related to the undelivered ore, and put an end to the mutual obligations of the parties with respect to it. But it professed to be the assertion of the right secured by the contract, and upon the construction of the contract itself which we think is the right one the exercise of that right would not be followed by such consequences. Aside from that consideration, we do not think the letter bears the construction which the defendant puts upon it. An absolute rescission implies that the parties are to be restored to their former position, and this would involve, among other things, the repayment of the excess of purchase price then in the hands of the vendor. This was not offered or proposed by it in the letter, and the purpose was plainly indicated to hold on to all the vendee's obligations. This put such a limit upon the effect of the language used as to prevent it from operating as a rescission in the technical meaning of that term. In the case of *Lumber Co. v. Bates*, 31 Mich. 158, there was a contract for the sale of a quantity of lumber, to be thereafter delivered, at an agreed price, part of which was paid down. The lumber was not delivered as agreed, and, after much procrastination, the vendees addressed a letter to the vendors, in which, after reciting the terms of the agreement, and the vendors' breach thereof, they go on to say:

"We shall not, therefore, now accept or receive said logs on the contract, and shall look to you for the money already paid you by us, and interest thereon, and the note of ours you now hold, and for our damages sustained by your failure to perform the contract according to its terms."

The vendees then sued to recover back the consideration which had been paid, upon the ground that the contract had been rescinded, and recovered judgment. But, upon a writ of error to the supreme court, that court said of the plaintiff's contention:

"They could not, in any event, rescind in part, or hold it valid for one purpose and void for another. They must rescind entirely, or not at all. But

here, after declaring their intention to rescind, they say, further, 'we shall look to you for our damages sustained by your failure to perform the contract according to its terms.' There being no rescission established in the present case, the judgment must be reversed."

And Judge Campbell, in a concurring opinion, said of the letter:

"I am satisfied that the letter cannot be treated as a rescission, even if the parties could then have rescinded. Taken altogether, it is rather an assertion of a breach of the contract, and of such delay as would justify a refusal to accept the lumber agreed to be delivered, by reason of the breach, and a claim of damages, instead of a return of the consideration."

That case bears a striking analogy to the present case, upon that aspect of the controversy.

This conclusion leads to the result that, upon the exercise of the right of cancellation provided by the contract after a failure to make the agreed payment, the further performance of it was abandoned, and the aggrieved party had the right to pursue its remedy for the damages sustained by it in consequence of the breach of the contract which was the cause of its abandonment. The plaintiff failed to make the December payment in the manner promised in its agreement, but remitted its notes instead of cash. This was at first objected to by the defendant, but, upon an agreement of the plaintiff to take up the notes during that month, they were retained. They were not so paid. But they were retained by the defendant, negotiated by it, and afterwards paid by the plaintiff. We think the defendant, retaining and negotiating the notes, was not entitled to treat the plaintiff as in default in respect to the December payment. But the default in the January payment was absolute, and justified the defendant in resorting to the privilege reserved, of refusing to go on with the deliveries on account of that default. Its purpose to do this was distinctly indicated on the 27th of January, when it refused to deliver ore as requested. That refusal could only be justified as an exercise of its election to proceed no further on the contract. It is true it offered to surrender the position it had assumed, if the other side would make the defaulted payments, but correspondence on the subject was fruitless, and no agreement was ever reached thereafter in respect to it, and on May 15th following it finally gave notice that negotiations were at an end, and, in effect, that it adhered to the proposition that the contract would be treated as canceled. The defendant stood upon the ground it had taken in January, and it must be taken to have elected to treat the contract as broken by the default in making the payment due in January. Upon this view of the nature of the contract, the admission of the letters which passed between the parties between the 29th of January and 15th of June, if erroneous, was harmless, for they would not change the contract or the rights and obligations of the parties.

The position of the parties, therefore, was this: The plaintiff was entitled to recover the amount which it had paid in excess of the contract price of the quantity of ore actually delivered; and the defendant was entitled to recover, by way of counterclaim, the damages which it had sustained from the plaintiff's breach of the contract which had, on account of such breach, been "canceled" by the defendant. As to the amount of excess of payment by the plaintiff,



there is no dispute. In regard to the measure of defendant's damages, we think the court below erred in adopting a rule which was not applicable. The defendant, entertaining an erroneous conception of the means which it was entitled to adopt to fix the amount of its damages, gave notice, in its letter of June 15th, of its purpose to sell the undelivered ore for account of the plaintiff, and hold the latter for the difference between the price realized from the sale and the contract price; and this purpose it carried into effect on July 31st, nine days after the suit was commenced. The sale in this case was of goods to be taken from a mass. The subject of the bargain was not, therefore, identified at the time when it was made. It is true that the goods might afterwards be identified by a separation from the mass, and the appropriation, by the vendor, of the portion thus identified, to the contract. *Blackb. Sales*, 128; *Benj. Sales*, 358 et seq.; *Clafin v. Railroad*, 7 Allen, 341; *Bank v. Bangs*, 102 Mass. 291. This is because his authority to make the appropriation is implied in the contract.

If the subject-matter is identified when the contract is made, the title passes to the vendee, in the absence of controlling stipulations. When the subject-matter is subsequently identified by its appropriation to the contract, the title passes at the time of such appropriation. But when there has at no time been identification of the subject, the title remains in the vendor. In those cases where the title has passed before the contract is broken, and the rights of the parties have been converted into claims for damages arising from the breach, the nature and kind of remedies to which the vendor may resort is the subject of much controversy in the opinions of the courts. There is high authority for the proposition that the vendor, in such a case, may, among other remedies, by virtue of a species of lien for the purchase price, sell the goods as those of the vendee, and hold the latter for the difference between the price obtained and the contract price. This was the remedy resorted to here. It is not necessary for us to decide whether the vendor has this remedy in the class of cases just mentioned. It is clear that this case does not belong to that class. Here, the title never passed, and the goods at all times remained the property of the vendor, subject to any disposition it might be pleased to make of them, until it finally sold them on the market to other parties. The implied authority of the vendor to segregate the goods and appropriate them to the contract had long previously expired. In such cases the rule is general, if not universal, that the measure of the damages which the vendor may recover is the difference between the contract price and the market price at the time fixed by the contract for delivery. 2 Sedg. Dam. (8th Ed.) § 753; *Boorman v. Nash*, 9 Barn. & C. 145; *Phillpotts v. Evans*, 5 Mees. & W. 475; *Ripley v. McClure*, 4 Exch. 345; *Leigh v. Paterson*, 8 Taunt. 540; *Brownlee v. Bolton*, 44 Mich. 218, 6 N. W. 657; *Keller v. Strasberger*, 90 N. Y. 379; *Zuck v. McClure*, 98 Pa. St. 541. In the present case the parties had, by mutual concurrence, postponed part of the October, November, and December deliveries, but to no definite time, and the parts of the ore which had been thus passed over, at the date of the cancellation, were then due. The

other installments, being those for January, February, March, and April, were deliverable in any part of each of such months, and it would seem that the average value during the month would be the just basis of comparison for the market price.

The defendant elected on the 29th of January, 1891, to treat the contract as broken. That was the inevitable inference to be drawn from its refusal to go on with it. And, having once made its election, was bound by it, unless the parties should thereafter substitute some new agreement, which, as we have already said, was not done. The proceeding of the defendant in making the sale on July 31st of a quantity of ore equal to the remaining portion thereof, for account of the plaintiffs, was wholly unauthorized, and proof thereof was immaterial. Nor was it admissible to prove the actual market value of the ore. It was several months later than the time to which such proof would be relevant, and it is distinctly shown that the price was steadily sinking during that period. The date was too remote to furnish any reliable basis for estimating the value of the ore at the dates when it was deliverable. But it further appears that the court made the plaintiff responsible for this sale in July, and made it the basis of the defendant's recovery. It follows, from what we have said, that this was error. There is no finding in regard to the value of the ore at the time fixed by the contract for the deliveries, and we have not the data for ordering the proper judgment. The judgment of the circuit court will therefore be reversed, with directions to award a new trial.

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In re CERTAIN MERCHANDISE.

(Circuit Court, D. Massachusetts. November 23, 1894.)

No. 188.

**APPEAL—REVIEW UNDER CUSTOMS ADMINISTRATIVE ACT—PETITION—DISMISSAL.**

Though the customs administrative act of 1890 (section 15), providing for an appeal, requires security for costs on the original application for review by the importer, and the practice of the court conforms thereto, an application filed when the statute was new, and when there was no express rule of court defining what the security should be, and prosecuted in good faith by counsel, who did not understand that the statute required security at the outset, will not be dismissed because security was not given when the application was made, if the ordinary cost bond in the sum of \$50 is filed within the time named in the ruling on the motion to dismiss.

Petition by Schoellopf, Hartford & Maclagan, Limited, for review under the customs administrative act of 1890. Heard on motion by the government to dismiss. Motion denied on conditions.

Josiah P. Tucker, for petitioner.

Wm. G. Thompson, Asst. U. S. Atty.

**ALDRICH**, District Judge. This is a petition by the importer for review under what is known as the "Customs Administrative Act of 1890," and there is no security for costs. Section 15, providing for review and appeal, requires that "on such original application

and on any such appeal security for damages and costs shall be given as in the case of other appeals in which the United States is a party." The government moves to dismiss on the ground that the statute as to security for damages and costs has not been complied with, but insists only upon the provision as to security for costs. Unquestionably, the statute requires security for costs to be furnished with the original application. We understand the practice in the Second circuit conforms to this idea. In view of the facts, however, that the statute was comparatively new at the time this petition was filed, that there was no express rule of court on the subject defining what the security should be, and that counsel by affidavit establishes that the petition is being prosecuted in good faith, and that the statute was not understood by him as requiring security at the outset, I am disposed not to grant the motion to dismiss, except upon the following condition: The petition will be dismissed unless the petitioner, on or before December 2, 1894, files with the clerk the ordinary cost bond in the sum of \$50. And leave is granted to the petitioner to file such security within such time, as of the date of filing the original application. The clerk will enter the same order in Nos. 173, 190, 236, 273, and 290.

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IN RE CERTAIN MERCHANDISE.

(Circuit Court, D. Massachusetts. November 23, 1894.)

No. 237.

**CUSTOMS DUTIES—CLASSIFICATION—WOOLEN CLOAKS LINED AND TRIMMED WITH FUR—ACT 1890.**

Cloaks of woollen cloth, lined and trimmed about the neck, sleeves, front, bottom, and back with fur, and not reversible, are dutiable at  $4\frac{1}{2}$  times the duty on unwashed wool of the first class, and 60 per cent. ad valorem, as cloaks "or other outside garments for ladies, and children's apparel \* \* \* composed wholly or in part of wool, \* \* \* made up or manufactured wholly or in part," etc., under paragraph 397 of the act of 1890, and not at 35 per cent. ad valorem, under paragraph 461, as manufactures of leather, fur, or of which these substances or either of them is the component material of chief value, "all of the above not specially provided for in this act," etc., though fur is a component material of chief value in such cloaks, since they are "specially provided for" by the former paragraph.

Petition by Alanson W. Beard for review of the questions of law and fact involved in the decision of the board of United States general appraisers in respect to a duty imposed on merchandise imported by C. F. Hovey & Co. in 1892. Decision of board reversed. Decision of collector affirmed.

Wm. G. Thompson, Asst. U. S. Atty., for petitioner.  
Josiah P. Tucker, for importer.

**ALDRICH**, District Judge. This is a petition for review of the questions of law and fact involved in the decision of the board of United States general appraisers in respect to a duty imposed upon an importation from Germany by C. F. Hovey & Co. in 1892. Para-

graph 397 of the act of 1890 establishes a duty of 4½ times the duty imposed on unwashed wool of the first class, and, in addition thereto, 60 per centum ad valorem, "on cloaks, dolmans, jackets, talmas, ulsters or other outside garments for ladies' and children's apparel and goods of similar description, or used for like purposes, composed wholly or in part of wool, worsted, the hair of the camel, goat, alpaca or other animals, made up or manufactured wholly or in part," etc. The article of import in question was invoiced with 15 other garments as "ready-made ladies' woolen garments," and entered by the importer as "German garments." It was a long, outside garment of woolen cloth, lined with fur, and the trimmings and ornamentations about the neck, sleeves, front, bottom, and back were likewise of fur. The basic or structural material, however, was wool. In other words, it was a cloth cloak, lined and trimmed with fur. The garment was not reversible, and therefore was in no sense a fur garment lined with cloth. The petitioner claims that the article of import was dutiable under paragraph 397, while the importer contends that it rightfully comes within the provisions of paragraph 461 of the act of 1890, which provides an ad valorem duty of 35 per centum. The latter paragraph describes "manufactures of leather, fur, gutta-percha, vulcanized India rubber known as hard rubber, human hair, \* \* \* or of which these substances or either of them is the component material of chief value, all of the above not specially provided for in this act," etc. Unquestionably this paragraph is broad enough and sufficiently explicit to embrace the article of import in question, were it not specially covered by the earlier provisions of the same act. It is clear, however, that the purpose of congress was to exclude from the general provisions of this paragraph all articles of manufacture specifically provided for elsewhere in the act. So we come to the question whether the article of importation is covered by the description embraced in paragraph 397. I think it is. It would be difficult to employ words more clearly and unmistakably descriptive of a manufacture consisting of various component materials than those used in paragraph 397, "on cloaks, \* \* \* or other outside garments for ladies' and children's apparel, \* \* \* composed wholly or in part of wool \* \* \* made up or manufactured wholly or in part," etc. The garment was a cloak. The structural part of the garment was not in part but wholly of woolen cloth, lined and ornamented with fur, and as such is specially provided for by this paragraph. It is true that fur was a component material, and that it was of chief value, but this fact does not relieve the article of import from the operation of the terms of paragraph 397, for the reason that the idea of chief value expressed by paragraph 461 is by the terms of the same paragraph limited to articles not specially provided for elsewhere. The argument presented that fur was the component material of chief value, and that the duty under paragraph 397 is disproportionate, is a strong equitable argument. It is apparent, however, that congress intended to lay a specific duty upon the manufactured wool entering into this class of garments, and also an arbitrary ad valorem duty on the value, including, of course, the component materials used

in connection therewith; and, as said by Nelson, J., in *Reimer v. Schell*, 4 Blatchf. 328, 330, Fed. Cas. No. 11,676, in speaking of articles of importation: "The proper inquiry is as to their qualities and characteristics, with a view to ascertain whether they come within the description. If they do, no argument can take them out of the rate of duty which has been imposed." Section 397 is a designation of articles by special description (*Barber v. Schell*, 107 U. S. 617, 2 Sup. Ct. 301), and it would seem that the article of import is plainly within such description. Holding these views, the decision of the general appraisers must be reversed, and that of the collector affirmed, and it is so ordered.

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THE C. G. WHITE.

THE C. G. WHITE et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. November 2, 1894.)

1. CUSTOMS LAWS—VIOLATION—PENALTY OF MASTER AND MATE—LIABILITY OF VESSEL.

Rev. St. § 3088, providing that when a vessel, its owner or master, has become subject to a penalty for violation of revenue laws, it shall be holden therefor, does not render it liable for a penalty imposed on its mate under section 2867, making the master and mate respectively liable for a penalty where the cargo of a vessel is unladen without authority of the customs officer.

2. SAME—ENFORCEMENT.

Under Rev. St. § 3088, providing that, when a vessel's master has become subject to a penalty for violation of revenue laws, it shall be holden for the payment thereof, and may be seized and proceeded against to recover the penalty, the lien may be enforced by libel of the vessel without judgment being first obtained against the master.

Appeal from the District Court of the United States for the District of Alaska.

Libel by the United States against the schooner *C. G. White*. Decree for libellant. Libelee and H. P. Lauritzen and others, claimants, appeal. Modified.

Andros & Frank, for appellants.

Charles A. Garter, U. S. Atty.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The schooner *C. G. White* cleared from the port of San Francisco on the 31st day of January, 1893, bound for a hunting and fishing voyage. She had on board only ballast and sea stores, guns and ammunition, and hunting and fishing gear. She was obliged to put into Honolulu to leave mail and get water. She was compelled by the authorities there to make entry at the customhouse before landing her mail or procuring water. She remained there 14 hours, and took on board nothing but water. She then proceeded to sea, and on March 18th she was compelled to put into the port of Yokohama to repair her rudder head, which had become shaky and was unsafe. The repairs required five days. By the laws of the port, a vessel, after being at anchor 48 hours, was

required to enter at the customhouse. The schooner therefore made entry, but nothing was unladen from her, and nothing was taken on board, except water and food for the crew. After clearing from this port, the vessel proceeded upon her voyage, and when off the Japan coast the first seals were caught. Thereafter, proceeding to the Alaskan waters, she touched at Senak Island, where it was learned that the schooner Czarina was in Caton harbor. The White proceeded thither to get mail from the Czarina, and while there the master of the White requested the master of the Czarina to take to San Francisco the skins of the seals that had been caught off the Japan coast, and they were accordingly transferred. The vessel was seized upon a libel for information filed in the district court of the United States for the district of Alaska, alleging that the acts above set forth are a violation of section 2867 of the Revised Statutes of the United States, whereby the vessel had become forfeited to the United States. The vessel was claimed by the master for the owners, and an answer was filed by the claimants, denying that the master, mate, or vessel had become liable for a penalty, or the vessel to forfeiture. A decree was entered adjudging that the United States have judgment against H. P. Lauritzen and J. Carlton, who were respectively the master and the mate—

"For the sum of one thousand dollars each, aggregating two thousand dollars in all, and the costs of this suit, and that, unless said judgment and costs are paid, due process be issued against the said schooner C. G. White, and said vessel be sold, and that out of the proceeds of such sale said judgment and costs and accruing costs be paid."

Section 2867 of the Revised Statutes provides as follows:

"If after the arrival of any vessel laden with merchandise, and bound to the United States, within the limits of any collection district, or within four leagues of the coast, any part of the cargo of such vessel shall be unladen, for any purpose whatever, before such vessel has come to the proper place for the discharge of her cargo, or some part thereof, and has been there duly authorized by the proper officer of the customs to unlade the same, the master of such vessel and the mate, or other person next in command, shall respectively be liable to a penalty of one thousand dollars for each such offense, and the merchandise so unladen shall be forfeited," etc.

Section 3088 provides:

"Whenever a vessel, or the owner or master of a vessel, has become subject to a penalty for a violation of the revenue laws of the United States, such vessel shall be holden for the payment of such penalty, and may be seized and proceeded against summarily by libel to recover such penalty."

The appellants contend first that the vessel was not liable for the penalty imposed upon the mate. The terms of these statutes are plain, and require no interpretation. There is no provision by which the vessel can be holden for the penalty which is denounced against the mate. Unless the vessel has herself incurred the penalty, it is only the owner or the master whose acts in violation of the revenue laws render her liable to seizure. So far, therefore, as the decree attempts to hold the vessel subject to sale for the penalty of \$1,000 incurred by the mate, it is erroneous.

It is contended further that the judgment against the master and the mate for the aggregate sum of \$2,000 is void for the reason that, in a proceeding in rem against the vessel, a judgment in personam cannot be rendered against persons who were not parties to the rec-

ord, nor served with process, and that a decree to enforce such judgment is void. So far as concerns the power of the court to enforce the lien upon the vessel without first obtaining judgment for the penalty, the appellants' contention is not in accord with the reasonable and fair construction of the statute, nor with the authorities. The Missouri, 3 Ben. 508, Fed. Cas. No. 9,652; *Id.*, 9 Blatchf. 433, Fed. Cas. No. 15,785; *U. S. v. The Queen*, 4 Ben. 237, Fed. Cas. No. 16,107; *Id.*, 11 Blatchf. 416, Fed. Cas. No. 16,108. In these decisions it is held that the words, "holden for the payment of such penalty," are intended to create an original liability upon the part of the vessel for a penalty equal to that imposed upon the owner or master, and that the provision for the seizure of the vessel and the summary proceeding against her precludes the idea of delay, and carries the meaning that the seizure and proceeding may be predicated directly upon the unlawful act whereby the penalty is incurred, and without preliminary action or proceeding to establish the liability of the owner or the master. The district court undoubtedly had the power to decree the sale of the vessel on account of the penalty incurred by the master, in the sum of \$1,000 and costs, and the cause will be remanded to the district court, with instructions to modify its decree in accordance with this opinion.

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RUSSELL v. KERN.

(Circuit Court, E. D. Wisconsin. September 13, 1894.)

1. PATENTS—IDENTITY OF INVENTION.

It appeared on demurrer that certain patents to George T. Smith (Nos. 187,923, 194,539, 208,936, 236,101, and 258,142), for machines for middlings purifying and flour dressing, covered the same invention shown and described in prior and expired patents to the same inventor. *Held*, that the question of identity is one of law, which can be determined solely from the face of the patents. *Heald v. Rice*, 104 U. S. 737; *Miller v. Manufacturing Co.*, 14 Sup. Ct. 310, 151 U. S. 186.

2. SAME—EXTENSION OF MONOPOLY.

The patents are invalid, as operating to extend the monopoly beyond the period allowed by law. *Miller v. Manufacturing Co.*, *supra*; *Oval Wood Dish Co. v. Sandy Creek Wood Manuf'g Co.*, 60 Fed. 285.

3. SAME—VALIDITY—PRELIMINARY HEARING.

Where a demurrer raises the question of invalidity on a preliminary hearing, while the question is ordinarily left to final hearing, it may be determined on preliminary hearing, where the issue is squarely presented on the face of the complainant's bill.

This was a suit by John H. Russell against John F. Kern for the infringement of certain patents, hereinafter enumerated in the opinion of the court. There was a demurrer to the original amended bill (58 Fed. 382), and, the bill having been further amended, the defendant again demurs.

George E. Sutherland, for complainant.

H. C. Gridley and Samuel Howard, for defendant.

SEAMAN, District Judge. The defendant demurs to an amended bill, alleging ownership in complainant and infringement by defendant of 10 several letters patent, issued to George T. Smith, for machines for middlings purifying and flour dressing, and for process, as

serted as constituting one compact machine. Copies of the patents are annexed to and made part of the bill of complaint, and are numbered and dated as follows: First, No. 133,898, issued December 10, 1872, on application filed October 21, 1872, for machine for dressing flour; second, No. 137,495, issued April 1, 1873, on application filed October 12, 1872, for process of manufacturing flour; third, No. 154,770, issued September 8, 1874, on application filed August 17, 1874, for flour-dressing machine; fourth, No. 158,992, issued January 19, 1875, on application filed May 20, 1872, for middlings-purifying machine; fifth, No. 164,050, issued June 1, 1875, on application filed July 12, 1871, for machine for dressing flour and middlings; sixth, No. 187,923, issued February 27, 1877, on application filed December 28, 1876, for middlings purifier; seventh, No. 194,539, issued August 28, 1877, on application filed September 8, 1874, for middlings purifier; eighth, No. 208,936, issued October 15, 1878, on application filed August 29, 1878, for middlings purifier; ninth, No. 236,101, issued December 28, 1880, on application filed November 2, 1880, for middlings purifier; tenth, No. 258,142, issued May 16, 1882, on application filed January 4, 1873, for middlings purifier.

This case was before the court upon demurrer to the original amended bill, and demurrer overruled. 58 Fed. 382. The bill of complaint has been further amended, and new points are now raised by demurrer. The following allegation in the original bill is now, among other changes, omitted, viz.:

The complainant further shows, upon information and belief, and charges the fact to be, that it is impossible to assess damages or estimate profits arising singly from the use of one of the devices covered by the George T. Smith's patents above mentioned, or any combination thereof less than the whole of them, and that damages cannot be assessed or profits determined in any other way than by taking the George T. Smith's middlings-purifying machine as a whole, as the same has been used by the defendant, and assessing damages or estimating profits for the use of said machine as a whole, and damages cannot be assessed or determined in parts or for parts thereof.

This allegation was deemed material at the former hearing to save for consideration the earlier and expired patents, as entering into the asserted compact machine.

The original bill was filed May 31, 1892, after the following of the patents in suit had expired, viz.: No. 133,898, of December 10, 1872; No. 137,495, of April 1, 1873; No. 154,770, of September 8, 1874; No. 158,992, of May 20, 1872. And No. 164,050, which was dated June 1, 1875, expired immediately thereafter, and before return of subpoena, and appears fully anticipated by No. 133,898. No claim to relief in equity could be based upon either of these expired patents. The objections which are now raised to the remaining and unexpired patents are serious, and, if well taken, are fatal to any relief here.

1. The objection which will be first considered is that the invention shown and described in the later and unexpired patents is the same invention shown and described in one or the other of the prior and expired patents issued to the same inventor. These prior patents are each fully disclosed by the bill as entering into a cause of action. Comparing their specifications and drawings with those



of the later patents, and in the light of the summary of mechanical elements claimed for each, as set out in the brief for complainants, I can find no escape from the conclusion that these later patents are covered by those of earlier issue, and are invalid, under the rules clearly stated in the recent case of *Miller v. Manufacturing Co.*, 66 O. G. 845, 151 U. S. 186, 14 Sup. Ct. 310; also, in *Oval Wood Dish Co. v. Sandy Creek Wood Manuf'g Co.*, 66 O. G. 1895, 60 Fed. 285. The differences seem to be in phraseology and not in device. Their allowance would "operate to extend or prolong the monopoly beyond the period allowed by law." For this comparison, it does not seem that aid could be afforded by extrinsic evidence; but the question of identity is one of law, which can be determined solely from the face of the patents. *Heald v. Rice*, 104 U. S. 737; *Miller v. Manufacturing Co.*, *supra*. It is not a question of patentable invention, in the general sense, or of inquiry into the prior state of the art, but only whether or not the subsequent patents are mere duplications or aggregations of the prior patented devices of the same inventor, set out in the same bill. While this determination would ordinarily be left to final hearing, it seems so squarely presented on the face of this bill that exception may well be made in favor of the preliminary ruling here called for.

2. The further point is urged that it appears from the face of the bill that the complainant is the assignee only of rights here under letters patent No. 133,898, and another patent, not in suit. This involves a construction of the instruments of assignment, and beyond any consideration deemed necessary at the former hearing, if it be assumed that the amended bill excludes the granting of any relief under No. 133,898, as an expired patent. This point impresses me as well presented by demurrer, because the bill distinctly pleads these sources of title as allegations of title in complainant; and I think there is much force in the objection that the assignment may not be held applicable to the later patents, but, in the view reached upon the preceding point, do not find a decision necessary.

The questions here raised are fundamental, and if they can be decided at the threshold, and I am right in my views, it will prove a great saving to all parties to have them now determined. If I am mistaken, the correction can be had by an appeal before the large expense in preparation for final hearing shall be incurred; and, in anticipation of that course, I have not deemed it necessary to extend this opinion beyond a statement of my conclusions, especially as there are so many demands upon my time. The demurrer will be sustained, and the bill dismissed for want of equity.

# SMITH et al. v. UNION IRON WORKS.

(Circuit Court, D. Minnesota, Fourth Division. November 26, 1894.)

## 1. PATENT—COMBINATION OF OLD DEVICES.

Claims 1 and 3 of the patent to Frederick Armstrong, No. 445,647, dated February 3, 1891, for an improvement in the shifting device on gang edgers, *held* valid in view of the evidence, and its use by the defendant enjoined.

**2. SAME—PRIMA FACIE EVIDENCE.**

The issuance of a patent is prima facie evidence of usefulness, novelty, and patentability, which can be overcome only by reliable and certain proof.

**3. SAME—VALID COMBINATION.**

A combination is valid when the several elements of which it is composed produce, by their joint action, a new and useful result, or an old result in a cheaper and more advantageous way.

This was a suit by Henry H. Smith and Alvarado Richardson, copartners trading as Smith & Richardson and as the Diamond Iron Works, against the Union Iron Works, to restrain the infringement of certain letters patent.

Paul & Hawley, for complainants.

P. H. Gunckel, for defendant.

NELSON, District Judge. This is an action brought against defendant, the Union Iron Works, of Minneapolis, Minn., by complainants, for infringement of patent No. 445,647, dated February 3, 1891, granted to them as assignees of Frederick N. Armstrong. The infringement alleged is with respect to the first and third claims, which read as follows:

"(1) In a gang edger, the combination, with the movable saws, of a stationary shaft, 13, extending across the machine, the guide bar arranged below said shaft, the bars, 21, mounted upon said shaft, 13, each provided with a recess engaging said guide bar, 15, the saw guides secured to the upper ends of said bars, and engaging said saws, and the pivoted levers engaging said bars, substantially as described."

"(3) The combination, with the saws arranged to move longitudinally upon the saw arbor, of the transverse stationary shaft, 13, the guide bar, 15, arranged below said shaft, the bars, 21, mounted upon said shaft, 13, and engaging said guide bar, the saw guides mounted upon said bars, the curved projections, 27, upon said bars, and the pivoted levers, 29, engaging said projections, 27, substantially as described."

The patentee claims, by a combination of old devices, to have invented a certain new and useful improvement upon the shifting devices used in gang edgers. Defendant admits that it manufactured a gang edger with a shifting device practically the same as complainant's, and upon examination I am of opinion that the slight change in the form of the fastening of the guide bar is not a substantial difference, and that the defendant's shifting device is an infringement, if the Armstrong patent can be sustained.

Defendant contends that the patent is invalid, and that, in view of the prior state of the art, Armstrong's improvement did not constitute invention, but was the product of mere mechanical skill. The issuance of a patent is prima facie evidence of patentability, usefulness, and novelty; and this presumption can be overcome only by reliable and certain proof. It is well established that a combination is valid when the several elements of which it is composed produce, by their joint action, a new and useful result, or an old result in a cheaper and more advantageous way. I think the evidence fairly shows that a better and more advantageous result has been obtained by the complainant's device, and I do not think the patent has been proved to be void for want of novelty.

A decree for an injunction will be entered, each party to pay its own costs.

## HUNT BROS. FRUIT-PACKING CO. v. CASSIDAY.

(Circuit Court of Appeals, Ninth Circuit. October 29, 1894.)

No. 157.

## 1. PATENTS—DAMAGES FOR INFRINGEMENT.

A jury can properly apportion all damages to the second claim of a patent when there is evidence tending to show that the royalty which the patentee had received was for this claim alone, and that the improvement covered by the first claim was not only valueless, but was a detriment to the machine.

## 2. SAME.

Where damages cannot be assessed upon the basis of a royalty, nor on that of lost sales, nor on that of hurtful competition, the proper method of assessing them is to ascertain what would have been a reasonable royalty for the infringer to have paid, and it is the legitimate province of a jury to determine this fact. *McKeever v. U. S.*, 14 Ct. Cl. 414; *Ross v. Railway Co.*, 45 Fed. 424; *Royer v. Coupe*, 29 Fed. 371; *Cary v. Manufacturing Co.*, 37 Fed. 654.

## 3. SAME.

Where there is no data from which the value of a royalty can be calculated with mathematical certainty, the damages, like damages in many other classes of cases, are calculable upon such evidence as it is in the nature of the case possible to produce.

In Error to the Circuit Court of the United States for the Northern District of California.

This was an action at law by John W. Cassiday against the Hunt Brothers Fruit-Packing Company to recover damages for the infringement of certain letters patent. There was a judgment for plaintiff, which was reversed upon writ of error sued out by defendant, and the cause remanded for further proceedings. 3 C. C. A. 525, 53 Fed. 257. At the second trial there was also judgment for plaintiff. Defendant brings error.

Wheaton, Kalloch & Kierce, for plaintiff in error.

Estee & Miller, for defendant in error.

Before GILBERT, Circuit Judge, and MORROW, District Judge.

GILBERT, Circuit Judge. This writ of error is brought to review the judgment upon a second trial of an action at law for damages for the infringement of letters patent No. 172,608, of date January 27, 1876, issued to John W. Cassiday, for improvements in drying apparatus. The improvements covered by the patent refer to that class of fruit driers known as "stack driers," and are embraced in two claims,—the first, for a system of flues for distributing hot air through the stack of trays at different points; the second, for a mechanism to raise the fruit trays vertically, so that a tray may be inserted at the bottom of the stack, and be gradually raised in the process of drying, and finally removed from the top. Only the second claim was shown to have been infringed. At the first trial, the patentee, in endeavoring to establish the measure of damages by proof of an established royalty, furnished proof that the royalty which had been received was for the entire machine, including both the claims of the patent, and did not attempt to segregate the amount due to each claim.

Upon writ of error to this court the judgment was reversed (*Packing Co. v. Cassidy*, 53 Fed. 257, 3 C. C. A. 525), the court holding that "the proof of a license fee for two improvements in fruit driers is not competent in order to show the damages sustained by an infringement of one of these improvements."

Upon the second trial it is assigned that the court erred, first, in refusing to charge the jury to find nominal damages only. This instruction was asked upon the theory that the evidence in the second trial, as upon the first, failed to apportion the amount of the royalty received by the patentee to the respective claims covered by the patent. This contention is not sustained by the bill of exceptions. It there appears that upon the second trial there was evidence tending to show that the royalty which the patentee had received was for the second claim of his patent alone, and that the improvement covered by the first claim was not only valueless, but was a detriment to the machine. Under such testimony the jury could properly apportion all the damages to the second claim, and it would have been error to charge as requested by the plaintiff in error.

It is further assigned as error that the court instructed the jury as follows:

"But you have a right to consider what would have been a reasonable royalty for the defendant to have paid, and fix the damages at that sum. In determining this point, you must consider all of the facts of the case, and the utility and advantage of the invention over the old modes or devices which had been used at the time of the infringement for working out similar results, if the evidence shows such utility and advantage." "In this case it is only the second claim which is said to be infringed, and, in estimating damages, you must bear this in mind; and the evidence must not only be sufficient to establish what would be a reasonable royalty for the patent as a whole, but must be sufficient to enable you to fix what part of it, if any, should be allowed for the claim infringed. The data for this must be given by the evidence. You cannot surmise or conjecture. In other words, the evidence must be reliable and tangible, and not conjectural or speculative." "In deciding the royalty, you are entitled to consider the relative value of the several inventions covered by the patent, and the patented and unpatented features of it. In considering what would be a reasonable royalty, or rather in considering what would be a reasonable amount of damages, if you find that there is evidence sufficient to fix a reasonable royalty, your attention is directed to the time of the infringement. In other words, the time the patent had yet to run should be considered by you."

It is urged that these instructions are erroneous, for the reason that they permit the jury to determine what was a reasonable royalty for the plaintiff's invention, and to fix the damages at that sum. The law upon this subject, as stated in *Walker on Patents* (section 563) is as follows:

"Where damages cannot be assessed upon the basis of a royalty, nor on that of lost sales, nor on that of hurtful competition, the proper method of assessing them is to ascertain what would have been a reasonable royalty for the infringer to have paid."

The rule so announced is admitted by the plaintiff in error to be a correct statement of the law if there be added thereto the single qualification that there must be testimony in the case tending to show what would have been a reasonable royalty, and it is denied that any such evidence was offered in this case. The admis-

sion, in short, concedes the correctness of the charge as an exposition of the law, but challenges its correctness as applied to the facts disclosed on the trial. On referring to the bill of exceptions, it will be seen that the patentee testified that he had endeavored to fix the royalty at \$100; that he had in some instances collected that amount as royalty; that he had sold his driers at \$250, and that they had cost him \$92; that his profits were \$158, of which he estimated \$58 to be the profits of the unpatented portions, leaving \$100 as profit on the invention which was said to be infringed. He further testified that, in his judgment, that sum was a fair and reasonable royalty. There was evidence that the established royalty on the prior machine of Alden, a much more expensive drier, made under a patent containing claims similar to those of the plaintiff's patent, was \$1,000, while its cost was but \$250; and that the lifting device in the Alden patent was made at an expense of \$75, while that of the patent in controversy cost but \$17. It is difficult to conceive how there could have been more direct proof concerning the amount of a reasonable royalty in a case such as this. The estimate of the patentee placing it at \$100 is, it is true, an expression of his opinion; but it is an opinion based to some extent upon figures and estimates. He evidently disclosed all the information he possessed upon the subject,—the cost of manufacture, the selling price, so far as he had sold, the profit, and his estimate of the proportion of the profit that should be attributable to the infringed invention. In this class of patents there are necessarily no data from which the value of a royalty can be calculated with mathematical certainty. The damages here, like damages in many other classes of cases, are calculable upon such evidence as it is in the nature of the case possible to produce.

The plaintiff was clearly entitled to damages for the infringement. If there had been an established royalty, the jury could have taken that sum as the measure of damages. In the absence of such royalty, and in the absence of proof of lost sales or injury by competition, the only measure of damages was such sum as, under all the circumstances, would have been a reasonable royalty for the defendant to have paid. This amount it was the province of the jury to determine. In so doing, they did not make a contract for the parties, but found a measure of damages. *McKeever v. U. S.*, 14 Ct. Cl. 414; *Ross v. Railway Co.*, 45 Fed. 424; *Royer v. Coupe*, 29 Fed. 371; *Cary v. Manufacturing Co.*, 37 Fed. 654.

We find no error, and the judgment of the court below is affirmed, with costs to the defendant in error.

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CHAMBERS-BERING-QUINLAN CO. v. FARIES.

(Circuit Court, S. D. Illinois. November 4, 1893.)

1. PATENTS—SEEDING DEVICES.

Claims 2, 4, 6, and 7 of the Barnes patent, No. 230,604, and claim 2 of the Faries patent, No. 259,677, relating to machines for forming interlocking eyes in wire chains for operating the seeding devices in check-row corn planters, *had* valid and infringed.

**2. SAME—VALID COMBINATION.**

The law is well settled that a valid combination claim may be drawn including a less number of parts than are required for the complete operation of a machine.

This was a bill in equity by the Chambers-Bering-Quinlan Company against Robert Faries to restrain infringement of a patent.

Bond, Adams, Pickard & Jackson, for complainant.

Crea & Ewing and E. B. Stocking, for defendant.

ALLEN, District Judge. This suit is based on patents No. 230,604, to Barnes, dated August 3, 1880, and No. 259,677, to Faries, dated June 20, 1882. Infringement is alleged in respect to the second, fourth, sixth, and seventh claims of No. 230,604, and the second claim of No. 259,677. Both of these patents relate to machines for forming interlocking eyes in wires or wire chains for operating the seeding devices in check-row corn planters. The eyes not only form the wire into a chain having long links, but they are so formed that each eye is of a size sufficient to operate an arm of the seeding device, and they are spaced so as to recur at the points where it is desired to deposit the seed for each hill of corn. The chain is not claimed. The patents are for machines for forming this special chain with rapidity and accuracy, and the claims in controversy are:

"(2) The sliding bolt L, spring, l, and standard, K, in combination with the rotating head, M, standard, B, and stud, b, substantially as described, and for the purpose specified."

"(4) In combination with a stud, b, for holding the ends of the wire, a head, M, located above the stud, b, which may be rotated to force the wire around the stud and form interlocking eyes thereon, as and for the purpose specified."

"(6) The sliding blocks, F, F', and wheels, I, J, in combination with standard B, and stud, b, and clamping jaws, C', C'', substantially as and for the purpose specified."

"(7) Treadle or lever, G, cords, g, and weighted cords, f', in combination with sliding blocks, F, F', and twister wheels, I, J, substantially as and for the purpose set forth."

The Wight patent, No. 126,365, is relied on as anticipating the second claim, but as this Wight machine, for forming umbrella ribs, wholly lacks the three elements first named in said second claim, it cannot contain the combination claimed by Barnes in this claim.

The Garrard patent, No. 199,637, is relied on as anticipating the fourth claim, but as this patent does not show any rotating "head, M, located above the stud, b," and does not form interlocking eyes, it wholly lacks an important element and feature of said fourth claim.

The defense relied on for the sixth claim is that it is for an inoperative combination. Anticipation is not asserted. This objection is not well taken, as the law is well settled that a valid combination claim may be taken for a less number of parts than are required for the complete operation of a machine. *Forbush v. Cook*, 2 Fish. Pat. Cas. 668, Fed. Cas. No. 4,931; *Inspirator Co. v. Jenks*, 21 Fed. 911; *Jenkins v. Gurney*, 23 Fed. 898; *McDonald v. Whitney*, 24 Fed. 600.

Patent No. 112,868, to Van Vleck, is relied on as anticipating the seventh claim. In the machine of this patent, for coiling bed springs, a single section is coiled at each end, and the wire operated on is the means for bringing the sliding blocks together. This machine does not have the twister wheels, nor the treadle lever and cord for bringing the sliding blocks together. Norton's patent, No. 106,951, is also referred to. This machine is for coiling wire bells in scroll forms. It does not have the two sliding blocks, nor the two twister wheels of this seventh claim. Other patents were offered in evidence by the defendant, but as they were not urged at the hearing I have not considered them.

The second claim of complainant's patent, No. 259,677, is:

"(2) In a machine for forming interlocking eyes and knots on check-row chains for corn planters, the combination of the hollow shafts, J, J', arranged opposite each other, the springs, s, arranged therein, and the hollow spindles, L, L, arranged within the shafts and acted on by the said springs, and having their projecting ends constructed to turn the ends of the wires, said spindles having independent longitudinal movement within, but revolving with the shafts, substantially as described."

Putnam's patent, No. 187,776, is relied on as anticipating this claim. This patent is for winding short wires along the length of a long or main wire, leaving the ends of the short wires to project for barbs. A machine for coiling barbs on a main wire must necessarily be a different machine than one which has only one wire cut into lengths to operate on, and to interlock the ends so as to form knots, and also permit the folding up of the chain thus formed. Neither machine can do the work of the other. The Putnam machine has only one hollow shaft. It does not have any hollow spindles, and it does not have the combination or operation of the second claim. No machines similar to those of the complainant's patents have been shown in the prior art, and the claims are all clearly valid. The evidence shows that the defendant became familiar with this class of machines while building them for the complainant, and he was enabled to make mechanical changes, such as would occur to a skilled mechanic in the use of equivalents, but upon the evidence of the experts, and a comparison of the machines, my conclusion is that the defendant's machines infringe each of the claims in controversy.

Let a decree for the complainant be entered in accordance with the prayer of the bill.

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PRATT et al. v. WILCOX MANUF'G Co.  
(Circuit Court, N. D. Illinois. December 29, 1893.)

**1. JUDGMENT—RES JUDICATA—WAIVER BY STIPULATION.**

The conclusiveness of a judgment sustaining a patent is waived by a stipulation fixing the amount of damages, and providing that if no appeal is prosecuted defendant shall not be estopped from raising again any questions necessary to a full determination of the merits in any suit then pending, or thereafter to be brought.

**2. PATENTS—INFRINGEMENT—ESTOPPEL BY CONTRACT.**

An agreement by two firms manufacturing under patents relating to the same subject-matter that neither will interfere with the other in the manufacture of the inventions set forth in their respective patents, and

that each will protect the other against third parties, operates to disqualify one party from acquiring any right to prosecute the other for any alleged infringement arising from operating under the patents of the latter.

**8. PARTNERSHIP—MERGER IN CORPORATION—EFFECT ON EXISTING CONTRACTS.**

A firm having the right to manufacture under a patent agreed with another firm, owning rival patents, that it would not interfere with the latter, and that each would protect the other against third parties. Afterwards, the first-mentioned firm was merged in a corporation which succeeded to all its rights under the patent. *Held*, that the corporation took those rights burdened with the limitations and obligations imposed by the contract.

Bill by Elias E. Pratt and E. C. Stearns & Co. against the Wilcox Manufacturing Company.

Hay & Wilkinson and C. C. Linthicum, for complainants.

Bond, Adams, Pickard & Jackson, for defendant.

**JENKINS**, Circuit Judge. The complainants bring suit for the alleged infringement of claims 2 and 3 of reissued letters patent to Elias E. Pratt, No. 7,795, dated July 17, 1877, the original of which letters patent were issued December 5, 1876, and numbered 184,983. On the 13th of January, 1887, the complainant Pratt entered into a contract with the firm of E. C. Stearns & Co. by which the latter were authorized to bring suit for infringement of the said letters patent with respect to door hangers containing and embodying the inventions supposed to be covered by the patent; Stearns & Co. to bear the expense of the suit, and to share in the net proceeds of the recovery. It was further agreed that if the patent should be sustained by the court, and hangers for house doors provided with elongated yoke, as described in the patent, should be held to infringe such letters patent, then Stearns & Co. were to have the exclusive right for the whole of the United States and the territories, during the period of the patent, to manufacture and vend, and license others to manufacture and sell, door hangers for domestic purposes under such letters patent. In an action brought in the United States circuit court for the Eastern district of Pennsylvania, by the complainant Pratt against Lloyd and Supplee, the patent was sustained by decree rendered on the 10th of December, 1889. Afterwards a suit was brought by Pratt against Wright and Dana, in the circuit court of the United States for the Northern district of New York, before Judge Wallace, who, in deference to the Pennsylvania decree, on the 9th of July, 1890, rendered an interlocutory decree sustaining the patent. The defendants in that suit were selling certain door hangers manufactured by the Wilcox Manufacturing Company, the defendant in this suit; and the latter company intervened in that suit, to protect the defendant therein, and contest the validity of the patent.

Within the ruling in the case of *David Bradley Manuf'g Co. v. Eagle Manuf'g Co.*, 6 C. C. A. 661, 57 Fed. 980, the defendant would be concluded from contesting the validity of the patent with respect to every ground of recovery or defense actually presented, and as to every ground which might have been presented; but in that suit the parties, on the 3d of March, 1893, agreed upon the amount



of damages to be entered in final decree, and stipulated that in the event that no appeal should be prosecuted the Wilcox Manufacturing Company should not be estopped by the judgment from raising again any and all questions necessary for a full determination of the merits in any suit or suits then pending, or which might thereafter be brought, on the Pratt patent. It is undoubtedly competent for parties to waive the conclusiveness of a judgment, and the matter is therefore, pursuant to the stipulation, still at large between the parties.

On the 20th of December, 1881, the Wilcox Manufacturing Company was the exclusive licensee of the owners under patents No. 202,587, dated April 16, 1878, and No. 241,882, dated May 24, 1881, and the firm of E. C. Stearns & Co. was the sole owner of the letters patent No. 186,388, granted to Warren E. Warner, dated January 16, 1877. These patents all related to door hangers. On that day the said parties and the Richards, owners of the patents controlled by the Wilcox Company, entered into an agreement by which the Wilcox Company and the said Richards authorized Stearns & Co. to sue all parties infringing the letters patent owned by the Wilcox Company, and appointed Stearns & Co. their attorney in fact for that purpose; and Stearns & Co. were to pay all the expenses of such suit, and diligently to prosecute the same; and Stearns & Co. authorized the Wilcox Company and Richards to bring suit against parties infringing letters patent 186,388 in their name, the Wilcox Company and the Richards to pay the expenses of the suits, and to diligently prosecute the same. In case of recovery in any suits brought, the expense should be deducted from the amount recovered, and the balance paid to the party owning the patent. It was further provided by that agreement that neither party should engage in the manufacture of door hangers like or similar to those manufactured by said parties, respectively, under the respective patents which they controlled, without the consent of the other party, and neither party should grant licenses to any other person to manufacture door hangers containing and embodying the features set forth and claimed in the patents owned and controlled by them, for use, or to be used, for sliding door hangers; the agreement to remain in force during the life of the patents, and to be binding upon the heirs and legal representatives of either party,—with right, however, to either party, for good cause, to cancel the agreement, first giving a statement in writing of the grounds of cancellation, and allowing the parties 60 days within which to perform.

The firm of E. C. Stearns & Co. was merged subsequently into the corporation (now one of the complainants) of E. C. Stearns & Co., but that corporation acquired all its title to the patent in suit, and all its rights thereunder, through the agreement made with the firm of E. C. Stearns & Co. by Pratt, and is, as I conceive, bound by that agreement. The contract with the defendant was substantially an agreement by which each party agreed not to interfere with the other in the manufacture of the inventions set forth in their respective patents, but to protect each other. It was an alliance offensive and defensive. In other words, Stearns & Co. sanc-

tioned and authorized the Wilcox Company to manufacture the Wilcox hangers, and to protect them in that right. They have not abandoned the agreement, and I am of opinion that, so long as it remains in force, Stearns & Co. are not in a position, by any agreement with Pratt or others, to acquire a title or right to interfere with the manufacture by the Wilcox Company under the Richards patent. I think it entirely inconsistent with their position to do so. The duty of Stearns & Co., under that agreement, was to protect the Wilcox Company in its right to manufacture under the Richards patent; and it would be inequitable to permit them, in violation of their agreement, to acquire by superior title the right to act in violation of their duty. *Davis v. Hamlin*, 108 Ill. 39.

This agreement was not set up in the New York suit. The record of that suit is obscure as to whether Stearns & Co. were parties to the suit. Of course, if Pratt was the sole complainant, the defense of that agreement might not have been available there. But, however that may be, the stipulation to which I have referred clearly puts the whole matter at large, and renders the defense available here. It is said, however, that Pratt was not a party to that agreement, and that is true; but Pratt is a mere nominal party complainant here, having given to E. C. Stearns & Co. the exclusive right to his patent, so far as it affects door hangers for household purposes. He may, in a technical sense, have the naked title to the patent, but he had no beneficial interest therein, so far as concerns door hangers for domestic purposes.

It is also objected that the E. C. Stearns & Co. of this suit is a corporation, while the E. C. Stearns & Co. of the contract was a firm. I need not stop to comment on this, for, as I have before remarked, all the title that the corporation had to the Pratt patent was obtained from the firm, and through an agreement with the firm, of E. C. Stearns & Co. In the hands of the firm that assignment and right under the Pratt patent was burdened with the obligation of their contract with the Wilcox Manufacturing Company, and the complainant corporation took whatever it acquired from the firm of E. C. Stearns & Co. cum onere. I am therefore of the opinion, without inquiring into the subject of the validity of the patent, or the novelty of the invention, or the question of infringement by the defendant, that the complainants cannot maintain their suit, and the bill will therefore be dismissed.

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ROSS v. CITY OF MINNEAPOLIS.

SAME v. CITY OF ST. PAUL.

(Circuit Court, D. Minnesota. December 3, 1894.)

PATENTS—DEVICE FOR RELEASING FIRE-ENGINE HORSES—INFRINGEMENT.

Bragg's patent, No. 173,261, for releasing horses in fire-engine houses by a combination of an electro-magnet, armature, trip levers, and suspended weight acting upon the latches or fastenings of the horses' stalls, though describing an electro-magnet in a horizontal position, used with an open circuit, *held* to be infringed by devices in which the electro-magnet is arranged vertically, and a closed or open circuit is employed, with equivalent mechanical devices in different positions.

These were suits in equity brought by Nathan O. Ross, trustee, against the City of Minneapolis and the City of St. Paul, respectively, for infringement of letters patent granted to Robert Bragg for a device for releasing fire-engine horses.

David E. Simpson (A. C. Paul, of counsel), for defendant city of Minneapolis.

Leon T. Chamberlain (T. D. Merwin, of counsel), for defendant city of St. Paul.

NELSON, District Judge. Complainant brings these suits against the city of Minneapolis and the city of St. Paul, Minn., for infringement of letters patent No. 173,261, issued to Robert Bragg, February 8, 1876, upon his application dated November 6, 1875. This is a patent for releasing the horses in fire-engine houses by a specific combination of an electro-magnet, armature, trip levers, and suspended weight acting upon the latches or fastenings of the horses' stalls. In his specification the patentee states:

"The object of my invention is to provide an arrangement by which I can obtain sufficient power from the action of an electro-magnet and its armature to perform certain stated duties. \* \* \* I will describe the arrangement and operation of my invention with especial reference to its application on fire-engine houses, in which it can be used for the purposes of releasing the horses from their stalls. \* \* \* Let A represent an electro-magnet, with which the wire of the fire-alarm telegraph is connected, so that when an alarm is telegraphed the electric current will pass through the magnet and cause the armature, B, to be drawn up against it. C is an upright trip bar, which is pivoted at its lower end, and has a circular notch, d, formed on one side of its upper end. A weight, D, is arranged to slide up and down beside the trip bar, and this weight has a roller, e, on one side, which can be caught in the notch, d, in the trip bar, when it is desired to suspend the weight and set the device. \* \* \* Now, it is evident that when the electric current enters the magnet the armature will be drawn up against it, thus releasing the weight, D, from the notch in the trip bar, and allowing it to drop. This weight can be connected directly with the device to be operated. \* \* \*"

The drawing shows the electro-magnet in a horizontal position, with the armature kept withdrawn from it by a small spring; hence the open circuit must be employed.

The infringement alleged is solely of the second claim, which is as follows:

"The combination, with the armature, B, of an electro-magnet, of the trip lever, C, and suspended weight, D, the several parts constructed and arranged to operate in the manner substantially as and for the purpose specified."

I have examined the various patents and models in evidence, and find none which embraces the combination and arrangement described in the second claim of the complainant's patent. The defendants admit that they use devices for releasing the horses in their fire-engine houses by the falling of a weight attached to the latches of the stalls, controlled by the action of an electro-magnet with its armature. The device used by the city of Minneapolis may be described as follows: An electro-magnet is arranged vertically, with the armature downwards. The closed circuit system is employed, by which the armature is supported normally by the action

of the current. On an alarm being given, the current is broken, the armature falls, and strikes a trigger, which releases the weight attached to the latches of the stalls, and frees the horses. In the device used by the city of St. Paul, the open circuit system is used. An electro-magnet is suspended vertically, with the armature downwards, hinged at one end. Below this is a pivoted arm, arranged so as to fall inwards by its own gravity, unless restrained. The free end of the armature rests on the top of this arm, and against a small projection or heel on the outside of it, which prevents the arm from falling inwards. To this arm is attached a vertical rod, a little above the pivot, the lower end of which connects with a bell-crank lever; the other end of this lever is made in the form of a hook, which engages and supports the free end of a strap hinge, which in its turn supports the weight attached by a cord to the latches of the stalls. On the current being applied by the sounding of an alarm, the armature is drawn up against the magnet, the pivoted arm is released and falls inwards, thus operating on the bell crank by means of the vertical rod, the hook is withdrawn, the strap hinge falls, and the weight is released.

Defendants' counsel contend that neither of these devices is a copy or an infringement of the Bragg patent, and in support of their proposition show that the magnets are vertical, instead of horizontal, that the trip bars are not pivoted or provided with notches as in the specification of the patent, and that there are various differences in the operation of the devices. Also, that in the Minneapolis device the closed instead of the open circuit is used, whereby the armature is constantly in contact with the magnet until released by the current being broken, instead of being away from the magnet and drawn in contact with it when the current is applied. Further, that, if the second claim of the Bragg patent be held to be valid, complainant must be restricted to and limited by the description in the specification, and hence defendants' devices do not infringe. I cannot adopt this view of the case. It is true there are certain differences in position, shape, and appearance between the devices used by the defendants and those described in the specification, but these, in my opinion, are mere matters of detail. The result obtained is the same, and, in order to obtain it, the same appliances are used, in substantially the same manner. I think a fair construction of the second claim of the patent, and an examination of the devices used by the defendants, show infringement of the second claim of the Bragg patent, and that the complainant is entitled to a decree in each suit for a perpetual injunction, and to an accounting, with a reference to a master, with costs. Ordered accordingly.

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CARD v. COLBY.

(Circuit Court of Appeals, Seventh Circuit. November 28, 1894.)

No. 184.

1. PATENTS—CONSTRUCTION OF CLAIMS—LIMITATION.

A claim should be read and construed in the light of the description and drawings and of the state of the art, not to enlarge the claim, but

to ascertain its true meaning and the extent of the invention asserted; and to such invention the patent must be restricted, although the actual invention made may have been of a broader scope.

2. SAME—LIMITATION—INFRINGEMENT—TOY BANKS.

The Colby patent, No. 373,223, for a "toy locomotive," and which relates to a toy bank having a discharging aperture controlled by a spring latch operated by the weight of the accumulated coin within, is limited by the language of the description and claim to toys, and is not infringed by a coin container operated on the same principle, but which consists merely of a hollow tube not adapted to be used as a toy vehicle, and which is not in fact a toy. 63 Fed. 462, reversed.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This was a suit by Edward J. Colby against George E. Card for infringement of a patent. The circuit court sustained the patent, and entered an interlocutory decree enjoining infringement (63 Fed. 462), from which decree defendant appeals.

Cyrus J. Wood (E. M. Marble, of counsel), for appellant.  
Barton & Brown, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

JENKINS, Circuit Judge. This is an appeal from an interlocutory decree passed on the 3d day of May, 1894, adjudging the validity of letters patent No. 373,223, issued to Edward J. Colby, November 15, 1887, for a "toy locomotive," and restraining the appellant from making, using, or selling toy banks or coin receivers containing the invention described and set forth in such patent, or from otherwise infringing upon Mr. Colby's rights under the patent. *Colby v. Card*, 63 Fed. 462. The decree adjudged that the appellant had infringed in making, using, and selling devices for coin holders made under and in accordance with letters patent No. 449,280, issued to Henry M. Brigham, March 31, 1891. The controversy involves the merits of the Colby patent, and the proper construction of the first claim therein, and the question of infringement. The specification forming part of the letters patent states that Mr. Colby has invented a "new and useful bank." He says:

"My invention relates to toys for banks, paperweights, and the like, and has for its object to provide a bank which can be used as a toy to be drawn by a child, can be used as a paperweight, or can be used as a bank, the contents of which are adapted to open the bank when they reach a certain weight. These objects I accomplish by means of the mechanism illustrated in the accompanying drawings."

The drawings represent a toy locomotive, and the patentee describes the use and operation of his invention as follows:

"The device is composed of two similar parts, which are brought together, and the locking cross rod is then placed in position with one end of its flange resting upon one side of the boiler, and its other end is upset, so as to securely fasten the parts together. In this position the smoke-stack and sand chest are firmly secured to the top of the boiler, so as to cover the aperture therein. The driving wheels may be either cast with the rest of the device, or they may be loose to rotate thereon. The money may now be introduced through the slit in the top of the cab, and when a sufficient quantity has been introduced to cause the weight thereof to force

the spring in the forward end of the boiler, and thus to depress the locking piston, the money contained in the cab will pass into the steam boiler, and the weight thereof will cause the lock piston to descend, so that the hook on the bar, K, is freed, and the smokestack and the sand chest may be removed, thus leaving an aperture in the boiler through which the coin may be extracted. As soon as this is done, the spring will restore the lock piston to its proper position, and if the piece, K, be again placed in position, the smokestack and sand chest will be locked to the boiler, as in the beginning."

He further states:

"I have shown my improvement as applied to a locomotive; but I have also applied it to other devices,—as, for instance, fire engines, wagons, and the like. It will be readily seen that its application to toys other than locomotives will be perfectly easy."

The claims of the patent are as follows:

"(1) A toy bank consisting of a hollow toy provided with a coin-receiving and a coin-discharging aperture, a movable cover for the discharging aperture, and a spring latch to secure the same from within; said spring latch being normally closed, but constructed to be opened by the weight of the coin within.

"(2) A toy bank consisting of a hollow locomotive provided with a coin-receiving aperture, a removable smokestack which covers the aperture through which the coin is removed, and a spring latch which is adapted to lock the smokestack in position, but, when depressed by the weight of the coin, permits it to be released and removed, so that the coin may be abstracted.

"(3) A toy bank consisting of a locomotive provided with a hollow boiler which serves as a coin receptacle, a removable smokestack which covers the aperture through which the coin is removed, and a spring latch which is adapted to lock the smokestack in position, but, when depressed by the weight of the coin, permits it to be released and removed, so that the coin may be extracted."

The first claim of the patent is alone involved in the contention here. The alleged infringing device is substantially a single tube having a fixed cover and a removable bottom, and provided with a slot or guide through which the coins are inserted. Attached to the removable bottom is a spiral spring upon which there is a cup-shaped piston. There is also a radially moving spring fixed near the end, which is secured in place, and dropped into a pocket on the inside of the cylinder, thereby preventing the bottom cover from being unscrewed. The cup-shaped follower is pressed towards the top of the cylinder by the spiral spring, but upon the insertion of the coins it is depressed until finally it moves over the radially moving spring, and presses it back out of the pocket in the cylinder, releasing the bottom cover so that it may be unscrewed, and the coins removed; in the language of the claim, "the bottom being automatically released by the pressure of the coin when a predetermined number is inserted." The difference in operation between the two articles is well and succinctly stated by the learned judge whose decree is here under consideration:

"The pressure operating upon the latch in the case of the complainant's device, and necessary to overcome the resistance of the spring, is the weight of the coin; the pressure in the defendant's device is the weight of the coin, with such added force as is communicated to the column of the coin by the forced introduction of the last piece. In one, the operating force is weight, pure and simple; in the other, the operating force is weight added to the pressure which is communicated by a wedge through a solid column."

The court below held that these are mechanical equivalents; that the appellant's device had adopted the appellee's idea of a spring, and had merely so strengthened it that a slight pressure added to the weight of the coin was necessary to overcome its resistance. In this opinion we fully concur, if the doctrine of mechanical equivalents can be properly applied in this case. And this brings us to the proper construction of the first claim of the Colby patent.

The claim should be read and construed in the light of the description of the invention and drawings attached, and of the state of the art to which the invention belongs, not to enlarge the claim, but to ascertain its true meaning and the actual invention asserted, and which the inventor desired to secure by letters patent. The question, then, is, did Colby claim a combination of several things, or the distinct invention of several things, or both? In other words, did he claim to have invented a coin holder having the capacity of being opened when the contained coin reaches a certain predetermined weight, independently of any combination; or was his claim for that in combination with a toy locomotive, a toy fire engine, a toy wagon, and the like, and to be limited to such combination? This is a material question, for a combination is an entirety, and, if the claim is for the combination of devices, there is manifestly no infringement here, the alleged infringing device being but one of the devices of the combination; otherwise, if the patent is for the distinct invention of one or several things; because we think that, in the alleged infringing device, the principle of opening the container of the coin by means of a certain predetermined weight of coin is applied substantially in the same way that it is applied by Mr. Colby in his device. There is substantial identity in that regard. So that the question is, what was the real subject of the patent? What did Colby declare and claim his invention to be? Was it for the general principle of opening a receptacle by means of a predetermined weight applied to a coin container, or was it for such a device in combination with a toy locomotive or other like toys? This can best be answered by the language employed by the patentee, for he is supposed to be fully informed with regard to his invention, and to know the precise nature of his claim. There is, however, one circumstance, says Mr. Curtis, that will always be decisive in construing a patent against a claim for the several things described in the specification, and that is that one or more of them is not new. 1 Curt. Pat. § 249. Let us look, then, at the state of the art at the time of this invention. Toy locomotives, confessedly, were well known. The general principle of unlocking by means of predetermined weight was known. It is illustrated in the patent to Albert S. Gabbey, No. 343,763, dated June 15, 1886, for an automatic grain weighing and registering machine. There the discharge cover was automatically released and opened by predetermined weight. We are not to be understood to assert that the Gabbey patent anticipates the coin-containing devices in question here, or that there is lack of invention in adapting the principle to coin containers. We refer to it to show that the broad principle

of automatic opening of a receptacle by predetermined weight was not new at the time of Colby's invention. In the Bossert patent for a savings box, No. 329,706, dated November 3, 1885, we find an invention, not indeed containing the same elements combined in substantially the same way to produce substantially the same result, but we find the broad principle of disengaging, by means of the coin introduced, the internal mechanism from the door of a savings box, so that the latter may be opened to remove the contained coins. There the registering wheel is operated by the weight or impact of the several coins as they enter. The cover is automatically released by the retraction of the latch, caused by the introduction of a predetermined number of coin. In the present device the release of the cover is effected by means of the combined weight of the coin. We cannot, therefore, regard Mr. Colby as a pioneer in the art. He has used an old device and a known principle, and produced a desirable toy bank. As well stated by his counsel, the Colby device "is a machine,—a definite combination of definite elements assembled to accomplish a given result"; or, as stated by the court below, "the combination with a hollow toy, having a coin receiving and discharging aperture, of a spring latch which secures the opening aperture from within until the specific weight of coin operating thereon opens the latch." What is it, then, that he asserted and claimed to have invented? The patent is for a "toy locomotive"; and he states that he has "invented a new and useful bank"; that "my invention relates to toys for banks, paperweights, and the like, and has for its object to provide a bank which can be used as a toy to be drawn by a child, can be used as a paperweight, or can be used as a bank." After describing the locomotive and the manner of operation, he states:

"I have shown my improvement as applied to a locomotive; but I have also applied it to other devices, as, for instance, fire engines, wagons, and the like. It will be readily seen that its application to toys other than locomotives will be perfectly easy."

Then follow the claims. Nos. 2 and 3 (not here involved) are respectively for a toy bank consisting of a "hollow locomotive," etc., "a toy bank consisting of a locomotive provided with a hollow boiler," etc. The first claim—the one in issue—declares for a "toy bank consisting of a hollow toy, provided with a coin-receiving and a coin-discharging aperture," etc. We are of opinion that a correct construction of the first claim requires its limitation to toys. Colby had first described a toy locomotive that could serve the double purpose of a plaything and a savings bank. He then asserts the application of his improvement to fire engines, wagons, and generally to "toys other than locomotives." The second and third claims are limited to locomotives. The first claim is for "a toy bank consisting of a hollow toy," etc. We cannot eliminate from this claim the words "consisting of a hollow toy," since, as we conceive, they were deliberately inserted to cover the very reservation of his specification that his improvement related as well to all hollow toys as to locomotives. It seems clear to us that the subject that Colby had in mind, and that he desired to secure by letters patent, was a toy to be



drawn by a child, serving also as a mechanical bank; otherwise, the expression in the claim, "a toy bank consisting of a hollow toy," is meaningless. The word "toy" is here twice employed. This double use of the word is significant. It means that the words "hollow toy" do not signify merely a toy bank, but a toy adapted for use as a plaything, and that can also be made to serve the uses of a toy bank. The suggestion that the inventor used the locomotive as but one form of embodying an invention which might exist under various forms, we think cannot be upheld. The suggestion is predicated upon the language of the specification that the invention "has for its object to provide a bank which can be used as a toy to be drawn by a child, can be used as a paperweight, or can be used as a bank." We think it clear that Mr. Colby designed by this language to say, not that he claimed invention for a coin receiver which could be opened by the contained weight, but that he had devised a toy vehicle adapted for optional use; as, a vehicle to be drawn by a child, a toy which might be used as a paperweight, and which also might be used as a bank, operative for the discharge of the contained coin as described. And this construction, we think, derives added weight from the previous statement in the same paragraph of the specification, that his invention "relates to toys for banks, paperweights and the like." That is, as we construe it, that it relates to toys for banks, to toys for paperweights and the like toys. We do not say—we are not called upon to say—that Mr. Colby did not invent a coin receiver that could not have been protected under proper letters patent; but he has not claimed, as we think, any such invention here. He has limited his claim to toy vehicles provided with the stated mechanism for coin receiving and automatic coin discharging. Under this construction of the claim of the patent, there is no case here for the application of the doctrine of mechanical equivalents. It cannot be contended that the appellant has infringed. His device is simply a coin container consisting of a hollow tube with the mechanism stated. It is not adapted to be used as a toy vehicle, and is not a toy. It is simply a coin container. The judgment will therefore be reversed, and the cause remanded with directions to dismiss the bill.

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JENSEN et al. v. NORTON et al.

(Circuit Court of Appeals, Ninth Circuit. November 1, 1894.)

No. 133.

1. PATENT—LIMITATION OF CLAIM.

Patent to Gordon, No. 214,292, on an improved machine for crimping the heads of tin cans, should be construed narrowly, since it is not a pioneer in the art, and not sufficiently meritorious to induce practical men to make any use of it. *Derby v. Thompson*, 13 Sup. Ct. 181, 146 U. S. 476.

2. SAME.

Claims 1, 2, 3, and 4 of the aforesaid patent construed as being limited to the specific structure shown and described, and not infringed by the patent to Jensen, No. 376,804, granted January 24, 1888, since the aforesaid specific structure is not found in the Jensen patent.

**3. SAME—LATER INVENTOR.**

Where a later machine is not only dissimilar to an earlier patented machine in details, but also in that it is a success where the earlier machine has failed of success, the later inventor is entitled to the award, which the patent laws design to confer upon success, rather than upon mere attempts.

Appeal from the Circuit Court of the United States for the District of Oregon.

This was a suit by Edwin Norton and Oliver W. Norton against Mathias Jensen and John Fox, to restrain the infringement of certain letters patent, and for an accounting. There was a decree for complainants, from which defendants appeal.

Wheaton, Kalloch & Kierce, for appellants.

Monday, Evarts & Adcock, for appellees.

Before ROSS, HANFORD, and MORROW, District Judges.

HANFORD, District Judge. This is a suit in equity by the appellees, Edwin Norton and Oliver W. Norton, against the appellants, Mathias Jensen and John Fox, brought in the United States circuit court for the district of Oregon, for an alleged infringement of patent No. 214,292, granted April 15, 1879, to William J. Gordon, on an improved machine for crimping the heads on tin cans. The alleged infringing machine is made in accordance with the specifications and drawings of patent No. 376,804, granted January 24, 1888, to the defendant Jensen. Said patent covers several claims, but only the crimping mechanism is assailed as an infringement of the Gordon patent. By their answer the defendants deny any knowledge as to whether Gordon was the first inventor of the machine described in the bill, and as to whether any patent thereon was ever granted, but do not otherwise, in their pleadings, attempt to raise an issue as to the validity of the patent sued on. In the argument before this court the defendants' solicitor has earnestly contended that the evidence proves the Gordon machine to be no improvement on the crimping devices which were in use prior to the date of its construction, and that it is in fact useless; but the answer contains no allegations that the Gordon patent is void for lack of novelty or utility of the invention, nor that it was anticipated.

The proofs in the case consist of the following on the part of complainants, viz.: Certified copies of the patent sued upon, and of the assignments vesting title thereto in complainants; also, a copy of the specification and drawings of the Jensen patent, 376,804, and the deposition of the defendant Jensen, showing that machines constructed in accordance with the specifications and drawings of this Jensen patent had been manufactured and sold prior to the filing of the bill, and since the issuance of the patent sued upon, by the defendants' company, the Jensen Can-Filling Machine Company, a corporation of which the defendants are and have been the president and secretary, and two of the three directors. And, on behalf of the defendants, depositions of Jensen, Devlin, Reed, and Elmore, and copies of two prior patents introduced to show the state of the art, namely, the Wilson patent, No. 51,667, and the Fancher patent, No. 132,595.

By its final decree the circuit court adjudged the Gordon patent to be valid, and the Jensen machine to be an infringement of the first, second, third, and fourth claims, which are as follows:

"(1) The bed disks, P, P<sup>1</sup>, adapted to be not only rotated, but alternately and automatically lifted and dropped, for the purposes set forth. (2) In an organized machine for heading cans, the combination, with continuously rotating cans, of crimpers, U, U<sup>1</sup>, adapted to be alternately brought into contact with the heads of the cans, and alternately forced out of contact therewith, substantially as shown and described. (3) As a device for alternately throwing the crimping rolls into and out of contact with the can heads, the counteracting springs, W, W<sup>1</sup>, and compressor track, X, substantially as shown and described. (4) As a device for alternately lifting and dropping the bed disks, P, P<sup>1</sup>, the circular camway, R, substantially as shown and described."

There being no evidence to the contrary, we must conclude that the complainants have proved that letters patent on the Gordon machine were granted lawfully; and, under the pleadings, we have only to determine the question at issue, as to the charge of infringement.

In view of the evidence introduced as to the state of the art prior to the time of Gordon's invention, and the uncontradicted evidence given by the witnesses called by the defendants, to the effect that said invention has not been found to be sufficiently meritorious to induce practical men to make any use of it, said patent must be given a very narrow construction. Mr. Gordon was not the first inventor of a machine consisting of rotating disks adapted to clamp tin cans, in combination with a crimping wheel adapted to press the flanges of the can heads tightly to the can bodies. Devices similar to those mentioned in the several claims of said patent were known to mechanics, and in general use, long before the inception of Mr. Gordon's idea. Therefore, while we may not question the validity of his patent, we must limit its effect. *Derby v. Thompson*, 146 U. S. 476, 13 Sup. Ct. 181. The patentee is not entitled, under his first claim, to a monopoly in the use of bed disks in can-making machinery, nor does this claim cover a combination of the bed disks with other parts, but is limited to bed disks adapted to rotate, and to be automatically lifted and dropped, and which, of themselves, will, when actuated, accomplish a specified purpose. That purpose is to receive the cans, and lift and guide them, with regularity and precision, into the exact position necessary for forcing the heads into contact with the crimping wheel at the right time, and assisting in clamping the can and spinning it around during the crimping process. An important function of each bed disk is to accurately center the can, and guide it, when lifted, so that the top end will enter the revolving, countersunk disk cog, designed to act with the bed disk in clamping the can and causing it to spin. The only means provided by the mechanism of the Gordon machine for so centering the can, and steadying it in a true vertical position while being lifted, is the countersunk space or depression in the bed disk, "adapted to hold the bottoms of the cans," as described in the specifications and shown by the drawings. The form of the bed disk is therefore an element of the claim. The substitution of a

bed disk with a smooth surface will leave the machine minus the necessary guide. In the Jensen machine, the bed disks are not countersunk, and there is no mechanical equivalent for the omitted element; the mechanism for guiding and centering the cans being entirely distinct from the bed disk, and different in principle and mode of operation. The contention of complainants' solicitor has been that the difference between the two machines, as regards the form of disks, consists in this only: That in the Gordon machine the bottom disk is countersunk, and the top smooth-surfaced, while in the Jensen machine the top disks are countersunk, while those which push from under the cans are smooth. But this is not fair. The specifications and drawings of the Gordon machine show that the under faces of the disk cogs are "countersunk to adapt them to hold the tops of the cans" corresponding to the upper faces of the bed disks, which are countersunk to hold the bottoms of the cans; and it is obvious that no device for centering the cans, and guiding them while approaching the top, can be attached to such disk cogs as are described in Gordon's specifications, without interfering with the application of the crimping wheel to the flanges of the can heads. We consider the variance already pointed out to be of sufficient importance to relieve the Jensen machine of the charge of infringement of the first claim, and deem it unnecessary to pass upon other questions relating to the first claim.

The second claim is unfortunately worded, as though it were for a combination including cans to be crimped with a device for doing the crimping. We construe it, however, according to the manifest intent of the party, that is to say: In an organized machine for heading tin cans, in combination with suitable mechanism for bringing into position, holding, and revolving the cans to be operated upon, crimpers of the form described in the specifications and drawings, adapted to be alternately brought into contact with the flange part of the can heads and withdrawn. This crimper is in the form of a truncated cone, terminating in a bead at the pointed end. It is so attached to the machine as to hang suspended in an inclined position; and the bead, by contact with the can body when the crimping roll is operating, serves as a gauge "to prevent injury or indentation to the body of the can." The truncated form of the crimping rolls, and the bead, are elements of the claim which are not found in Jensen's machine. The gauge is omitted entirely, and nothing which can be justly denominated as a mechanical equivalent therefor has been substituted. This relieves the machine of the charge of infringement of the second claim.

The third claim is for a device for alternately throwing the crimping rolls into and out of contact with the can heads, consisting of a combination of spiral springs and a cam in semicircular form, called a "compressor track." Two springs alternate with each other in pressing a crimper into position for doing its work as the compressor track, when actuated, comes alternately against one and then the other. In the Jensen machine, the pressure for moving the crimping wheels alternately against and from the can heads is likewise derived from a cam and spiral springs. But in other re-

spects these parts of his machine bear no resemblance to this device. If the complainants were entitled, by virtue of the Gordon patent, to the exclusive benefit of the idea of employing a cam in any form or shape, and springs in connection with can-crimping machines, the defendants would undoubtedly be guilty of infringement of this claim. But that idea is old, and the patent does not cover it. The particular device which the patent does cover has not been reproduced nor imitated in the Jensen machine.

In regard to the fourth claim, the circular cam therein, described as a device for alternately lifting and lowering the bed disks, must be understood as a cam mounted upon rubber ball cushions, and supporting a balance weight, as shown in the drawings. Otherwise, it does not embrace any patentable invention, for not only is the cam itself very old, but the particular use described is strictly analogous to the previous uses to which it has been applied. We are satisfied from the evidence that Mr. Jensen's mechanism is so much better than Gordon's, in this respect, as to be fairly considered a different device. It omits entirely the balance weight, and works well without that element of this claim.

The Jensen machine is not only dissimilar to the Gordon patented machine in the details of its several parts, but, as a whole, it differs in this: that it is a success, and a useful aid to man. Practical men have use for it, whereas the Gordon machine appears to us, in the light of the testimony, to have fallen far short of the expectations of its designer. It seems to require something more than mere mechanical skill in finishing and adjusting its different devices. By comparison, its rival shows radical improvements, entitling it to public favor, and its patentees to the reward which the patent laws were designed to bestow upon success, rather than upon mere attempts. The decree of the circuit court is reversed, with costs, and the cause will be remanded, with instructions to dismiss it at the costs of the complainants.

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#### THE IDLEWILD.

SMITH v. ROBINSON et al.

(Circuit Court of Appeals, Second Circuit. December 3, 1894.)

No. 25.

#### WHARFAGE—ILLEGAL STRUCTURE.

R. was in possession of a wharf, a part of which extended beyond the established bulkhead line of the harbor, and constituted an invasion of the right of the public in the soil, and a technical public nuisance. There had been no interference by the public authorities with R.'s possession or collection of wharfage. *Held*, that the owners of a vessel, who had used the wharf with knowledge of R.'s possession, and of his intention to exact wharfage, could not avoid payment of such wharfage by disputing R.'s title to the land on which the wharf was erected. Lacombe, J., dissenting.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by Jeremiah P. Robinson and others, as executors of Jeremiah Robinson, deceased, against the steamship Idlewild for wharfage. The district court rendered a decree for the libelants. 59 Fed. 628. Claimant appeals.

Henry P. Goodrich, for appellant.

Frank D. Sturges, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The libel in this case was filed to recover wharfage charges against the steamship Idlewild for the period of 19 days during which she lay at the libelants' wharf at the foot of Court street, in Brooklyn. The district court found that the facts established an implied agreement to pay a reasonable charge for the steamer's use of the wharf, and decreed in favor of the libelants at the rate of \$5.43 per day. No objection is made to this amount, if anything is due. The appeal calls in question the right of the libelants to receive anything for the use of the wharf, because its easterly side, where the vessel lay, was six or seven feet beyond the bulkhead line, as established by law. The answer alleges that the wharf at which the steamship was made fast was not the property of the libelants.

The facts, concerning which there is no dispute, were stated by the district judge as follows:

"The evidence shows that the libelants' testator became the owner in fee of a strip of land bounded on its easterly side by the established bulkhead line, and that Downing & Lawrence became the owners in fee of the land adjoining on the westward of the libelants' testator; that the latter in 1878, in conjunction with Downing & Lawrence, built the wharf in question, which is 24 feet wide, and from 300 to 400 feet long. The middle line of this wharf was the division line between the two owners. The easterly line of the wharf, as above stated, was built out some six or seven feet beyond the proper bulkhead line. From that time until the present, the libelants, or their testator, have been in the possession and management of the whole easterly half of the wharf, and in the ordinary use thereof for wharfage purposes, and have accommodated vessels there, collecting the usual charges for wharfage. So far as the evidence shows, there has never been any interference by the state or by the city authorities with the libelants' possession or collection of wharfage. \* \* \* No express contract is shown in the case of the Idlewild, but she went there in the ordinary course of business."

The east side of the pier is a pile pier, under which the water flows without obstruction. At low water there are probably seven feet of water close to the pier. As a rule, no cargo is handled there.

In the argument of the case, the claimant does not rely merely upon the fact that the libelants are without title to that part of the wharf where the vessel lay, but also upon the fact that they are trespassers upon the rights of the public, and that the easterly end of the wharf is technically a public nuisance. The title and the power of the several states over tide waters and over or to the land under them below high-water mark, within the borders of the respective states, were recently very carefully examined in *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, and, so far as New York is concerned, were stated in *People v. Vanderbilt*, 26 N. Y. 292. It is only necessary to say here that the libelants have and claim to have no

right to the soil easterly of the established bulkhead line, and that therefore the pier, as to the six or seven feet which extend beyond that line, is a purpresture, which Judge Selden, in the *Vanderbilt Case*, defines to be "an invasion of the right of property in the soil while the same remains in the king or the people." He defines a nuisance to be "an injury to the *jus publicum*, or common right of the public to navigate the waters"; and says, what has not always been recognized, "that there is a wide difference between the two, and that, although they may coexist, yet either may exist alone without the other." Whether the structure, as to its six or seven feet, constituted an actual obstruction to navigation, was not shown. It, however, projected beyond the bulkhead line as established by law, and we are of opinion that so much of a structure which, without authority of the state or of the United States, projects into navigable water in a harbor, beyond the bulkhead line established by the state, may be considered an obstruction to the commerce of the port, and, being a violation of the harbor lines which the state has rightfully established for the benefit of navigation, is technically a public nuisance. The decision of the question depends, in our opinion, upon principles which are of an elementary character. Wharfage is "a pecuniary charge, in the nature of rent, to which vessels are liable for the use of a dock or wharf" (1 Ben. Adm. § 283); in other words, for the use of real estate. The law implies a promise, by the occupant of land with the consent of the owner, to pay the owner a quantum meruit for such occupancy. 1 Archb. N. P. 98. The occupant is a tenant for the time being. The tenant who comes in under a particular landlord "cannot dispute the title of the landlord so long as it continues as it was at the time the tenancy commenced." *Jackson v. Rowland*, 6 Wend. 665. The libelants were not only the apparent owners, but, as between the claimant and themselves, the only owners of the enjoyed premises; for, while the people own the land under the projection beyond the bulkhead line, the state has no claim against the claimant for wharfage. It had permitted the libelants to occupy the premises and collect wharfage, as their own, from the time the wharf was built. But stress is laid upon the character of the libelants' possession, which was a trespass, and the character of the structure, which, in the eye of the law, is a public nuisance. The strength of a tenant's defense against the payment of rent is not enhanced by the fact that he can justly apply harsh epithets to the character of the landlord's title. For example, it was no defense against the payment of rent by a tenant of glebe land that the rector had obtained the living illegally, and that thereby his title was avoided. *Cooke v. Loxley*, 5 Term R. 4; *Hodson v. Sharpe*, 10 East, 351. The mere fact that a structure which is permitted by the state can be technically called a public nuisance does not enable persons who use the structure, with knowledge that for its use payment is required by the owner, to escape payment. A railroad corporation which had occupied by its trains the railroad bridge owned by another could not avoid the payment of the agreed tolls which had become due, upon the ground that the bridge had been declared to have trespassed upon the rights of the public, and had been adjudged

to be a public nuisance. The existing obligations of the lessor and lessee, as between themselves, would not be affected by such a declaration, however well authorized.

The doctrine of estoppel is not confined to the case of an occupant of land who is strictly a renter, and whose debt is strictly rent. Thus, in *Eastman v. Tuttle*, 1 Cow. 248, it was held that "in assumption by A. against B. for depasturing and keeping on hay the cattle of B., at his request, on land in A.'s possession, B. is estopped to show that the title of the land was not in A., but in B., at the time the services were performed." It is, moreover, a general principle that one who enters into a contractual relation with another is estopped from asserting, at variance with his contract, a hostile title to the subject-matter not subsequently acquired. *Kinsman v. Parkhurst*, 18 How. 289; *Board v. Allen*, 99 N. Y. 539, 2 N. E. 459. The decision in *The Idaho*, 93 U. S. 575, respecting the duty of the bailee of personal property to deliver it to the true owner, rather than to the bailor, is in conformity with the principle which has been stated, because the contract of bailment is to restore the property, or to account for it; "and he does so account for it when he has yielded it to the claim of one who has right paramount to that of his bailor." In this case, the shipowners had impliedly promised to pay for the individual benefits which they received from the use of the wharf, and, so long as the state permits it to be used, their contracts must be performed.

The decree of the district court is affirmed, with interest and costs of this suit.

LACOMBE, Circuit Judge (dissenting). I am constrained to dissent from the opinion of the court. The case seems to me distinguishable from the authorities cited as to the tenant's liability for rent when the landlord is a trespasser. This particular structure is illegal, not because the apparent owner has built it upon the land of another, who might himself have built it, had he chosen so to do. It is a structure whose erection by any one, whether a private person or not, is expressly prohibited by the sovereign power. No mere failure to prosecute by the public officers whose duty it is to cause its removal can change its character. I concur with the statement in the opinion of the court that, although built on land belonging to the state, "the state has no claim against the claimants for wharfage"; but I cannot see how the persons who put the obstruction there can have any better claim. Moreover, I do not think a court of admiralty should lend its aid to individuals who, not only without authority, but in flat defiance of the express orders of the state, have placed an obstruction to navigation in that part of a water way which has been reserved as a fair way for the vessels of all comers, and who seek to make a profit out of the transaction. If claimant had used so much of libelants' structure as was lawfully erected, the case might be different; but, so far as the facts show, the *Idlewild* simply tied up at the outer end of the wharf, and did not use any part of it for a landing. I am unable to differentiate this case from one where a private person, having driven two piles into the channel



of a public watercourse six feet from shore (the state forbidding the placing of any such obstruction therein), should seek the aid of the court to recover compensation from a vessel which tied up to the piles, and which, had he not placed them there, might have anchored herself, bow and stern, in the same place.

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## THE SILVIA.

## FRANKLIN SUGAR-REFINING CO. v. THE SILVIA.

(District Court, S. D. New York. November 24, 1894.)

## SHIPPING—NEGLIGENCE OF VESSEL—ACT FEB. 13, 1893.

Under the act of congress of February 13, 1893, providing that a ship-owner who exercises due diligence to make his vessel seaworthy, and properly equipped and supplied, shall not be liable for damage resulting from errors in navigation or in the management of said vessel, an owner who equips his vessel with proper ports, glasses, and iron covers for the ports, of the usual kind, is not liable for damage resulting from the omission of the officers of the vessel, at the time of sailing on a voyage, to close the iron covers over the glass port lights, in consequence of which water breaks through the glass and injures the cargo.

This was a libel by the Franklin Sugar-Refining Company against the steamship *Silvia* to recover damages for injury to a quantity of sugar consigned to libellant.

Wing, Shoudy & Putnam (Charles C. Burlingham, of counsel), for libellant.

Convers & Kirlin, for claimant.

BROWN, District Judge. On the delivery of the libellant's consignment of sugar by the steamship *Silvia*, in Philadelphia, in February, 1894, a quantity of the sugar was found to have been damaged by sea water which had got into the ship through a glass port light, broken during the voyage. The port was supplied with a proper iron cover or dummy, which, however, was not closed or made fast at the time of sailing, although the hatches leading downward into that compartment were battened down. This, in my judgment, was negligence on the part of the ship, for which the vessel and the owners would have been liable (*Steele v. Steamship Co.*, 3 App. Cas. 72; *The Carron Park*, 15 Prob. Div. 205), but for the provisions of the act of congress known as the "Harter Act," passed February 13, 1893 (27 Stat. p. 445, c. 105; 2 Supp. Rev. St. p. 81, c. 105,) which, by section 3, provides:

"That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel."

For the libellant it has been contended that the ship was not in a seaworthy condition on sailing, by reason of the fact that the covers for the glass ports were not properly closed, though the hatches

were battened down so as to prevent ordinary access or observation of the compartment in any change of weather. There is no evidence, however, nor can I assume, that the iron covers or dummies were not of the ordinary kind, and sufficient to prevent the breaking of the glass in the ports and any ingress of water beyond what the scuppers would clear had the covers been properly closed. In supplying the usual iron covers, the owners had "used due diligence to make the ship seaworthy" as regards these ports, and had fulfilled their obligations in this regard under the act of February 13, 1893, so as to bring themselves within its protection. Although the ship sailed from Mantanzas in an unseaworthy condition, from the fact that the hatches were battened down without the closing of the iron coverings of the ports below, that was not the owner's fault. The duty to close the iron covers to prevent the breakage of the glass and the ingress of sea water was a duty appertaining exclusively to the "management of the vessel, which devolved upon the officers of the ship," and the omission to close them was a "fault or error in the management of the vessel" within the language of the act. The omission was a fault of precisely the same nature as the omission to put on hatch covers would have been in a rough sea. By the supply of proper ports, proper glasses and proper iron covers for the ports, as in the supply of proper hatch covers, the owner's duty of "due diligence" was fulfilled; and if the officers of the ship, either at the moment of sailing or afterwards, omit to make use of the things supplied to put or keep the ship in a proper seaworthy condition for meeting the perils of the seas from time to time, such an omission seems to me purely a fault "in the navigation or management of the vessel," for which the owner is not responsible under the recent act.

The case is quite like that of *Hedley v. Steamship Co.* [1892] 1 Q. B. 58, [1894] App. Cas. 222, where a seaman in a heavy lurch of the ship was thrown overboard and drowned, because the stanchions and rails, properly supplied for the ship by the owners, had not been set in place on the starboard side as they ought to have been set on the departure of the ship. The administratrix sought to recover damages of the owners. In the decision of the case, both in the court of appeal and in the house of lords, two points were adjudged,—First, that the master's neglect to set the stanchions and rails was the negligence of a fellow servant in the navigation of the ship, for which the owners were not liable at common law; secondly, that under the provisions of the merchant's shipping act, which are equally stringent with those of our own act, as respects the obligations of the owner to make and keep the ship seaworthy, the supply of all the usual and proper equipment was a full compliance with the act by the owner in respect to the stanchions and rail, and that the "fault was in not making use of the equipment with which the ship had been furnished." [1894] App. Cas. 228. See, also, *The Southgate* [1893] Prob. Div. 329; *The Warkworth*, 9 Prob. Div. 20. This seems to me precisely applicable to the act of congress of February 13, 1893, and upon that ground the libel must be dismissed, but, as the question is a new one, without costs.

## HICKLIN v. MARCO et al.

(Circuit Court, D. Oregon. November 28, 1894.)

No. 1,711.

**PRACTICE—CORRECTION OF DECREE—CLERICAL ERROR.**

Though a court of equity has power to correct clerical errors in its decrees at any time, it will not interfere to correct what may have been a judicial error; and it will not correct a clerical error in a decree entered two years before the application for correction, by a judge other than the one to whom such application is made, and subsequently affirmed on appeal.

This was a bill in equity by Lyman T. Hicklin against Henry Marco and others for the redemption of a mortgage. Defendants in their answer, set up a claim for the value of permanent improvements made by them while in possession of the premises, and the case was heard upon exceptions to this part of the answer. The court allowed the defendants' claim (46 Fed. 424), but otherwise gave judgment for plaintiff. Subsequently, on appeal by defendants as to the amount of the decree, the judgment of the circuit court was affirmed. 6 C. C. A. 10, 56 Fed. 549. Plaintiff prays an amendment of the decree in so far as it restricted his right of redemption to a one-fourth interest in the mortgaged premises.

C. W. Miller and David Goodsell, for plaintiff.  
Zera Snow, for defendants.

**BELLINGER**, District Judge. The plaintiff petitions for an amendment of the decree herein, rendered more than two years ago. The suit involved the validity of a foreclosure proceeding brought against the plaintiff's ancestor. The plaintiff, having succeeded to an undivided one-fourth interest in the lands sold on such foreclosure, brought this suit against those holding under the foreclosure sale. The court held the foreclosure invalid, for want of jurisdiction upon the service of summons had in the suit, and decreed that the plaintiff might redeem as to his one-fourth interest in the mortgaged premises by payment of the mortgage debt. It is claimed that the decree should have been for redemption of the entire property mortgaged, instead of the one-fourth interest belonging to plaintiff; that inasmuch as the plaintiff is required by the decree to pay the entire mortgage debt, and the court was not authorized to decree otherwise, the restriction of the right to redeem to one-fourth of the mortgaged premises is a manifest error, that the court ought to correct on this application. It is within the power of the court to correct clerical errors in its decrees at any time, and the court is at liberty to ascertain the existence of the alleged error by any satisfactory evidence. The written opinion of the judge, his memoranda upon the docket, and his personal recollection are sufficient to authorize a correction of the entry. In this case the correction is asked for upon the ground that the plaintiff is compelled to redeem from the entire mortgage debt, and consequently is subrogated to all of the rights of the mortgagee,

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and that the decree, in failing to provide for this, necessarily fails to conform to what was intended by the court in rendering it. I am satisfied that the decree should have been in accordance with what the plaintiff claims, but I am not satisfied that the error complained of is a clerical error. It may be a judicial error. If I shall undertake to correct this decree upon the ground that it does not conform to my own opinion of what the decree should be, I will assume the function of revising the judgments and decrees of my predecessor under the pretense of correcting them. The mere fact of error, if found to exist, does not justify an inference that there has been a clerical error in entering the decree. The decree in this case was entered more than two years before the discovery of the alleged error. In the meantime the case was tried on appeal in the circuit court of appeals, where the decree appealed from was affirmed more than a year and a half ago. 6 C. C. A. 10, 56 Fed. 549. These facts and the fact that there has been a change in the judges of the court since the decree was rendered, independently of other considerations, make it inexpedient to grant the prayer of this petition. I should hesitate to interfere with the decree under such circumstances upon proof, however conclusive, that there had been a clerical error in entering it. The prayer of the petition is denied.

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SIDDALL v. BREGY.

(Circuit Court, E. D. Pennsylvania. December 4, 1894.)

No. 3.

JURISDICTION—JUDICIAL DUTIES OF STATE JUDGE.

A circuit court of the United States has no authority to review the judgments of the state courts, and hold their judges responsible for failure to discharge their judicial duties.

This was an action by Theodore W. Siddall against the Honorable F. Amedee Bregy.

The plaintiff filed the following statement of claim, viz.:

"F. Amedee Bregy, the defendant, is one of the judges of the court of common pleas of the commonwealth for the county of Philadelphia, sworn to obey and administer the laws of the United States and of the commonwealth of Pennsylvania without fear or favor. His neglect or refusal to do so deprives the state of a republican form of government. He has denied, and now denies, to me, within his jurisdiction, the equal protection of the laws, alike of the commonwealth of Pennsylvania and of the United States, especially of clause 1 of the fourteenth article of the United States constitution. I bring this action to recover from him reparation in damages therefor in the sum of one hundred thousand dollars. In support of my claim I show that I obtained from the said court of common pleas a subpoena commanding one Mary Siddall to appear and show cause, if any she had, why a decree of nullity of a void marriage contract should not be entered of record, said suit being entitled 'Siddall vs. Siddall, Common Pleas No. 1, March Term, 1894, No. 5,' and I ask that the records of that suit be made part of this statement. Said subpoena was based upon a libel bearing the hand and seal of a magistrate and the signature of a judge as required by law, and placed in the custody of the prothonotary of the court.

"(1) In or about March, 1894, I exhibited to Judge Bregy, in court, affidavit and evidence that an asportation had been made of my libel from among

the archives of the court of common pleas, to my injury, the same being a felony at common law, and demanded process and remedy; whereupon the judge refused me the remedy for the wrong, and dismissed the case, thereby becoming an accessory to the larceny of the records of his own court, to my own special wrong and injury.

"(2) And, further, I did then and there exhibit to Judge Bregy affidavit and evidence that the prothonotary and others had published copies of my said libel, or preliminary proceeding, together with defamatory comments, to my aggrievance, the same being a contempt of court, indictable under the laws of the commonwealth at my instance and demand. The prothonotary and others came into court, and made affidavit that my allegations were true; whereupon I demanded process and remedy, which said Judge Bregy refused, and dismissed the case, thereby becoming an accessory to contempt of his own court, to my special wrong and injury.

"(3) And, further, I did then and there submit affidavit and evidence that the prothonotary and others had published criminal libel upon me, and I demanded process and remedy; whereupon the judge refused me remedy for the wrong, and dismissed the case, thereby becoming an accessory to the escape of the wrongdoers, to my especial wrong and injury.

"(4) And, further, I did then and there submit affidavit and evidence to Judge Bregy that the prothonotary had allowed, aided, and abetted parties other than parties to the suit, without an order of the court, in direct disobedience of an order of court and of an act of assembly, to inspect, copy, and carry off my libel out of his official custody, and I demanded process and remedy, which the judge wrongfully refused, and allowed the wrongdoers to escape, to my special wrong and injury.

"(5) And, further, said Judge Bregy did then and there override the acts of assembly, and make law and practice in this wise: He ordered and directed the prothonotary to place among the records of the court in Siddall v. Siddall a paper which did not, and does not, bear the hand and seal of a magistrate nor the signature of a judge, and to pretend that it was a good and lawful libel in divorce. He did this upon the motion of one of the parties whom he was required by his oath of office to hold to answer for the crimes, contempts, and misdemeanors above set forth, with the intention of shielding the prothonotary and his confederates, and of hindering and delaying me. He did it against my objection and protest, and notwithstanding my offer to produce a duplicate original, which should conform to the requirements of the law, when and as soon as the offenders were indicted and convicted. Moreover, none of the parties to the said suit asked for the order. It was made upon the motion of an impertinent intermeddler.

"(6) Notwithstanding that it was clearly and fully disclosed by the libel, the answer, and the affidavits that the nullity of the marriage contract had been established judicially before a tribunal selected by the commonwealth itself and by the respondent, Judge Bregy unlawfully made absolute a rule upon me to pay a counsel fee for the respondent in Siddall vs. Siddall.

"(7) And I charge it was a further invasion of my rights and of the jurisdiction of the court of quarter sessions for Judge Bregy to impose upon me the payment of money for the benefit of respondent in Siddall vs. Siddall; it being shown that the court of quarter sessions had passed upon the question, and ordered an ample allowance, which was more than paid up in full.

"(8) And further, in her answer and in her affidavit to support the rule for alimony and counsel fee, respondent charges upon oath that her allowance was in arrears. The charge was shown by the receipts of the guardians of the poor, and by her own affidavit on cross-examination, to be absolutely untrue and malicious. Nevertheless, for the purpose of hindering and delaying me, Judge Bregy imposed upon me the payment of thirty-five dollars, declaring from the bench that I had brought the suit, and must pay for it. I charge that it was the bounden duty of Judge Bregy to then and there award me a decree of nullity, and to hold respondent for her perjury; that his not doing so was and is a denial of my rights as a citizen of the United States.

"(9) I charge that the above acts of omission and commission upon the part of Judge Bregy are, in law and in fact, a conspiracy with the respondent

and others to violate the provisions of the state and national law, and especially the provisions of the first clause of article fourteen of the constitution of the United States, to my injury, oppression, threatening, and intimidation; that he is violating his oath of office, and using his office to abridge the privileges and immunities to which I am of right entitled as a citizen of the United States; and that he denies me the equal protection of the laws within his jurisdiction.

"Affidavit.]

Theodore W. Siddall, Plaintiff."

To this statement the defendant filed a demurrer, assigning the following reasons, among others: The statement is vague, uncertain, and indefinite. The plaintiff refers to the alleged records of a suit in a state court without setting the same forth. None of the counts in said statement discloses any legal liability on the part of the defendant.

Theo. W. Siddall, in pro. per.

George S. Graham and F. Carroll Brewster, in support of demurrer.

Judges of courts of record are not liable for their judicial acts (Bradley v. Fisher, 13 Wall. 335; Scott v. Stansfield, L. R. 3 Exch. 220; Calder v. Halket, 3 Moore, P. C. 28), even if they exceed their jurisdiction (Lange v. Benedict, 73 N. Y. 12; Yates v. Lansing, 6 Am. Dec. 290; Stewart v. Cooley, 23 Am. Rep. 690). The statement shows on its face that the acts complained of were performed by defendant in a judicial capacity, in an action over which he had jurisdiction.

DALLAS, Circuit Judge. The statement of claim in this case does not set forth a cause of action of which this court can take cognizance. The substance of the matters averred is that the defendant, by acts done or omitted by him in the exercise of his office as one of the judges of a court of the state of Pennsylvania, has caused damage to the plaintiff, who was a suitor before him; but this tribunal has no authority to review the judgments of the state courts, and hold their judges responsible for failure to correctly discharge their judicial duties. Judgment for defendant on the demurrer.

#### GORMULLY & JEFFERY MANUF'G CO. v. BRETZ et al.

(Circuit Court, E. D. Pennsylvania. December 4, 1894.)

No. 90.

##### 1. INTERROGATORIES.

Interrogatories should be confined to the matters set up in the bill, and be relevant to the case which it alleges.

##### 2. SAME—CREATION OF CORPORATION.

Where a bill charges that a corporation is practically the same concern under a corporate organization as a partnership, which partnership is charged with the breach of a certain agreement, and the transfer of such agreement to the corporation, it is permissible to inquire, with the object of connecting the two organizations, into the circumstances connected with the creation of the corporation, and the number of its shares which were acquired by the members of the partnership.

This was a suit by the Gormully & Jeffery Manufacturing Company against Jacob S. Bretz and others.

The bill disclosed that the complainant, an Illinois corporation, was the owner of a number of letters patent relating to the manufacture of bicycles and tricycle structures; that the defendants, being copartners under the

name of Bretz, Curtis & Co., were desirous of using, selling, and importing, and selling to others to be sold and used, bicycles and tricycles, employing in their construction and operation the inventions of one or more of the said letters patent, and securing a license therefor from the complainant; that upon certain considerations the complainant and defendants signed an agreement in which the complainant licensed the said letters patent to defendants, who thereupon covenanted not to thereafter engage in the manufacture of bicycles or tricycle structures, nor in the importation or sale of such structures (except two certain English machines), without the written consent of the complainant. The defendants further agreed to make monthly reports of the number of structures imported and sold, and to pay monthly to complainant, for the use of such structures upon the imported bicycles, the sum of five dollars each. The complainant was to have the privilege of examining the books of defendants, and to call for reports under oath. The defendants also agreed not to transfer the agreement. The sum to be paid complainant was at no time to be less than \$1,000 annually. The complainant agreed to defend the defendants from certain suits for patent infringements. The bill further averred that in October, 1890, a few months after signing the said agreement, the said Bretz and Curtis, together with three others, pretended to form a corporation under the laws of Pennsylvania, under the name of Bretz & Curtis Manufacturing Company (since the Curtis-Child Manufacturing Company), for the purpose of manufacturing and dealing in bicycles, etc., and similar articles. Corporate papers were issued to them on October 27, 1890. Of the 500 shares of capital stock, 240 shares were subscribed by Bretz, and the same number by Curtis, the remaining 20 shares being divided among the other three corporators (the law of Pennsylvania requiring at least five subscribers to an intended charter). The bill then averred that 200 shares each were issued to Bretz and Curtis as full paid, in consideration of the conveyance by them of certain bicycle goods, and certain contracts, licenses, and leases, and the business of Bretz, Curtis & Co., including the agreement above set forth; but whether or not there was a specific conveyance of said contract or license the complainant averred ignorance, and prayed discovery. Of the amount of stock in said corporation now owned by said Bretz and Curtis, the complainant also averred ignorance, because defendants have neglected to file their statement of such in the proper office, and prayed discovery thereof, averring also that the corporation is only a continuation of the partnership. The defendants have failed to make any report of bicycle or tricycle structures imported or sold, and have not paid any part of the said royalty since October 31, 1890; and the bill averred that the said corporation was engaged in the manufacture of bicycle and tricycle structures, and the importation thereof, other than the two certain English machines, and that such manufacture, importation, and sale is that of said Bretz and Curtis. The bill, after averring performance on the part of the complainant, prayed relief according to the facts set forth, and asked that defendants be perpetually enjoined from manufacturing, selling, and importing structures other than allowed by the agreement, and damages for the breach of same. Answers were also prayed for to the following interrogatories:

"(1) What contracts, licenses, and leases relating to the importation or sale of bicycle or tricycle structures have Jacob S. Bretz and George E. Curtis conveyed or assigned to Bretz & Curtis Manufacturing Company, and when? (2) Was the contract of license of March 18, 1890, between the Gormully & Jeffery Manufacturing Company and Jacob S. Bretz and George E. Curtis, trading as Bretz, Curtis & Co., at any time conveyed and assigned to Bretz & Curtis Manufacturing Company? And, if so, when? (3) What were the terms of the conveyance of certain bicycles, tricycles, accessories, and goods, and certain contracts, licenses, and leases, and the goodwill and business of the firm of Bretz, Curtis & Co., referred to in clause eight of the charter of the Bretz & Curtis Manufacturing Company? (4) How many shares of stock of the Bretz & Curtis Manufacturing Company have been issued? (5) What are the names of the stockholders of said company upon the date of the filing of this bill, and how many shares are held by each? (6) Has Jacob S. Bretz acquired or disposed of any stock of the Bretz & Curtis

Manufacturing Company since the organization thereof? And, if so, what amounts, and upon what dates? (7) Has George E. Curtis acquired or disposed of any of the stock of the Bretz & Curtis Manufacturing Company since the organization thereof? And, if so, what amounts and upon what dates?

"Note: The defendant Jacob S. Bretz is required to answer the interrogatories numbered, respectively, 1, 2, 3, 4, 6. The defendant George E. Curtis is required to answer the interrogatories numbered, respectively, 1, 2, 3, 4, 7. The defendant Bretz & Curtis Manufacturing Company is required to answer the interrogatories numbered, respectively, 1, 2, 3, 4, 5, 6, 7."

The answer of the Curtis-Child Manufacturing Company denied in detail the main allegations of the bill, averring that said agreement was in restraint of trade, and making no response to the interrogatories propounded. The answer of Curtis admitted the agreement, but denied its effect in equity, for several reasons, and made no answer to the interrogatories. The complainant thereupon took exception to the answers as insufficient.

Crossdale & Adams, for complainant.  
Horace Pettit, for defendants.

DALLAS, Circuit Judge (after stating the facts). Seven interrogatories are included with the bill in this case. The defendant Jacob S. Bretz was not served, and has not appeared. By note to the bill, the defendant George E. Curtis was required to answer the interrogatories numbered 1, 2, 3, 4, and 7, and the defendant Bretz & Curtis Manufacturing Company (now Curtis-Child Manufacturing Company) was required to answer the interrogatories numbered 1 to 7, inclusive. Neither of these defendants has answered either of them, and argument has now been heard upon exceptions filed by the complainant to their refusal to do so. Interrogatories should be confined to the matters set up in the bill, and be relevant to the case which it alleges. If not material to the purpose of the suit, a defendant ought not to be compelled to answer them.

For complainant, it is contended that the first three interrogatories are pertinent in "elucidation" of "the allegation that there was a conveyance of the license contract in suit to the Bretz & Curtis Company." The first interrogatory is not directed solely to that contract, but inquires "what contracts, licenses," etc., have been conveyed or assigned; and full reply to it might involve disclosure of contracts and conveyances other than that in suit, and of transactions with respect to which the complainant has no right to discovery. The second interrogatory is unobjectionable. The third interrogatory should be answered, either fully or by the statement of some fact justifying the refusal to do so. No sufficient reason for declining to answer it was suggested upon the argument.

The plaintiff's counsel has stated that the remaining interrogatories are intended to elicit discovery of the fact that the Bretz & Curtis Manufacturing Company is the successor of Bretz, Curtis & Co., and is really the same concern under a corporate organization. It is legitimate to inquire, with this object, into the circumstances connected with the creation of the corporation, and the number of its shares which were acquired by Bretz and Curtis, the consideration therefor, etc. To this extent, but not further, the fourth, fifth, sixth, and seventh interrogatories are well founded.



The first exception is dismissed. The second and third exceptions are sustained. The fourth and fifth exceptions to the answer of George E. Curtis, and the fourth, fifth, sixth, and seventh exceptions to the answer of Curtis-Child Manufacturing Company, are so far sustained that the defendants are, respectively, directed to answer the interrogatories to which those exceptions severally relate, to the extent which the foregoing opinion indicates to be requisite. The defendants are assigned to answer in accordance with this opinion on or before the next rule day.

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BOSWORTH et al. v. JACKSONVILLE NAT. BANK.

(Circuit Court of Appeals, Seventh Circuit. November 27, 1894.)

No. 176.

1. BILL OF EXCHANGE—EQUITABLE ASSIGNMENT—APPROPRIATION OF FUNDS.

On September 12, 1893, the C. Railway Company drew two drafts in favor of the J. Bank, upon the R. Railway Company for a part of a fund in the hands of that company belonging to said C. Railway Company, which fund, however, would not be payable until September 25th. On September 21st, receivers of the C. Railway Company were appointed, and took possession of its property, including the fund in the hands of the R. Railway Company, which was subsequently paid to them. The J. Bank did not present the drafts for acceptance, or notify the R. Railway Company of their existence, until after the appointment of the receivers, nor did the R. Railway Company ever accept them. *Held*, that the drawing of the drafts did not, without their acceptance, constitute an appropriation of a part of the fund to the payment of the J. Bank, nor an equitable assignment to it of a part of the fund, but that the receivers became entitled to the fund upon their appointment, and it was rightly paid to them.

2. OFFICERS OF CORPORATIONS—DUTIES TOWARDS CREDITORS — ILLEGAL PREFERENCE.

The drafts having been drawn and delivered to the bank in payment of a note of the C. Railway Company, on which H., its president and one of its directors, was surety, and at a time when the railway company was in failing circumstances, *held*, that they constituted an illegal preference to one who, as an officer and member of the corporation, stood in a relation of trust towards its general creditors.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

This was an intervening petition in the nature of a bill in equity, brought by the Jacksonville National Bank against C. H. Bosworth and E. Ellery Anderson, as receivers of the Chicago, Peoria & St. Louis Railway Company, to obtain payment to the bank of certain funds in the hands of the receivers. In the circuit court a decree was entered for the intervener. Defendants appeal.

This is a suit in equity, brought by the Jacksonville National Bank, as intervener, against the receivers of the Chicago, Peoria & St. Louis Railway Company, to recover the sum of \$7,500, being the amount of two several drafts drawn by Marcus Hook, as treasurer of the railway company,—one for the sum of \$2,500 and the other for \$5,000,—upon W. G. Purdy, treasurer of the Rock Island & Pacific Railway Company, each dated September 12, 1893. These drafts were delivered on the day of their date to the cashier of the bank, with directions that, when paid, the proceeds were to be indorsed upon

a certain note for \$10,000 which had theretofore, on July 25, 1893, been executed by the railway company to the bank, with William S. Hook, its president, as surety, for money borrowed by the railway company from the bank, and used to carry on its business. The sum of \$2,500 had already been paid by said railway company upon said note, by its check dated September 11, 1893, and these two drafts were intended to pay the balance due upon the said \$10,000 note. These drafts were drawn and delivered by the railway company before the appointment of receivers, and, at the time of their delivery, Marcus Hook, the treasurer of the company, notified the bank, through its cashier, that they were drawn under an agreement between the said railway company and the drawees that the traffic balances for the month of August, 1893, in the hands of the Pacific Company, and against which the said drafts were drawn, would not be payable until September 25th following. This fund, not yet due, against which the drafts were drawn by the company, was a balance coming to said company from the drawee, the Chicago, Rock Island & Pacific Railway Company, amounting to \$11,550.39, being the freight traffic balance for the month of August, 1893, in the hands of the Pacific Company belonging to the Chicago, Peoria & St. Louis Railway Company. It will be seen from this statement that the drafts, amounting in the aggregate to \$7,500, called for only a part of the fund against which they were drawn. They were not presented for payment by the bank until after the receivers were appointed. They were then presented, and payment demanded of the drawee, and refused. Nor until such receivers were appointed was any notice given to the drawee of the possession of the drafts by the bank. Afterwards, on September 27th and November 1st, the money due for such freight balances, and against which the drafts were drawn, was paid by the Pacific Company to the receivers of the Chicago, Peoria & St. Louis Railway Company, the appellants. The claim on the part of the bank is that the drawing of the drafts constituted an appropriation in equity to that extent of the said fund in the hands of the drawee, which gave the bank a lien thereon pro tanto in preference to other creditors, although the said drafts were never accepted or paid by the drawee. The contention on the part of the receivers is that, inasmuch as the drafts were not presented or accepted or the money paid before the railway went into the hands of receivers, and the money was then paid over to the receivers upon demand, no lien attached to the money in the hands of the drawees, and that the receivers hold it as trustees for the benefit of the railway company and its general creditors; that the fund in the hands of the Rock Island & Pacific Company was a single fund and cause of action, and could not be divided and parceled out to different creditors, except by actual payment, or at least by an acceptance which would bind the drawee to pay. The decree of the court below was in favor of the bank.

The following additional facts may be stated, as showing the history of the proceedings which culminated in the bringing of this suit by the bank as intervener and petitioner for the recovery of the amount of these drafts. On December 18, 1890, the Chicago, Peoria & St. Louis Railway entered into possession of the St. Louis & Chicago Railway Company, under a written lease, and continued in possession until about the 22d day of July, 1893. On the 10th day of July, 1893, R. J. Cavett, receiver of the said St. Louis & Chicago Railway, filed a petition in the United States circuit court for the Southern district of Illinois, setting out the lease aforesaid, and alleging material defaults in the performance of the covenants of the same by the said Chicago, Peoria & St. Louis Railway Company; and prayed a surrender of the said St. Louis & Chicago property, a decree for arrears in rent, and for damages. On this, process issued, and the Chicago, Peoria & St. Louis Railway Company appeared August 7, 1893, and demurred thereto. On September 12, 1893, R. J. Cavett, as receiver aforesaid, filed his amended petition against the Chicago, Peoria & St. Louis Railway Company, W. S. Hook, and Marcus Hook, alleging an indebtedness of said defendants to petitioner of \$75,000; and further alleging the indebtedness of the said Chicago, Peoria & St. Louis Railway Company to many other railroads, corporations, and individuals, and default in bonded interest,—and thereupon prayed that a receiver might be appointed to take possession of the property of said Chicago, Peoria & St. Louis Rail-

way Company. Whereupon an order was entered setting down the above petition, together with the applications of the Woodward & Tiernan Printing Company, the St. Louis & Southeastern Railway Company, and John Coughlin for the appointment of a receiver of the Chicago, Peoria & St. Louis Railway Company, and other companies comprising the "Jacksonville Southeastern Line," for hearing on the 21st day of September, 1893. On September 21, 1893, the Mercantile Trust Company of New York, as trustee, filed its bill in chancery against the Chicago, Peoria & St. Louis Railway Company, in the United States circuit court for the Southern district of Illinois, alleging default in interest on first mortgage bonds, insolvency, and praying for the appointment of a receiver and foreclosure. Afterwards, on September 21, 1893, the court of its own motion entered an order consolidating the applications for the appointment of a receiver of the said Chicago, Peoria & St. Louis Railway Company, filed by R. J. Cavett, the Woodward & Tiernan Printing Company, John M. Coughlin et al., and the St. Louis & Southeastern Railway Company, with the bill of complaint of the Mercantile Trust Company, under the name of "The Mercantile Trust Company, complainant, against the Chicago, Peoria & St. Louis Railway Company, defendant." On the same day, the court entered an order appointing C. H. Bosworth and E. Ellery Anderson receivers of the Chicago, Peoria & St. Louis Railway Company, and of all the other railways comprised in and commonly known as the "Jacksonville Southeastern Line." Pending such application for a receiver, and on the 16th day of September, 1893, Boyd, Stickney & Co. sued out an attachment in the circuit court of Peoria county, Ill., against the Chicago, Peoria & St. Louis Railway Company, on a claim of \$5,499.64, and levied the same on two passenger coaches, in addition to garnishing the Chicago, Rock Island & Pacific Railway Company, the Rock Island & Peoria Railway Company, and the Atchison, Topeka & Santa Fé Company, railway corporations indebted to said Chicago, Peoria & St. Louis Railway Company on account of traffic balances. Meanwhile, the Chicago, Peoria & St. Louis Railway Company was indebted to the Jacksonville National Bank, as before stated, in the sum of \$10,000, upon the promissory note of July 25, 1893, with William S. Hook as surety. Later the garnishment proceedings of Boyd, Stickney & Co. were dismissed, and the Chicago, Rock Island & Pacific Railway Company paid the receivers of the Chicago, Peoria & St. Louis Company the amount ascertained to be due on the said freight traffic balance. On October 28, 1893, the Chicago, Peoria & St. Louis Railway Company filed its appearance in the consolidated cause of the Mercantile Trust Company against the Chicago, Peoria & St. Louis Railway Company. On December 5, 1893, the demurrer of the Chicago, Peoria & St. Louis Railway Company to the bill of the Mercantile Trust Company came up for hearing, was argued, and the demurrer overruled. In said consolidated cause, on the 18th day of December, 1893, the Jacksonville National Bank filed its intervening petition, alleging the indebtedness of \$10,000 to the petitioner by the said Chicago, Peoria & St. Louis Railway Company, evidenced by its promissory note executed July 25, 1893; the drawing of the two drafts above mentioned, by Marcus Hook; the indorsing and delivery of the same to petitioner; that the drafts were drawn on a particular fund, and was an appropriation of the said fund; and praying that the court would order the payment of the said drafts out of the fund mentioned. The receivers of the Chicago, Peoria & St. Louis Railway Company were made defendants, and filed an answer thereto denying the right of the petitioner to the amount claimed. On February 16, 1894, the court entered a decree finding that it was the custom in doing business between the Chicago, Peoria & St. Louis Railway Company and the Chicago, Rock Island & Pacific Railway Company to settle freight balances between the two companies on or about the 25th of each month, and that the officers of the bank were informed of this fact when the drafts were delivered, and that the drafts would be paid on or about the 25th of the month; that it was the intention and purpose in delivering said drafts to have the proceeds applied to the payment of the balance due on said note; and further found that by the said two drafts the Chicago, Peoria & St. Louis Railway Company appropriated the sum of \$7,500 of said freight balances to the payment of said \$10,000 note, and that the said receivers had no right or title to the same, as such receivers; and the court thereupon ordered the re-

ceivers to pay to the bank, in 20 days from date, the sum of \$7,500, with interest; and the receivers thereupon assigned errors and took an appeal to this court from the decree.

Bluford Wilson (Philip Barton Warren, of counsel), for appellants.  
Isaac Morrison and Thomas Worthington, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge (after stating the facts as above). 1. We are of opinion that this case is controlled by the decision of the supreme court of the United States in *Mandeville v. Welsh*, 5 Wheat. 277. Justice Story in that opinion says:

"It is said that a bill of exchange is, in theory, an assignment to the payee of a debt due from the drawee to the drawer. This is undoubtedly true where the bill has been accepted, whether it be drawn on general funds or a specific fund, and whether the bill be, in its own nature, negotiable or not; for, in such a case, the acceptor, by his assent, binds and appropriates the funds for the use of the payee. \* \* \* In cases, also, where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund, and, after notice to the drawee, it binds the fund in his hands. But where the order is drawn, either on a general or a particular fund, for a part only, it does not amount to an assignment of that part, or give a lien, as against the drawee, unless he consent to the appropriation, by an acceptance of the draft, or an obligation to accept may be fairly implied from the custom of trade, or the course of business between the parties, as a part of their contract. The reason of this principle is plain. A creditor shall not be permitted to split up a single cause of action into many actions without the assent of the debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any legal or equitable assignments by which it may be broken into fragments. When he undertakes to pay an integral sum to his creditor, it is no part of his contract that he should be obliged to pay in fractions to any other persons. So that, if the plaintiff could show a partial assignment to the extent of the bills, it would not avail him in support of the present suit."

The case, also, of *Palmer v. Merrill*, 6 Cush. 282, opinion by Chief Justice Shaw, is very much in point, wherein it was held that an assignment, for a good consideration, from the assured, in a life policy, by an indorsement in writing thereon, of part of the sum assured thereby, notice of which is given to the insurers, but the policy retained in the hands of the assignor, does not transfer to the assignee such an interest in the policy as will entitle him, if the estate of the assured proves insolvent, to recover the whole sum assigned to him of the assured's administrator, who has received the whole amount of the policy from the insurers. This case is quite analogous to the one at bar. The receivers stand in the place of the administrator in the Massachusetts case, and represent, not only an insolvent debtor, but all of its creditors as well, whose rights attached to the fund upon their appointment, and before any appropriation of the portion thereof represented by the drafts had been effected by presentation or acceptance, and even before the fund became due and payable by agreement of the railway companies. It appears from the record, not only that the bank omitted to give the drawee notice of its claim to part of the fund, but received the drafts with knowledge that the fund would not accrue or be available until Sep-

tember 25, 1893, which was four days after the appointment of the receivers; and the only notice that was given by the bank, which was by the presentation of the drafts for payment, was also after the receivers had been appointed, and had notified the drawee of their appointment, and claimed the fund. The decree appointing the receivers clothed them with all the property rights of the company, "together with all tolls, rents, incomes, franchises, issues, and profits, and generally with all the authority and rights usually given to receivers by a court of equity." It is nowhere claimed or asserted that the drawee, prior to the receivership, accepted the drafts, or had notice of their existence, and it would seem that the transaction was treated by the bank as incomplete and unexecuted until the freight balance should be determined upon by the railway company, the drawee. In the meantime, as seems entirely just and equitable, the right of the receivers and the general creditors, whom they represented, had attached to the fund, in preference to that of the creditor who was seeking a preference after the company had become insolvent and its affairs put into course of liquidation.

The following remarks of Chief Justice Shaw in the case last referred to lay down the correct doctrine:

"According to the modern decisions, courts of law recognize the assignment of a chose in action, so far as to vest an equitable interest in the assignee, and authorize him to bring an action in the name of the assignor, and recover a judgment for his own benefit. But, in order to constitute such an assignment, two things must concur: first, the party holding the chose in action must, by some significant act, express his intention that the assignee shall have the debt or right in question, and, according to the nature and circumstances of the case, deliver to the assignee, or to some person for his use, the security, if there be one, bond, deed, note, or written agreement, upon which the debt or chose in action arises; and, secondly, the transfer shall be of the whole and entire debt or obligation in which the chose in action consists, and as far as practicable place the assignee in the condition of the assignor, so as to enable the assignee to recover the full debt due, and to give a good and valid discharge to the party liable."

And the same rule holds in equity. Indeed, the entire doctrine of assignments of choses in action is one growing out of equity jurisprudence, and founded upon equitable considerations, as by common law the legal title to a chose in action could not be passed by assignment; and still, according to the generally accepted doctrine, they are only assignable so far as to vest in the assignee an equitable interest. The doctrine of the above cases was fully recognized and enforced by the supreme court of Illinois in *Railway Co. v. Nichols*, 57 Ill. 464.

2. As it appears from the record that by the note to the bank for \$10,000, of July 25, 1893, William S. Hook, who was president and director of the railway company, bound himself as surety for the payment of the note, the railway company, being in failing circumstances, and already, when the drafts were drawn, a party to proceedings which placed it in the hands of a receiver, could not give a preference to one who, as an officer and member of the corporation, stood in a relation of trust toward the general creditors. It is insisted that the property of an insolvent corporation is a trust fund in such a sense as to preclude the directors and officers of the corpora-

tion from dealing with it in such a manner as to secure preferences for themselves. And this is undoubtedly the general doctrine, and the doctrine in Illinois. See *Beach v. Miller*, 130 Ill. 162, 22 N. E. 464; *Roseboom v. Whittaker*, 132 Ill. 81, 23 N. E. 339; *Cook, Corp.* § 691.

In a recent case decided by this court (*Sutton Manufg Co. v. Hutchinson*, 63 Fed. 496, opinion by Mr. Justice Harlan), the doctrine is thus summed up:

"It is, we think, the result of the cases that when a private corporation is dissolved, or becomes insolvent and determines to discontinue the prosecution of business, its property is thereafter affected by an equitable lien or trust for the benefit of creditors. The duty in such cases of preserving it for creditors rests upon the directors or officers to whom has been committed the authority to control and manage its affairs. Although such directors and officers are not technical trustees, they hold, in respect of the property under their control, a fiduciary relation to creditors; and, necessarily, in the disposition of the property of an insolvent corporation, all creditors are equal in right, unless preference or priority has been legally given by statute or by the act of the corporation to particular creditors. In what cases, where the subject is uncontrolled by legislation, can such preference of priority be legally given by a corporation? Undoubtedly a solvent corporation, if not forbidden by its charter, may mortgage its property to secure the performance of obligations assumed before or at the time of the execution of the mortgage. So, a mortgage executed by a corporation whose debts exceed its assets, to secure a liability incurred by it or on its behalf, will be sustained if it appears to have been given in good faith to keep the corporation upon its feet, and enable it to continue the prosecution of its business. A corporation is not required by any duty it owes to creditors to suspend operations the moment it becomes financially embarrassed, or because it may be doubtful whether the objects of its creation can be attained by further effort upon its part. It is in the line of right and of duty when attempting, in good faith, by the exercise of its lawful powers and by the use of all legitimate means, to preserve its active existence, and thereby accomplish the objects for which it was created. In such a crisis in its affairs, and to those ends, it may accept financial assistance from one of its directors, and by a mortgage upon its property secure the payment of money then loaned or advanced by him, or in that mode protect him against liability then incurred in its behalf by him. Of course, in cases of that kind a court of equity will closely scrutinize the transaction, and, in a contest between general creditors and a director or managing officer who takes a mortgage upon its property, will hold the latter to clear proof that the mortgage was executed in good faith, and was not a device to enable him to obtain an advantage for himself over those interested in the distribution of the mortgagor's property. *Richardson's Ex'r v. Green*, 133 U. S. 30, 43, 10 Sup. Ct. 280; *Oil Co. v. Marbury*, 91 U. S. 587, 588.

"Entirely different considerations come into view when an insolvent corporation having no expectation of continuing its business, and recognizing its financial embarrassments as too serious to be overcome, mortgages its property to secure a debt previously incurred to one of its directors, or, in a general assignment of all of its property, gives him a preference. To a general assignment by a private corporation for the equal benefit of all its creditors, including directors, no objection could be made, because it recognizes the equal right of creditors to participate in the distribution of the common fund. Such an assignment, Lord Ellenborough said, in *Pickstock v. Lyster*, 3 Maule & S. 371, is to be referred to an act of duty rather than of fraud, and is an act by the assignor that arises out of a discharge of the moral duties attached to his character of debtor to make the fund available for the whole body of creditors. The contention of the defendants is that, in disposing of their respective properties, an individual and a corporation were recognized at common law as having equal rights; and as the former may, in the absence of a statute forbidding it, transfer the whole or part of his property

with the intention or with the effect of giving a preference to some of his creditors, to the exclusion of others, so an insolvent corporation, when financially embarrassed and not intending to continue its business, may make a preference among its creditors, whoever they may be, and whatever their relation to the corporation or to the property transferred. If this be a sound rule, it would follow that directors, being also creditors, of an insolvent corporation which has abandoned the objects of its creation, and ceased an active existence, may distribute among themselves its entire assets, if the reasonable value thereof does not exceed their aggregate demands. We cannot accept this view. In our judgment, when a corporation becomes insolvent, and intends not to prosecute its business, or does not expect to make further effort to accomplish the objects of its creation, its managing officers or directors come under a duty to distribute its property or its proceeds ratably among all creditors, having regard, of course, to valid liens or charges previously placed upon it. Their duty is 'to act up to the end or design' for which the corporation was created (1 Bl. Comm. 480); and when they can no longer do so their function is to hold or distribute the property in their hands for the equal benefit of those entitled to it. Because of the existence of this duty in respect to a common fund in their hands to be administered, the law will not permit them, although creditors, to obtain any peculiar advantage for themselves to the prejudice of other creditors. This rule is imperatively demanded by the principle that one who has the possession and control of property for the benefit of others—and surely an insolvent corporation, which has ceased to do business, holds its property for the benefit of creditors—may not dispose of it for his own special advantage to the injury of any of those for whom it is held. That principle pervades the entire law regulating the conduct of those who hold fiduciary relations to others, and, instead of being relaxed, should be rigidly enforced in cases of breach of duty or trust by corporate managers seeking to enrich themselves at the expense of those who have an interest equally with themselves in the property committed by law to their control. It would be difficult to overstate the mischievous results of a contrary rule as applied to those intrusted with the management of corporate property."

That the Chicago, Peoria & St. Louis Railway Company was insolvent when the drafts were drawn, on September 12, 1893, can hardly admit of question. Since July 10, 1893, a suit had been pending against the company, brought by Cavett, receiver of the St. Louis & Chicago Railway, alleging default in performance of covenants in the lease, and asking a surrender of the same. On the 12th of September, the very day the drafts were drawn, Cavett, receiver, filed an amended petition against the Chicago, Peoria & St. Louis Railway Company, William S. Hook, and Marcus Hook, alleging an indebtedness of \$75,000 to the petitioner, and also alleging indebtedness to many other railroads, corporations, and individuals, and, among the rest, default in the bonded indebtedness of the defendant company, and asking the appointment of a receiver, and the case was set for hearing on September 21st. On that day, September 21st, the Mercantile Trust Company began the suit for foreclosure upon the bonds of the company for default in the payment of the interest thereby secured falling due on the 1st day of September, 1893. On the same day of the filing of this bill, September 21st, receivers were appointed for the railway company, who, on the morning of September 22d, took possession of the road.

It would be difficult to distinguish this case upon principle from that of the Sutton Manufacturing Company, quoted from as above. There is this difference: that William S. Hook, at the time of the drawing of the drafts, was not a creditor of the railway company

for the amount of its indebtedness to the bank. He was merely surety for the payment of the note. The money was advanced by the bank to the company, and used in its business. The bank, therefore, was primarily the creditor. William S. Hook could only be considered the creditor, in respect to the money represented by the note, after he should pay the note as surety for the railway company, and become subrogated in the place of the bank in respect to the indebtedness. But it seems pretty clear that this difference in Mr. Hook's relation to the railway company, as compared to that of a creditor proper, would make no difference in the application of the rule in regard to giving preferences. This was so adjudged in *Lippincott v. Carriage Co.*, 25 Fed. 577, and in *Howe v. Tool Co.*, 44 Fed. 231, both decided by Judge Woods, and referred to with entire approval in *Sutton Manuf'g Co. v. Hutchinson*, supra. The intention to make the preference and the motive are manifest from the record. The note did not fall due until September 26th. On September 11th, \$2,500 was paid, and indorsed upon it. These drafts for \$7,500 were drawn on the next day, September 12th, two weeks before the note would become due, against a fund not yet due, and of a then uncertain amount. There is no reason appearing for singling out this particular debt for such prompt payment except to favor William S. Hook, president, who had signed as a joint and several maker, but who, as between him and the railway company, was surety for the payment of the debt. Was William S. Hook, in preferring the bank, gaining any peculiar advantage to himself to the prejudice of other creditors? We think this question admits of but one answer. The advantage he would gain to himself by such preference would be the cancellation of his own obligation to the bank for the debt, which cancellation would forestall his becoming the creditor of an insolvent corporation. Being surety upon the note to the bank, and liable to be called upon to pay the same, as one of the makers, when due, he would have the same motive, in case of insolvency or threatened insolvency of the company, to prefer the bank as a creditor, as he would to prefer himself as a creditor. There would be the same temptation to fraud and unfair dealing in the one case as in the other.

And upon the whole case we must hold that the preference thus sought to be made of this particular creditor, on the very day of the filing of the amended petition praying for the appointment of a receiver, and after default made in the payment of interest upon the bonded indebtedness of the railway company, was an unlawful preference; and, upon both grounds discussed in this opinion, the decree of the court below is reversed, and the cause remanded, with directions to enter a decree in favor of the appellants.



## CLEVELAND, C. &amp; S. R. CO. v. KNICKERBOCKER TRUST CO. et al.

(Circuit Court, N. D. Ohio, E. D. December 11, 1894.)

No. 5,156.

**RAILROAD FORECLOSURE—PAYMENT OF INTEREST BY RECEIVER.**

The C. Railroad Co., which was formed by a consolidation of several other railroad companies, made a mortgage, covering its whole line and all its equipment, called the "consolidated mortgage," which was a second lien with reference to other mortgages previously made by the component companies on parts of the line. The C. Co., having become embarrassed, and made, or being about to make, default in payment of interest on all these mortgages, and being also largely indebted for supplies, labor, etc., instituted a suit against the trustees of the several mortgages, and obtained the appointment of a receiver of the road. The trustee of the consolidated mortgage filed a petition asking that the receiver be instructed to pay, out of moneys then in his hands, certain overdue interest on one of the first mortgages, alleging that, if such interest were not paid, foreclosure proceedings would be begun upon such mortgage, and confusion, delay, and litigation would follow, but that in a suit for foreclosure of the consolidated mortgage, which alone covered all the property and equipment of the road, all its liabilities and assets could be marshaled and applied to the various liens attaching to them, and that needless and expensive litigation would thereby be avoided. *Held*, that as it was not alleged that, by a foreclosure of the first mortgage in question, the system would be dismembered and its earning power destroyed, and as the court had incurred large indebtedness in the operation of the road, which it should be its first duty to secure, the receiver would not be directed to pay the interest in question out of the moneys in his hands.

This was a suit by the Cleveland, Canton & Southern Railroad Company against the Knickerbocker Trust Company, Clara Morgan Rotch and others, as executors of William J. Rotch, deceased, and the International Trust Company, to obtain the appointment of a receiver of the complainant company, and to marshal its assets and ascertain the several liens thereon, and obtain a decree enforcing the equities of all parties with reference to the complainant's assets and liabilities. Receivers were appointed by an order entered September 15, 1893. The Knickerbocker Trust Company, trustee under the consolidated mortgage, presented a petition asking that the receivers be directed to pay certain interest on the first mortgage covering a part of complainant's line.

W. R. Day and C. W. Fairbanks, for the motion.

Williamson & Cushing, A. T. Brewer, and J. R. Keating, opposed.

**RICKS**, District Judge. The petitioner in this case files an application representing:

"That the complainant company executed a certain mortgage bearing date of May 14, 1892, to the petitioner as trustee, and secured by an issue of 10,000 bonds of \$1,000 each; that 600 of said bonds have been issued and are outstanding; that the interest on said bonds falling due December 1, 1893, and thereafter, has not been paid; and that under the provisions of said mortgages, the holders of a majority of said bonds have requested your petitioner to declare the principal of said bonds to be due; and that under the provisions of said mortgage your petitioner has declared said principal to be due and payable, and has served notice of such declaration upon said railroad company, as

required by the terms of the mortgage; and thereupon, under the provisions of said mortgage, the principal of said bonds have become due and payable as they mature, due and payable at the time made payable by their terms. The petitioner further avers that a certain mortgage bearing date of July 1, 1887, executed by the complainant company to the International Trust Company of Boston as trustee, to secure an issue of 2,000 bonds of \$1,000 each, aggregating \$2,000,000, with interest at the rate of 5 per cent. per annum, payable on the 1st days of July and January of each year, is outstanding as a lien against said property; that said interest had been paid up to January 1, 1894, but the interest becoming due July 1, 1894, amounting to \$50,000, has not been paid, and has been due and unpaid since July 1, 1894; that said mortgage is designated as the 'first mortgage,' and the bonds, all of which are now outstanding, constitute the first lien upon that portion of said complainant's railroad extending from Cleveland to Coshocton, and from Canton to Sherrodsville. The petitioner further represents that the receiver heretofore appointed in this action has now in his hands money sufficient to pay said interest on said first mortgage bonds which became due July 1, 1894, in excess of the amount required to pay all current expenses and repairs and taxes which have accrued since the commencement of this action. The petitioner further represents that, as it appears in complainant's bill of complaint, there are various mortgages covering various parts and branches of said complainant's railroad, and that the mortgage executed to your petitioner is the only mortgage which covers all of the property and equipment of said complainant, the same being known as a 'consolidated mortgage'; that if said interest due on said first mortgage bonds should not be paid by January 1, 1895, then under the terms of said mortgage the holders of the bonds thereby secured will cause an action to be brought to foreclose said mortgage on the part of said complainant's railroad covered by said first mortgage; and that a committee of said holders of bonds has already been formed for the purpose of causing said foreclosure proceedings to be commenced as soon as may be after January 1, 1895. The petitioner further represents that said first mortgage was executed by the complainant company before the same was consolidated with the Coshocton & Southern Railroad and other companies into the present complainant organization, and that since such consolidation a large part of the equipment now on complainant's railroad has been acquired, and that therefore the petitioner's mortgage is the only mortgage covering such equipment. The petitioner further represents that said complainant is still indebted to divers and sundry persons in large amounts for supplies and materials furnished within six months prior to the commencement of this action, and that the receiver has no means with which to pay the same; but a number of persons to whom said complainant is indebted as aforesaid have filed intervening petitions in this action, praying the court to order the amounts owing to them, respectively, to be paid; that the unsecured indebtedness amounts to several hundred thousand dollars, the exact amount of which the petitioner refers to as indicated in the reports of the receiver. The petitioner further represents that if foreclosure proceedings should be commenced by the trustee of said first mortgage it would result in inextricable confusion, and would delay and harass said unsecured creditors, and involve them in needless litigation and expense; but, if foreclosure proceedings be commenced by your petitioner, such proceedings will bring the whole of the property, including all the equipment, before the court for adjudication and sale and distribution of proceeds; and your petitioner has therefore directed its solicitors to commence such proceedings at the expiration of the thirty days from the notice hereinbefore mentioned, declaring the principal due. Your petitioner further represents that the property mortgaged by said first mortgage is adequate and abundant security for the payment of the bonds thereby secured, and that the amount of said bonds will undoubtedly have to be paid from the proceeds of any such of complainant's said property; and as said bonds do not mature, according to their terms, till July 1, 1917, it may become greatly to the advantage of the other creditors of said complainant, and the lien holders upon its property, to have the property of said complainant sold subject to said mortgage, and therefore said interest of July 1, 1894, should not be suffered to continue in default so long that the bondholders

secured by said first mortgage may declare the principal of said bonds due, as they may do if the same should not be paid before the end of the present calendar year. Petitioner therefore prays that the receiver may be ordered to pay the interest which became due upon said bonds secured by said first mortgage on July 1, 1894."

This application was argued before me on Saturday last, and, as an early decision was requested, I can only briefly outline the reasons which occur to me now why this motion should be denied. The relief sought for by this petition is not unusual; but the cases, so far as I can now recall them, in which such relief has been allowed, were cases in which a failure to grant the relief would result in a dismemberment of the railroad property mortgaged, or the sale of some part thereof which was exceedingly valuable to the corporation, serving to give it a large part of its business in the transportation of freights, or was valuable to it because of terminal facilities. This was notably the case in the order made by Judge Lacombe in the foreclosure of the New York, Lake Erie & Western Railroad property. But, in the case now before me, the chief reason urged why the relief should be granted is that thereby the petitioner, as trustee, under the consolidated mortgage, would be able to proceed by foreclosure, and bring the main line and all the branches, as well as the equipment, of the complainant corporation into court, to be sold and distributed according as the liens may be hereafter marshaled. It is also urged that such relief would place what is known as the six-months creditors in a more favorable position, and effect more liberal remedies. Granting these reasons to be true, I think them still insufficient to warrant the court in ordering \$50,000 to be paid out of the sum now in the hands of the receiver towards the payment of this interest on the first mortgage bonds. This is a proceeding where the insolvent debtor corporation is complainant. The money now in the hands of the receiver, to a certain extent, represents net earnings; but, as against these earnings, the court, since taking possession of the property, has incurred large indebtedness, and I think it should be the first duty of the court to look after the security of this indebtedness, and to pay it as soon as it reasonably can. There are creditors unsecured who have strong equities upon this fund, and I think it would be unjust to them to make any further diversion now. It may well be suggested that, if the advantages to accrue to petitioner are as great as represented, it might properly advance this money, pay off this interest, and then assert its right to be subrogated to the claims of the first mortgage bondholders upon said fund. This is a matter of policy and of business management, which the petitioner alone can determine. As before stated, I am so pressed with other duties that in the short time given me I cannot further go into details, but I think the conclusion reached by the court is a just one. The motion will be overruled.

**EVANS v. LANCASTER CITY ST. RY. CO. et al.**

(Circuit Court, E. D. Pennsylvania. December 11, 1894.)

No. 18.

**1. DEMURRER TO BILL OF DISCOVERY.**

A demurrer to a bill of discovery, being a refusal to answer certain allegations of the bill, for reasons appearing upon the face of the bill and pointed out by the demurrer, will not be sustained, where immateriality is the sole ground of demurrer, unless the facts clearly show that the discovery sought is immaterial to the purposes of the suit.

**2. SAME UNLAWFUL SCHEME.**

Where a bill of discovery charges the defendants with having united and combined in an unlawful scheme to the injury of the complainant, and he insists that it is essential to his relief that the acts of each of them in carrying that scheme into effect should be disclosed, and that full answers from all of them are requisite to that end, the court will grant the discovery asked for.

This was a suit by William E. Evans against the Lancaster City Street-Railway Company and others.

The bill set forth that the complainant was a citizen of the state of New York, and the owner of 32 shares of the Lancaster Traction Company, one of the defendants, by purchase, with power of transfer, from one Eby. Upon request for transfer, of the proper officers, of the said shares, he was refused, because the Pennsylvania Traction Company, another of said defendants, had unlawfully, by exceeding its charter privileges, acquired the control of the property, direction, and books of the said Lancaster Traction Company, and apprehending that the complainant, as a stockholder of said company, by proceedings in court might nullify such unlawful acquisition, the said Pennsylvania Traction Company used its unlawful control of the direction of said Lancaster Traction Company to prevent, and thereby prevented, an issuance of a new certificate of transfer of said shares of stock to the complainant. The bill averred that the Lancaster Traction Company was a corporation organized March 7, 1893, with a capital of \$550,000, and also gave the dates of organization, amount of capital stock, etc., of the Lancaster City Street-Railway Company (the East End Passenger Railway Company and the West End Street-Railway Company having become merged in the former). The Lancaster & Millersville Railroad Company, the Lancaster & Columbia Railway Company, the Columbia & Ironville Street Passenger Railway Company, the Lancaster & Strasburg Railway Company, and the Columbia & Donegal Railway Company, were all defendants. The Lancaster Traction Company subsequently acquired the property and franchises of the Lancaster City Street-Railway Company. The Pennsylvania Traction Company was organized July 19, 1893, for the purpose of the construction and operation of motors and cables, or other machinery for supplying motive power to passenger railways, and the necessary apparatus for applying the same. On January 5, 1894, the Pennsylvania Traction Company, although it had no title to or interest in the said railways, beyond the ownership of a few shares of the capital stock, executed a mortgage to the Provident Life & Trust Company of Philadelphia, another defendant, for the securing of 1,500 coupon bonds for the sum of \$1,000 each, and of 1,000 coupon bonds for the sum of \$500 each, to be issued by the said Pennsylvania Traction Company, and in and by said mortgages undertook to convey to the said trustee the railways of the aforesaid companies, together with the motors, cars, franchises, and other appliances. The said mortgages were delivered to the said trustee and recorded. On February 3, 1894, the said Pennsylvania Traction Company procured a lease for a term of 999 years of all the aforesaid railway companies, and had the same recorded. At the time of the execution and delivery of the said leases, the Pennsylvania Traction Company possessed no railway whatever, but the railways embraced in said leases were already equipped for operation.

There was no statute of Pennsylvania granting power to said companies to lease their roads, or to the Pennsylvania Traction Company the power to acquire such franchises by lease or otherwise. The total capitalization of the said railways is \$5,265,000, and the length of track is 40 miles,—a sum largely beyond the limit of \$100,000 per mile of track fixed by the act of May 14, 1889, § 5. The bill further claimed that the issue of \$660,000 of mortgage bonds and \$330,000 of capital stock was purely fictitious, and in violation of the act under which the said Pennsylvania Traction Company was organized, which act forbids any increase of capital stock or indebtedness save for labor done or for money or property actually received. The said bonds and stock were issued in payment of the property of the said Lancaster Traction Company, the same being divided into 11,000 shares at \$50 each, making altogether a payment of \$990,000 without in anywise augmenting the property basis. A large part of the \$2,000,000 of bonds secured by the said mortgage and a large portion of the capital stock of the said Pennsylvania Traction Company have been freely disposed of to officers, directors, and others for neither a money consideration nor for labor done, but as the fruits of the scheme aforesaid. The acquisition by said company of the control of the said railways, and the means used therefor, were charged to be violative of the rights of the complainant as a shareholder of the Lancaster Traction Company, and violative of the laws of Pennsylvania. The bill therefore prayed that defendants make answer to the averments set forth, that the Lancaster Traction Company be enjoined to issue a certificate for the said shares to the complainant, and that the Pennsylvania Traction Company be restrained from interfering therewith, and also be restrained from selling, disposing of, or impairing the status of any of, the property of the said companies; that the mortgage to the Provident Life & Trust Company be declared void, as also the leases and purchases of stock of the said railways; and that the said Pennsylvania Traction Company be enjoined to withdraw from all management, control, and interference with the said railways.

To this bill several of the defendants interposed demurrers in the following form: "And now this defendant doth demur in law to the said bill, and for cause of demurrer sheweth that any discovery which can be made by this defendant touching any of the matters in the said bill of complaint contained cannot be of any avail to the said plaintiff for any of the purposes for which a discovery is sought against this defendant by the said bill, nor entitle the said plaintiff to any relief touching any of the matters therein complained of. Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant doth demur to the said bill, and prays judgment of this honorable court whether it shall be compelled to make any other answer thereto; and it humbly prays to be hence dismissed, with its reasonable costs in this behalf sustained."

M. Hampton Todd, for plaintiff.

J. Hay Brown, R. C. Dale, and George Nauman, for defendants.

DALLAS, Circuit Judge (after stating the facts). This case has been argued upon demurrers filed by several of the defendants, and which have been treated by counsel, with apparent correctness, as demurrers to discovery, and not to relief; but "a demurrer to discovery, indeed, is not in its nature a demurrer at all, but a mere statement in writing that the defendant refuses to answer certain allegations in the bill, for reasons which appear upon the face of the bill, and which the demurrer points out." 1 Langd. Eq. Pl. § 97. The several refusals to answer which have been here interposed, though not all expressed in the same terms, are all based upon substantially the same ground, viz. that the discovery sought is immaterial to the purposes of the suit. This, however, is at least not so apparent on the face of the bill as to warrant the court in

assuming, at this stage and on these demurrers, that the facts inquired about are irrelevant. The theory of the bill appears to be that the defendants united and combined in an unlawful scheme to his injury; and he insists that it is essential to his relief that the acts of each of them in carrying that scheme into effect should be disclosed, and that full answers from all of them are requisite to that end. If this contention should be supported by the complainant, and if the bill should be ultimately sustained by the court, the right of the complainant to the discovery he seeks will have been established; but the order now made must be understood to be without prejudice to the right of the defendants, or any of them, to again raise, otherwise than by demurring to discovery alone, the questions which have now been discussed at bar. At present I need only say that I have no doubt that if the complainant is entitled to relief against all those whom he has joined as defendants, his right to discovery from all of them is unquestionable. The demurrers, including those joined with answers as well as those which have been separately filed, are overruled, and the demurrants are assigned to answer or plead, or to demur (but not to discovery merely), on or before the next rule day; and all questions of costs are reserved.

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**DETROIT CITIZENS' ST. RY. CO. et al. v. CITY OF DETROIT.**

**CITY OF DETROIT v. DETROIT CITY RY. et al.**

(Circuit Court of Appeals, Sixth Circuit. October 2, 1894.)

No. 200.

**1. STREET RAILROADS—POWER TO TAKE EASEMENT IN STREETS FOR TERM BEYOND CORPORATE EXISTENCE.**

A street-railway company is not incapable of taking a grant of a right to use streets of a city for its railway for a term extending beyond its own corporate franchise, the interest granted being assignable.

**2. SAME—DURATION OF RIGHT TO USE STREETS.**

The duration of such a right depends on the language of the grant and the extent of the interest which the grantor had authority to grant.

**3. MUNICIPAL CORPORATIONS—POWER TO GRANT USE OF STREETS FOR STREET RAILWAYS.**

The use of city streets for street-railway purposes being, under the law of Michigan, a legitimate use, the general powers vested in the city of Detroit by its charter to open, close, and widen streets, and to prescribe, control, and regulate the manner in which the streets shall be used and enjoyed, are broad enough to permit the city to consent to the use of its streets for such purposes by any company having the requisite franchises of a street-railway company.

**4. SAME.**

Query, whether such general powers authorize consent to such use, either in perpetuity or for a definite term.

**5. SAME—CONSTRUCTION OF CORPORATE POWERS.**

The rule which requires strict construction of the powers of municipal corporations is not to be applied so as to defeat the legislative intent.

**6. SAME—CONSENT OF CITY TO USE OF STREETS FOR STREET RAILWAYS—LIMITATION OF TERM.**

Laws Mich. 1861, p. 11, added, to the general tram-railway act of 1855, sections 33 and 34, which authorized the organization of companies to construct and operate street railways, with a proviso that no such com-

pany should be authorized to construct a railway through the streets of a city without the consent of the municipal authorities, and under such regulations and upon such terms and conditions as they might from time to time prescribe; and Laws 1867, p. 257, added a further proviso that, after such consent should have been given and accepted, such authorities should make no regulations or conditions whereby the rights or franchises so granted should be destroyed or unreasonably impaired, or such company be deprived of the right of constructing, maintaining, and operating such railway. *Held*, that under these provisions, when construed together and with regard to the peculiar constitutional policy of the state limiting the legislative power in respect of direct interference with purely local concerns of cities, the general charter powers of the city of Detroit over its streets, the general purpose the legislature had in view, and other sections of the same acts which provided for acquiring rights of way and for mortgaging street railways, including their rights of way, every such mortgage to be deemed a mortgage upon real estate, the power of the city of Detroit to give the "consent" required was not a power merely implied, and therefore to be strictly construed, but was directly conferred, and authorized a grant of such easement of way in the streets as was requisite for the purposes to be accomplished; and as such power was conferred without express words of limitation, and the "terms and conditions" on which the grant was to be made were left to the discretion of the local government, the term of such a grant was not necessarily limited by the duration of the franchises of the grantee. 56 Fed. 867, and 60 Fed. 161, reversed.

7. SAME.

The power of the city to make such a grant of a right of way extending for 16 years beyond the corporate life of the grantee was not limited by any necessary implication from the policy of the state as shown by Const. Mich. art. 13, § 10, which provides that no corporation, except for municipal purposes or for construction of railroads, plank roads, and canals, shall be created for a longer period than 30 years; or from the limitation to the same period imposed by the legislature upon the life of street-railway companies; or from apprehension of possible evils from long grants of such street privileges. 56 Fed. 867, and 60 Fed. 161, reversed.

Appeals from the Circuit Court of the United States for the Eastern District of Michigan.

This was a bill filed in the circuit court of Wayne county, Mich., by the City of Detroit, against the Detroit City Railway, the Detroit Citizens' Street-Railway Company, Sidney D. Miller and William K. Muir, trustees, and the Washington Trust Company of the City of New York, for an injunction to compel the removal of tracks from the streets, and to restrain the further operation of a street railway therein. The cause was removed to the federal court by the Washington Trust Company of the City of New York, and a motion to remand was afterwards denied. 54 Fed. 1. A motion by complainant to postpone the hearing on bill and answer, or, in the alternative, to dismiss the bill, was also denied. 55 Fed. 569. At the hearing upon the bill and answer, the injunction was refused as to the lines of the Congress & Baker Street-Railway Company and the Cass Avenue Street-Railway Company, and further argument ordered as to the remaining lines, with leave to the parties to amend their pleadings. 56 Fed. 867. The cause was heard upon the argument and amended pleadings, and a decree was rendered in favor of the complainant, excepting as to the lines named above, with costs to the defendants. 60 Fed. 161. An appeal was taken to the supreme court by the Detroit City Railway and Charles

M. Swift, who had been made trustee in the place of William K. Muir, deceased, but the appeal was dismissed for want of jurisdiction, no opinion being delivered. 154 U. S. 500, 14 Sup. St. 1145. The remaining defendants and the complainant separately appealed to the circuit court of appeals.

James C. Carter, for appealing railway companies.

Ashley Pond and Otto Kirchner, for Detroit Citizens' St. Ry. Co.

Sidney T. Miller, for first mortgage bondholders.

John C. Donnelly (Fred A. Baker and Henry M. Duffield, of counsel), for Washington Trust Co.

Charles A. Kent and Benton Hanchett, for City of Detroit.

Before JACKSON, Circuit Justice, LURTON, Circuit Judge, and SAGE, District Judge.

LURTON, Circuit Judge. The relief which the bill seeks is the removal from the streets of Detroit of the tracks and cars of the Detroit Citizens' Street-Railway Company. The ground upon which the relief is sought is that the term for which the city consented to the use of the streets occupied by that company has expired by limitation, and that that company is therefore an unlawful trespasser on the streets, and its tracks and cars a public nuisance. The Detroit Citizens' Street-Railway Company is the assignee and successor of the Detroit City Railway Company. The street easements or privileges now involved were derived from the Detroit City Railway Company, and the controversy depends upon the duration of the term acquired by that company from the city.

In November, 1862, the city council of Detroit, by ordinance, consented to the use of certain designated streets for a term of 30 years, by Cornelius S. Buchnell and his associates and their successors and assigns, when they should become incorporated as a street-railway company under the general law of Michigan providing for the incorporation of street-railway companies. Though that easement was to Buchnell and associates, yet it was given in anticipation that they would become incorporated, and thereby acquire the franchises essential to the operation of a street railway for tolls; and the grant was so framed as to inure to them in their corporate capacity. Subsequently, they did comply with the requirements of the law of the state, and became incorporated under the name of the Detroit Street-Railway Company, with a corporate life limited to 30 years. The date of this incorporation was May —, 1863. This consent ordinance contained numerous provisions concerning the streets to be occupied, the kind of structure to be put down, the mode in which the cars should be operated and track maintained, the amount and kind of license tax to be paid the city, etc.

Immediately upon incorporation, the company proceeded to construct and operate the contemplated road. Frequent ordinances recognizing the original consent, and enforcing the terms and conditions upon which it was made, leave no doubt but that consent has inured to the Detroit City Railway Company. In course of time the relations between that company and the city council became



complicated and unsatisfactory. A new adjustment of the terms and conditions upon which the consent had been given was regarded as a necessity. The ordinance of 1862 was therefore, in November, 1879, amended in numerous particulars. New burdens and obligations were imposed upon the company, additional taxes were provided for, some reduction in tolls was required, and certain extensions deemed desirable by the public were demanded. Under the statute providing for obtaining the consent of cities and villages to the construction and operation of street-car lines on or in the streets of such cities and villages, it was provided that after such consent had been granted it should not be revoked or altered without the consent of each party to the contract. The inducement operating upon the railway company to give its assent to the very serious burdens imposed by the change proposed in the terms and conditions upon which the city had consented to its occupancy of the streets was found in a provision of the new ordinance, by which the term for which the city consented to the use of its streets for street-railway purposes was extended for 30 years from the date of the new arrangement. The original consent would have expired in May, 1893, being for 30 years. The extension of the rights and privileges originally conferred would operate to extend the term until November, 1909. This extension of the term seems to have been the sole consideration for the assumption by the company of the new burdens imposed by the new proposal. It was regarded as a sufficient consideration, and was accepted in writing as required by law, and became a binding and irrevocable agreement, unless the contract was void as being in excess of the corporate powers of the contracting parties.

The act under which the Detroit City Railway Company became incorporated contained a provision limiting the corporate life of all companies organized thereunder to a term of 30 years from date of organization. Thus, the grant of an extension of the term was to a company whose corporate life would expire 16 years before its street rights and privileges. This fact has given rise to this litigation, and the question to be decided turns upon the significance to be attached to the grant of a 30-year street easement to a corporation having only 14 years of corporate life. That the corporate life of the Detroit City Railway Company would expire 16 years before the expiration of the extended term of street rights was a fact well known both to the city authorities and the railway company. Upon the expiration of the corporate life of the corporation, its corporate franchises to operate for tolls a line of street railway would likewise expire. The grantee in the extension ordinance could not, therefore, effectively enjoy the rights and privileges conferred beyond the period of its corporate existence. This, we must assume, was well known to both of the contracting parties. What, then, was the consideration moving the corporation to accept the new burdens and obligations to obtain a grant it could not personally enjoy beyond the duration of its corporate life? The answer is obvious. The original consent was not limited to Buchnell and his associates, nor to the corporation which they were pro-

moting, and to which the consent was to inure. That consent was to the grantees named and described, and their "successors or assigns." The ordinance of 1879 was not a new grant or a new consent; it was confessedly an extension of the old grant of consent, upon the terms and conditions of the old consent, except in so far as those terms were readjusted. It follows that the extension of that term was a grant to the Detroit City Railway Company and its successors and assigns. While, therefore, neither party supposed that it was in the power of the city council to extend the corporate life or corporate franchises of the Detroit City Railway Company beyond the term prescribed in the law which gave it birth, yet it was supposed and believed by each that the value of the extended term would consist in its assignability to a grantee endowed with the franchises essential to the enjoyment of the city's consent to the use of its streets for street-railway purposes. These considerations operated to induce the acceptance of the new terms imposed, and reliance upon the soundness of the opinions then entertained has led to the investment by the company in important extensions and costly improvements, aggregating in amount upward of a million of dollars. In reliance upon the property value of the extended term, the property, franchises, and property rights of the company were mortgaged by the Detroit City Railway Company to the defendants Sidney D. Miller and W. K. Muir as trustees to secure an issue of \$1,000,000 of bonds, all of which are now outstanding in the hands of purchasers who have relied upon the validity of the extension ordinance. In January, 1891, that company sold and assigned its railway, franchises, rights of way, and property rights of every kind to the Detroit Street-Railway Company, a corporation of the state of Michigan. In October, 1891, the Detroit Street-Railway Company sold and transferred all its railway and franchises and easements of every kind to the defendant the Detroit Citizens' Street-Railway Company. The latter was a corporation lately organized under the general incorporation law of Michigan, and having all the powers and franchises necessary to the operation of a street railway. Each of these sales and assignments was in pursuance of express statutory authority, and neither transaction is in any way questioned. After the Citizens' Street-Railway Company had acquired the road and property of its predecessors, it executed a mortgage to the defendant the Washington Trust Company to secure an issue of \$3,000,000 of bonds, of which \$2,000,000 are outstanding in the hands of holders induced to buy in reliance upon the extension of the term made in 1879. To grant the relief sought will entirely extinguish rights and privileges in the streets which the complainant avers can now be disposed of for upward of a million of dollars. It is equally plain that the value of the tangible property owned by the railroad company and conveyed in its mortgages, such as its tracks and equipment, will be enormously reduced if removed from the streets. That the extension was made and accepted in good faith is not questioned. That the street-car companies have not faithfully complied with all the terms and conditions imposed by the adjustment made in

1879 is not averred in any pleadings. The only theory upon which the bill was filed is that the opinion entertained at the time of the extension as to the power of the city council to extend the term of the street rights of the street-railway company beyond the duration of its corporate life was erroneous, and that the contract was void as being *ultra vires*.

The circuit court concurred in opinion with the counsel for complainant, and granted a decree for the removal of the tracks and cars from the streets as being in law a public nuisance. A review of that decree presents propositions very grave in character, both by reason of the magnitude of the private interests concerned, and in that their determination will affect public interests involved in the supposed limitations upon the powers of the municipalities of Michigan.

The views entertained by the circuit judge, and which led him to the conclusion now to be reviewed, are expressed in an opinion reported in 55 Fed. 569. That opinion may be thus summarized:

(1) That the power to make the grant relied on by defendants in this case must be found in the train or street-railway acts, or not at all.

(2) That the power conferred by those acts to grant an easement in the streets to a street-railway company is not an express, but an implied, power.

(3) That "a power implied must be limited to the necessity which gives rise to its implication."

(4) That "an inevitable limitation thus arising is that the easement shall not endure beyond the life of the franchise for which the easement is given."

(5) That the corporate life and corporate franchises originated under a general law which limited their continuance to a period of 30 years.

(6) That it therefore followed that the power of the city was limited to the grant of an easement of way in the public streets not exceeding in duration the corporate life of the company receiving the grant.

The very eminent counsel for the city have, in addition to the points of decision stated, argued very strenuously that, irrespective of the capacity of the city to make the grant in question, it was not within the corporate power of the Detroit City Railway Company to receive a street franchise for a term extending beyond its corporate franchise. We cannot at all agree to this proposition. The duration of any estate which such a corporation may take must depend upon the language of the grant and the power of the grantor to make it.

"It was an incident at common law to every corporation to have a capacity to purchase and alien lands and chattels, unless they were especially restrained by their charter or statute." 2 Kent, Comm., side pages 281, 282.

The same author says:

"Corporations have a fee simple for the purpose of alienation, but they have only a determinable fee for the purposes of enjoyment. On the dissolution of the corporation, the reverter is to the original grantor or his heirs; but

the grantor will be excluded by the alienation in fee, and in that way the corporation may defeat the possibility of a reverter."

"If real or personal property or negotiable contracts are conveyed to a corporation, subject to no condition, the company has the right to transfer the same absolutely, and in such case the title of the purchaser will not be affected by a subsequent dissolution of the corporation." *Mor. Priv. Corp.* §§ 330, 1031; *Nicoll v. Railroad Co.*, 12 N. Y. 121; *State v. Rives*, 5 Ired. 305-309; *People v. O'Brien*, 111 N. Y. 13, 18 N. E. 692; *Omaha Bridge Cases*, 10 U. S. App. 192, 2 C. C. A. 174, 51 Fed. 809.

The case last cited was where a lease of trackage and bridge rights was made to a railroad company for 999 years, which had only a corporate life of 40 years.

In *People v. O'Brien*, cited above, the instance was that of a grant of an easement in the streets of New York, unlimited as to time. The grant of street rights had been made by the city of New York in perpetuity to a street-railway company having a corporate life limited to 1,000 years, but subject to a reserved right of amendment, alteration, or repeal. The grant was made by authority conferred by an amendment to the constitution of the state adopted in 1875, which prohibited the enactment of any law which should authorize "the construction or operation of a street railway except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of that street or highway upon which it is proposed to construct or operate such road be first obtained." *Const. N. Y. art. 3, § 18.* The court of appeals of New York, in a most elaborate opinion, held:

(1) That the "consents" obtained "were the muniments of title to the enjoyment of the rights acquired thereunder by the railroad company," and constituted a property interest which was not destroyed by the repeal of the charter.

(2) That there was no limitation upon either the power of the city to grant an easement in perpetuity extending beyond the prescribed life of the corporation, nor did such limitation operate to limit the power of the corporation to receive such grant. The court said, as to the duration of such a grant, that:

"This is to be determined by a consideration of the language of the grant and the extent of the interest which the grantor had authority to convey. We think this question has been decided by cases in this court, which are binding upon us as authority in favor of the perpetuity of such estates. That a corporation, although created for a limited period, may acquire title in fee to lands or property necessary for its use, was decided in *Nicoll v. Railroad Co.*, 12 N. Y. 121, where it was held that a railroad corporation, although created for a limited period only, might acquire such title, and that, where no limitation or restriction upon the right conveyed was contained in the grant, the grantee took all of the estate possessed by the grantor. The title to streets in New York is vested in the city in trust for the people of the state, but under the constitution and statutes it had authority to convey such title as was necessary for the purposes of corporations desiring to acquire the same for use as a street railroad. The city had authority to limit the estate granted, either as to the extent of its use or the time of its enjoyment, and also had power to grant an interest in its streets for a public use in perpetuity, which should be irrevocable. *Yates v. Van de Bogert*, 56 N. Y. 526; *In re New York Cable Ry. Co.*, 109 N. Y. 32, 15 N. E. 882. Grants similar in all material respects to the one in question have before been before the courts of this state

for construction; and it has been quite uniformly held that they vest the grantee with an interest in the street in perpetuity for the purposes of a street railroad. *People v. Sturtevant*, 9 N. Y. 263; *Davis v. Mayor*, etc., 14 N. Y. 506; *Milhau v. Sharp*, 27 N. Y. 611; *Mayor, etc., v. Second Ave. R. Co.*, 32 N. Y. 261; *Railroad Co. v. Kerr*, 72 N. Y. 330. Other cases are also reported in the books, but it is deemed unnecessary to accumulate authorities on this point."

We are clearly of opinion that the power of the Detroit City Railway Company was not restricted to the taking of such a grant for a term limited by its corporate life.

The fact that it could not personally enjoy the interest thus granted after the expiration of its substantial and corporate franchises would not cut down the estate granted. Its power of alienation was unaffected, and its assignee, if otherwise endowed with the franchises essential to the operation of street railways, might enjoy the rights and privileges derived by assignment. The duration, character, and extent of an estate conveyed to a corporation must be determined by the terms of the grant unless there be an express prohibition in its organic law, or one imposed by statute. *Ang. & A. Corp. § 195*; *State v. Rives*, 5 Ired. 305-309; *Asheville Division No. 15 v. Aston*, 92 N. C. 579; *State v. Gas-Light Co.*, 102 Mo. 472, 14 S. W. 974, and 15 S. W. 383; *Gere v. Railroad Co.*, 19 Abb. N. C. 193, 203, and cases cited above. There is nothing in the nature of the property rights involved in a grant of an easement in the streets for street-railway uses which distinguishes it from other property acquired by a corporation in the exercise of its franchises; but it by no means follows that, because the street-railway company had the capacity to take an easement in the street for a term extending beyond its corporate franchises, the city had the power to make such a grant.

The power of the city in such matters is not to be determined solely by the power of the grantee to receive the interest attempted to be conveyed. It is just as essential that the city shall have the power to make the grant as that the grantee shall have the capacity to take the estate granted. In its last analysis the soundness or erroneousness of the conclusion reached by the circuit court must turn upon a consideration of the powers possessed by the city in respect to the use of the streets for street-railway purposes. That public streets are a public trust, to be held and preserved for legitimate street uses, is an obvious truth. That the ordinary power to control the public streets usually conferred upon all municipal governments will not justify a diversion to other uses, nor support a delegation of the power of control to others, or any abridgment of the legislative authority of the city over the streets, is well-settled law. In view of these general principles, what were the powers possessed by the city of Detroit touching the use of its streets for street-railway purposes?

1. By repeated decisions of the Michigan courts it has been adjudged that a street railway, whether the motive power be horse or electricity, is but an improved mode of street use, and is not, therefore, an additional servitude which abutting owners may restrain. *Railroad Co. v. Heisel*, 38 Mich. 62; *In re Grand Rapids St. Rys.*, 48

Mich. 433, 12 N. W. 643; Maybury v. Gaslight Co., 38 Mich. 154; People v. Railway Co., 92 Mich. 522, 52 N. W. 1010; Dean v. Railway Co. (Mich.) 53 N. W. 396.

2. If the use of the streets for street-railway purposes is a legitimate use, then it must follow that the general powers vested in the city by its charter "to open, close, and widen streets," and "to prescribe, control, and regulate the manner in which the highways, streets, avenues," etc., "shall be used and enjoyed," is a power broad enough to permit the city to consent to the use of its streets for such purposes by any company having the requisite franchises of a street-railway company. Judge Dillon, in his work on Municipal Corporations (section 575), in summing up his conclusions with respect to the general charter powers of municipalities over their streets as affecting the power to grant permission for such use of the streets by street railways, says:

"The ordinary powers of municipal corporations are usually ample enough, in the absence of express legislation on the subject, to authorize them to permit or refuse the use of streets within their limits for such purposes."

Upon a full consideration of the subject, the supreme court of Kansas, in the case of Atchison St. Ry. Co. v. Missouri Pac. Ry. Co., 31 Kan. 661, 3 Pac. 284 (the opinion being by Judge Brewer, now an associate justice of the United States supreme court), came to the same conclusion. Bearing upon the same question are the cases of Brown v. Duplessis, 14 La. Ann. 842; State v. Corrigan Con. St. Ry. Co., 85 Mo. 274; Davis v. Mayor, etc., 14 N. Y. 506 (opinion of Comstock, J., as to the sufficiency of the general powers to support a revocable license); Elliott, Roads & S. 563; Booth, St. Ry. Law, § 15. That a revocable license would be within the general charter powers of the city is distinctly supported by the opinion of Judge Taft, now under review.

3. Whether such general powers will authorize a consent in perpetuity or for a definite term is doubtful. The weight of authority seems to be that any grant of an easement for a definite time operates as an abridgment of the legislative power of control over the streets, and would not be an exercise of the legislative powers conferred by the charter. This view is strongly supported by the New York authorities, as well as many others. Davis v. Mayor, etc., 14 N. Y. 506; Milhau v. Sharp, 27 N. Y. 611; Mayor, etc., v. Second Ave. R. Co., 32 N. Y. 272. These cases seem to proceed upon the theory that the grant of any easement in the streets is the conveyance of a property interest commensurate with the purpose for which it is to be used, and therefore irrevocable, unless that power is reserved. In Mayor, etc., v. Second Av. R. Co., cited above, the court drew a very sharp distinction between the legislative and contractual powers, saying that:

"The rights to create and establish ferries and railroad franchises, are quite distinct and separate from their duties as legislatures, having authority to pass ordinances for the control and government of persons and interests within the city limits. The latter are powers held in trust, as all legislative powers are, to be used and exercised for the benefit and welfare of the whole community, while the former are property, in the ordinary sense, to be acquired and conveyed in the same manner as natural persons acquire and

transfer property, and subject to the operation of such ordinances and by-laws as may be lawfully passed." 32 N. Y. 271.

It is to be also observed that the early decisions of that state did not recognize a street railway as an ordinary street use, but a new burden upon the fee. The cases are reviewed in *Fobes v. Railroad Co.*, 121 N. Y. 505, 24 N. E. 919. Other cases holding that the general power of controlling the streets will not support a consent to their use in perpetuity or for a term of years are *Railway Co. v. Mayor*, etc., 4 Cold. 406; *Louisville City Ry. Co. v. Louisville*, 8 Bush, 415; *Eichels v. Railway Co.*, 78 Ind. 261; *State v. Trenton*, 36 N. J. Law, 79; *Nash v. Lowry*, 37 Minn. 263, 33 N. W. 787; *Lake Roland El. R. Co. v. Mayor*, etc., of Baltimore (Md.) 26 Atl. 510. The contrary view is supported in *Brown v. Duplessis*, 14 La. Ann. 842, and *State v. Railway Co.*, 85 Mo. 274. The question is an open one in Michigan. In view of the strong constitutional policy of that state in favor of local control of matters purely local, to be hereafter more fully referred to, it is not impossible that the courts of Michigan, if the occasion shall arise, will refuse to follow the New York cases, in view of the widely differing policies of the two states in the matter of legislative control over purely municipal interests.

We do not think it necessary to decide this question, inasmuch as the case must turn upon a consideration of other legislation more definitely bearing upon the power of the city to grant a vested easement.

In the interpretation of the legislation hereafter to be considered, we shall make further reference to these charter powers; but we shall, for the purposes of this case, assume that further power was necessary to support a permission to use the streets granted for a term of years.

4. This was the state of the law when the Michigan legislature, in 1861, made provision for the incorporation of street-railway companies.

The constitution of the state does not permit the organization of private corporations under special acts, but requires the enactment of general laws under which the requisite number of persons may become incorporated with the powers prescribed in the general law. In obedience to this requirement there was enacted, in 1855, a general law providing for the organization of train (or tram) railway companies. Those corporations were peculiar, in that it was contemplated that the railway constructed should be subject to use by any owner of cars adapted for use on such road. The compensation of the owners of the road was to consist in tolls taken at toll gates placed at intervals along the line. This train-railway act was amended in 1861, so as to provide for the organization of street-railway companies. This amendment may be found at sections 3526 and 3527, How. Ann. St. Mich.

In 1867 the act was further amended, which latter amendment appears as a proviso to section 3527. These sections are as follows:

"3526. Added 1861, p. 11, Feb. 2, Act 14. Sec. 33. It shall be competent for parties to organize companies under this act to construct and operate railways in and through the streets of any town or city in this state."

"3527. Added, *Ib.*, Am. 1867, p. 257, Mar. 27, Act 188. Sec. 34. All companies or corporations formed for such purposes shall have the exclusive right to use and operate any street railways constructed, owned, or held by them; provided that no such company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe; provided, further, that after such consent shall have been given and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining and operating such railway in the streets in such consent or grant named, pursuant to the terms thereof."

By another act passed in 1863, the act was further amended, being section 3528, and is as follows:

"3528. Added 1863, p. 33, Feb. 18, Act 33. Sec. 35. It shall be lawful for any corporation or association organized under the act hereby amended, for the purpose of building and operating street railways, to borrow money for the purpose of constructing and operating the road or roads proposed to be constructed by them, and for that purpose to mortgage or create any other lien on their franchise, road, superstructure, fixtures, rolling stock and equipments; and whenever such corporation or association shall have acquired a simple easement or right of way for its proposed road, or any part thereof, and shall have made and filed its articles of association in conformity to the provisions of the act hereby amended, any mortgage or mortgages executed by such corporation or association upon the route or routes where such easement or right of way has been obtained as aforesaid, shall be a legal and valid lien upon the right of way so obtained, to the entire extent of the interest of such corporation or association therein, and upon the superstructure and fixtures upon such route or routes, whether the same shall be built before or after or partly before or partly after such mortgaging, and any such mortgage shall be deemed to be a mortgage upon real estate."

In 1867 a separate act was passed, providing for the organization of street-railway companies. That act did not substantially change the manner of organization or powers of such companies, nor the mode in which street rights might be acquired. How. Ann. St. §§ 3526, 3527. Section 3548 reads as follows:

"3548, Sec. 13. Any street railway corporation organized under the provisions of this act, may, with the consent of the corporate authorities, of any city or village, given in or by an ordinance or ordinances duly enacted for that purpose, and under such rules, regulations and conditions as in and by such ordinance or ordinances shall be prescribed, construct, use, maintain and own a street railway for the transportation of passengers, in and upon the lines of such streets and ways, in said city or village, as shall be designated or granted from time to time for that purpose, in the ordinance or ordinances granting such consent; but no such railway company shall construct any railway in the streets of any city or village until the company shall have accepted in writing the terms and conditions upon which they are permitted to use said streets; and any such company may extend, construct, use and maintain their road, in and along the streets or highways of any township, adjacent to said city or village, upon such terms and conditions as may be agreed upon by the company and the township board of the township, which agreement and the acceptance by the company of the terms thereof, shall be recorded by the township clerk, in the records of his township."

Section 3549 provided that, after rights and privileges had been granted to any street railway, such grant should not be revoked.

Section 3550 confers power upon any street railway to purchase



and acquire, at judicial or private sale, any street railway "owned by any other corporation or company, together with all the real and personal estate belonging thereto, and the rights, privileges and franchises thereof, and may use, maintain and complete such road, and may use and enjoy the rights, privileges and franchises of such company, the same and upon the same terms as the company whose road and franchises were so acquired could have done." It also gives to such companies power "to sell, lease, dispose of, pledge or mortgage" "their railway, fixtures, property, and appurtenances, rights, privileges and franchises."

By section 3564, all the "powers, rights, protection and privileges" conferred by the act were extended to all companies theretofore organized in that state.

These two acts were both in full force and effect at the date of the extension ordinance of 1879, and are the acts which the circuit court construed as conferring only an implied power to grant an easement of way.

5. That the street-railway acts cited heretofore do confer the power to grant an easement is conceded by the learned counsel for the city. That this power is not expressly limited as to the term for which such a grant may be made is also conceded. Their contention is that the power under which any easement may be granted is not an express power, but implied only from the power granted to "consent to the operation" of the charter franchises; that a power arising only from this power "to consent" is necessarily limited by the duration of the franchises consented to. This conclusion seems to rest the case upon the assumption that the power of the city to grant any easement is found alone in the train-railway act, and to exclude from consideration, in construing that act, the peculiar constitutional policy of the state limiting the legislative power in the matter of direct interference with the purely local concerns of the cities and chartered villages of the state. It also excludes from consideration the general charter powers of the city of Detroit over its streets; it fails to read, in connection with the train-railway act, the more elaborate street-railway act passed in 1867, and in full force and effect when the extension ordinance was passed, and attaches little importance to the general purpose the legislature had in view when it undertook to provide for the establishment of street-railway companies. Any conclusion drawn alone from an artificial construction of the train-railway act, and which ignores in so large a degree the primary canon of construction which requires that effect shall be given to the intent of the lawmaking power, and that that intent shall be ascertained in every legitimate way, must bring about an unsatisfactory result.

We entirely agree with the rule which requires a strict construction of the powers of municipal corporations, "and that such corporations can exercise only those powers which are either granted by express words, or those necessarily or fairly implied in or incident to the powers expressly granted, or those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable." 1 Dill. Mun. Corp. § 55.

But the books abound in rules of construction. They all have one end in view, and that is to ascertain and declare the intent of the act under construction. Contrasting the rule which requires a strict construction of penal statutes with the rule requiring that the intent of the legislature shall govern, Chief Justice Marshall, in *U. S. v. Wiltberger*, 5 Wheat. 95, as to the rule of intent, said:

"It is a modification of the ancient maxim, and amounts to this: that, though penal statutes are to be strictly construed, they are not to be construed so as to defeat the obvious intention of the legislature."

In *U. S. v. Hartwell*, 6 Wall. 395, the court, in speaking of this rule of strict construction of certain classes of statutes, said of the rule that:

"Whenever invoked, it comes attended with qualifications and other rules no less important. It is by the light which each contributes that the judgment of the court is to be made up. The object in construing penal as well as other statutes is to ascertain the legislative intent. That constitutes the law. If the language be clear, it is conclusive. There can be no construction where there is nothing to construe. The words must be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and overstrict construction. The rule does not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity which the legislature ought not to be presumed to have intended. When the words are general, and include various classes of persons, there is no authority which would justify a court in restricting them to one class, and excluding others, where the purpose of the statute is alike applicable to all. The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular, instead of the narrow technical, one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent."

Guided by these modifications of the strict construction rule, we will now proceed to test the soundness of the conclusion reached in regard to the construction of the train-railway act.

We must begin with the observation that it is an error to assume that under either of the street-railway acts the operativeness of any of the franchises conferred upon street-railway companies is made dependent upon the consent of municipalities. The power to consent is not a power of consent to the operation or vitality of the charter franchises. The consent which the city is to give is a consent to the construction of any such road in its streets. In support of the contention that municipal consent is essential to the full vitality of the charter franchises, much importance has been attached to the fact that the requirement of such consent is found in the train-railway act in the form of a proviso to section 34, and therefore to be construed as a limitation upon the granting section No. 33. The learned circuit judge seems to have attached much weight to the fact that this provision constitutes a proviso, for he says:

"The office of a proviso is usually that of a limitation." "It here introduces a limitation in two ways: First, by making the franchise operative only on consent of the city; and, second, by allowing the city, in giving its consent, to surround the exercise of the franchise with such further limitations as it may choose to impose."

While the ordinary purpose of a proviso is one of limitation, yet it is not always the case. It sometimes operates to broaden an act, and often is introduced by way of abundant and excessive caution. Provisos should be strictly construed, and their effect ascertained from a general view of the act to which they are attached. *Suth. St. Const.* § 222.

In the more elaborate street-railway act passed in 1867, and which must be looked to as one source of the city's power to pass the extension ordinance, this provision does not occur as a proviso. There the language of section 13 (being section 3548, *How. St.*) is that "any street-railway corporation organized under the provisions of this act may, with the consent of the corporate authorities of any city or village," etc., "construct, use, maintain and own a street railway," etc. This would seem to indicate that very little consequence is to be attached to the fact that the consent feature of the train-railway act appears in the form of a proviso. What the intent of the legislature was in requiring the companies organized under that act to obtain the "consent" of the city must be determined by much wider consideration of the questions involved.

To the practical operation of a street railway, three things were essential under the law of Michigan. These were:

First. Corporate capacity; this, because under the law of that state there seems to have been no provision by which natural persons could directly acquire the other requisite franchises.

Second. A franchise to operate the road and take tolls.

Third. A right to occupy particular streets with the necessary tracks and equipments.

These three requisites are distinct and separable. The first two are essentially franchises which could only come from the state; the third and equally essential requisite could not come from the state, and, if acquired at all, must come from the municipality within which it was proposed to exercise its substantial franchises. This conclusion is rested on the limitation imposed upon the legislative power of the state concerning purely municipal interests.

The constitutional provisions referred to are these:

"The legislature shall provide for the incorporation and organization of cities and villages, and shall restrict their powers of taxation, borrowing money, contracting debts and lending their credit." Article 15, § 13.

"The legislature may confer upon organized townships, incorporated cities and villages, and upon the board of supervisors of the several counties, such power of local legislative and administrative character as they may deem proper." Article 4, § 33.

"The legislature shall not \* \* \* vacate nor alter any road laid out by commissioners, or highways, or any street in any city or village, or in any incorporated town plat." Article 4, § 23.

In speaking of the effect of the restrictions upon state interference in local matters of municipalities, the supreme court of Mich-

igan, in *Allor v. Wayne Co.*, 43 Mich. 76-97, 4 N. W. 492, through Campbell, J., said:

"It is not, and it certainly cannot be, claimed that under our constitution there be any such thing as a municipal government which is not managed by popular representatives and agencies deriving their authority from the inhabitants. No business which is in its nature municipal can be controlled by the state or other outside authorities."

He cites *People v. Hurlbut*, 24 Mich. 44; *Hubbard v. Springwells*, 25 Mich. 153; *People v. Common Council of Detroit*, 29 Mich. 108; *Attorney General v. Holihan*, Id. 116. Judge Campbell, in the same opinion from which we have just quoted, adds:

"The municipal corporations of this state, as we have had frequent occasion to declare, are all organized in such a way as to preserve to the inhabitants full means of 'self-government.'" 43 Mich. 102, 4 N. W. 492.

It is impossible to draw from these provisions any recognition of inherent or ungranted authority in either the townships, villages, or cities of Michigan. That they do have the effect to limit materially the ordinary powers of legislatures over the purely local affairs of such communities is most obvious. It is equally obvious that in regard to purely local affairs the legislature can only act by conferring discretionary power in regard to such subjects upon the local authorities. If the legislature wishes to confer or withhold such power, it may do so. If it shall deem such powers expedient, it may confer them with such limitations as it shall deem wise. The power, when conferred, must be subject, as to its exercise, to both local discretion and administration. It can no more command the exercise of the power conferred than it could directly act in regard to such local concerns. From these constitutional limitations a policy favorable to local self-government is plainly deducible; and, in the interpretation of legislative provisions designed to confer power over purely local concerns, consideration should be given to this state policy, as well as to the fact that the legislature ought, in the interest of local government, to confer a wide discretion upon municipalities, being itself incompetent to legislate directly upon such concerns. It is evident that the legislature could not grant to any street railway the right to construct and operate its road upon any particular street. It may provide for the incorporation of such companies, and endow them with the franchises necessary. For the necessary street rights they must be referred to the only authority which can grant such privileges,—the local government of the municipality in which it is proposed to operate such road. It may confer power upon such municipalities to grant or withhold such easements. The right to make such grants may be conferred, subject only to such terms and conditions as the municipality may impose, or it may surround the power with such limitations as it shall deem wise. It cannot require that the municipality shall exercise the powers conferred. That must be left to the discretion of the municipal authority. If this view of the limitations upon the legislative power of the state be sound, it must follow that when the state acts in the only way that it can act,—by conferring upon the municipality the powers necessary to the establishment of such

public facilities of intra-city travel,—and does this in general terms, limitations upon the discretion of the municipality in the exercise of that power ought to be plainly apparent before the court will be justified in declaring their existence.

The design of the legislature was to provide for what was becoming, under the demands of modern civilization, a pressing public necessity,—a necessity as indispensable as lighted or paved streets; yet they were public facilities, the demand for which was only felt in the cities of the state, and was a matter of strictly local interest. The state could only authorize the incorporation of companies, and endow them with such substantial franchises as would enable them to operate such roads whenever the municipalities should grant the necessary consent to the occupation of their streets with their tracks and equipments. This it could only do by a general law applicable to all companies organized to carry on that business. The just, reasonable, and fair interpretation of the provision in each act requiring consent is that nothing in either act shall be construed as authorizing any such road to occupy the streets of any city with its tracks and cars without first obtaining from such city the right of way necessary, which right may be granted by the city upon terms and conditions satisfactory to it and acceptable to the company, and that this consent to such construction and occupancy shall not be subject to repeal or alteration when granted and accepted.

If these two acts be treated as not in themselves conferring any power to consent to the use of the public streets for street-railway purposes, it is because the legislature deemed that such power already existed. If this recognition of the existence of the requisite authority be confined, as to Detroit, to the legislative authority of that city, under its charter powers, to grant a revocable easement, franchise, or license, then it would seem to follow that a necessary effect of the provision found in each of these acts prohibiting the repeal or alteration of the consent granted after acceptance, would operate to destroy the former power of revocation, and make any subsequent exercise of the original legislative power irrevocable. However this may be, we are of opinion that these acts do directly confer power to consent to such use of the streets, and that, when such consent is once given and accepted, it is irrevocable for the term fixed by the grant. The power to consent is in and of itself the power to grant an easement. The "consent" is an easement, and the act of consenting to the use of the streets for street-railway purposes is the act of granting an easement in the streets. Consent to such use of the streets constitutes a typical easement, and the right granted thereby is an interest in realty, being an incorporeal hereditament. Whether this easement is subject to revocation, or is in perpetuity, or for a term of years, may depend upon the terms of the ordinance or the further terms of the act conferring the power to grant the consent.

What the legislature meant by the "consent" it intended the municipality should grant if it saw fit is illustrated by section 10 of the train-railway law. That section permitted such companies to enter upon and condemn, under the state's right of eminent domain,

a right of way 100 feet in width, but limited this right by prohibiting the location of such road "through any orchard or garden without the consent of the owner thereof." This did not, in any true sense, make the operation or exercise of the franchise granted dependent upon the owner of the orchard or garden. It simply said to such companies:

"We grant you the power to enter upon and condemn a right of way; but if, in the exercise of your franchises, you wish to locate your road through an orchard or garden, this power shall not be taken to authorize you to locate your road through such orchard or garden without you obtain the owner's consent,—that is, unless you, by agreement, obtain an easement from the owner."

It is not enough that the incorporators have obtained a franchise to be an incorporation, nor that the corporation has been endowed with power to operate a railroad, commercial or street; but it must also acquire, from those owning or controlling the property on or over which it is proposed to run their road, a permission to occupy sufficient land for that purpose. In this sense it may be said that every railway company having the requisite franchise to acquire, own, and operate such road, and not having the power of eminent domain, is unable to exercise its franchise to operate such a road until it shall first obtain the "consent" of those owning or controlling the land over which its road must be constructed. But it is not true that either the franchise to construct or operate a railway comes from the owner of private lands or the municipal authorities controlling the public streets. The right to construct and operate a road through an orchard or garden or on the public streets is dependent, in the first instance, upon the consent of the owner of the orchard or garden, and, in the second, upon the consent of the local government controlling the public streets. This consent or permission, whether it come from the private owner or the local government, is in all respects, whether it be permanent or for a term of years, or at the will of the one consenting, what the law denominates an "easement," the duration of which is dependent only upon the extent of the interest the grantor had authority to grant, and the terms of the consent itself. That the power, whatever it may be, is not an implied power, is most obvious. The legislature, it must be remembered, did not have the power, independently of the city, to grant to any company a right to enter upon and occupy the streets of Detroit. Now, if it had granted the right to enter upon a particular street and occupy it for such purposes without in terms mentioning the consent of the city, it will be agreed that there was an implied power granted the city authorizing it to consent; but when, as in these two acts, it is expressly provided that the consent of the city must be first obtained, and then the legislature proceeds to expressly state how that consent shall be given,—that the terms and conditions must be such as are satisfactory to the city, and that, after such consent has been given and accepted, the right, franchise or easement shall not be destroyed or unreasonably impaired by any regulation or conditions to be made thereafter by the city,—it seems too obvious for argument that a power is expressly given.

An express statement of the mode in which an implied power is to be exercised, and an express statement of what shall be its effect when exercised, is an inexplicable anomaly.

That the legislature regarded the "consent" of the city to such use of the streets as in itself an easement of way is most apparent when we look to other sections of the same acts. By an amendment of the street-railway sections of the train-railway act it was provided that all such corporations should have the power to borrow money for the purpose of building and operating their roads, "and for that purpose to mortgage," etc., "their road and superstructure, fixtures, rolling stock and equipments, and whenever such road shall have acquired a simple easement or right of way for its proposed road, \* \* \* any mortgage or mortgages executed by such corporation, \* \* \* upon the route or routes where such easement or right of way has been obtained, as aforesaid, shall be a legal and valid lien upon the right of way so obtained to the entire extent of the interest of such corporation \* \* \* therein, \* \* \* and every such mortgage shall be deemed a mortgage upon real estate." Substantially similar power is conferred under the subsequent street-railway act.

The case of *People v. O'Brien*, to which we have several times referred, is again in point, as to the effect of a municipal power to consent to the construction of such road. In that case the court (as we have in another part of this opinion shown) held:

First. That the "consents" were the muniments of title to the enjoyment of the rights acquired thereunder.

Second. That the limitation stated in the charter was not operative as a limitation upon the power of the city to grant an easement in perpetuity.

The third point, as to the effect of a repeal of the charter upon the rights thus acquired, is not in point here.

It must follow that, if a grant in perpetuity to a 1,000-year corporation was good, a grant for 30 years to a 14-year corporation would be equally good, under a like power to consent.

The same court, in the case of *Miner v. Railroad Co.*, 123 N. Y. 242, 25 N. E. 339, applied the same principle in a condemnation case. A railway corporation was organized with a life of 50 years. It condemned a right of way across the lands in question. Subsequently, it became consolidated with other railroad companies, who took and acquired all its rights, property, and franchises. An action of ejectment was brought to recover the right of way which had been condemned, the life of the corporation which condemned it having expired. It was held that the condemnation of the easement was, in the very nature of the transaction, intended to be a permanent appropriation of the right of way for railroad purposes, and that the easement thus appropriated was not limited to the life of the corporation.

Our conclusion upon this branch of the case is:

First. That the legislature meant, by the term "consent," no more and no less than would be meant by "right of way" or "ease-

ment," "Consent," in the connection used, is synonymous with "easement" or "right of way."

Second. This power to "consent" is not an implied power. The power is directly imported by the language of the act. To say that the municipalities shall have power to consent to such use of the public streets is to say no more than is imported when the legislature says that such company may put down their tracks with the consent of the city, on terms and conditions agreed upon between the city and the company. In the latter case, quite as plainly as by the first form of expression, the legislature permits the exercise of the power to grant an easement for such purposes. No rule of construction would authorize us to say that in the one form the power is any more express than in the other.

6. We are thus led to conclude that these street-railway acts directly confer upon the municipalities of the state power to grant to street-railway companies such an easement of way in the streets as is requisite for the purposes to be accomplished. That power is conferred without any express words of limitation. On the contrary, the "terms and conditions" upon which the grant is to be made are left to the discretion of the local government. Unless there be some limitation implied by other considerations not yet alluded to, the term for which such a grant may be made is just as much a matter about which municipal discretion is to be exercised as any other of the terms of the grant.

One who contends that a provision of an act must not be read literally must be able to show one of two things, either that there is some other provision which cuts down or expands its meaning, or else that the provision itself is repugnant to the general purview. *Nuth v. Tamplin*, 8 Q. B. Div. 253; *Suth. St. Const.* § 238.

It has been urged that by necessary implication this power is limited to an easement not exceeding the duration of the substantial charter franchises, and that such limitation is implied:

First. From a consideration of the policy of the state concerning the duration of corporations as shown by the state constitution.

Second. From the limitation imposed by the legislature upon the life of street-railway companies.

Third. An apprehension of possible evils to result from perpetual or long grants of street privileges.

Section 10, art. 15, of the state constitution provides that no corporation, except for municipal purposes or for the construction of railroads, plank roads, and canals, shall be created for a longer period than 30 years. It has been much debated as to whether street railways come within this prohibition. Street railways were practically unknown when the constitution was adopted. The provision referred to seems to except out of the limitation all that class of quasi public corporations to which a street railway belongs. The same reasons which would demand a long continuance of the powers of a commercial road, a canal, or a plank road, apply to a street railway. These considerations seem to indicate that a railway is not within the class of corporations to



which the constitutional inhibition is applicable, and, if applicable at all, it is only so because the excepted corporations are specifically named. The spirit of the provision would include such companies within the exceptions. The legislature, by the limitation imposed upon the life of street-railway corporations, was probably of opinion that the letter of the constitution operated to require them to apply the limitation, inasmuch as a street railway is not a commercial railway. In any view of the question, that constitutional provision does not afford evidence of any such strong public policy as should operate to impose a limitation upon the power of the city to make a grant of a right of way extending for 16 years beyond the corporate life of the grantee.

The evils to be apprehended from long grants of easements to such companies seem to us not to be such as to justify a constructive limitation on that account. The power to make an irrevocable contract giving an easement of some considerable duration is an inseparable incident in any scheme for furnishing such public facilities as a street railroad. The duration of such grants must be a question of discretion to be exercised by some public authority. That the exercise of that discretion should be left to the local government as a question of purely local interest seems most consistent with the proprieties of the case, and most in accord with the decentralizing policy so peculiar to the state of Michigan.

Lord Eldon, in *Wilkinson v. Adam*, 1 Ves. & B. 466, quotes Lord Hardwicke as saying that "a necessary implication means, not natural necessity, but so strong a probability of an intention that one contrary to that which is imputed to the party using the language cannot be supposed." This definition meets our approval. Applying it to the considerations urged as sufficient to impose a limitation by implication, we are unable to say that they afford "so strong a probability of an intention that one contrary to that which is imputed cannot be supposed." *State v. Union Bank*, 9 Yerg. 164.

The decree must be reversed, and bill dismissed.

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CITIZENS' ST. R. CO. v. CITY RY. CO.

(Circuit Court, D. Indiana. November 10, 1894.)

No. 8,866.

1. STREET RAILROADS—RIGHT TO USE STREETS.

The general act (Act Ind. June 4, 1861; Rev. St. Ind. 1881, § 4143 et seq.)<sup>1</sup> under which a street-railway company was organized, giving perpetual corporate existence, required that, before commencing the construction of any street railroad through the streets of any city, consent of the common council thereto should be obtained. A city ordinance gave such consent to the company to lay its tracks in certain streets, with the right to operate the railway for 30 years. During that period the term

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<sup>1</sup> Rev. St. 1891, § 5450 et seq.

was extended by ordinance to 37 years. *Held* that, whether the city had or had not authority to impose such limitation of time, the company had, during the enlarged term, an unexpired franchise, which the courts should protect against wrongful impairment, the remedy being the same whether its rights in the streets were perpetual or limited, although the two positions were inconsistent.

2. SAME—POWER OF CITY TO LIMIT TERM OF USE OF STREETS.

The city had no power so to limit the term. Per Woods, Circuit Judge, Baker, District Judge, dissenting.

3. SAME—GRANT TO RIVAL COMPANY OF RIGHT TO USE STREETS.

Complainant, a street-railway company organized under an act (Act Ind. June 4, 1861; Rev. St. Ind. 1881, § 4143 et seq.)<sup>1</sup> which required it, before commencing the construction of its road through the streets of the city, to obtain the consent of the common council thereto, obtained such consent to lay its tracks in certain streets, and to operate the railway for a certain term. Before the expiration of that term, an act constituting a new charter for the city (Act Ind. March 6, 1891) created a board of public works, with power to authorize, by contract, street-car companies to use any street in such city, and to prescribe the terms and conditions of such use, such contracts to be approved by the common council; and a contract was so made and approved, granting to defendant company the right to lay and maintain lines of street railway on certain streets, many of which were occupied by complainant's tracks. *Held*, that complainant was not entitled to equitable relief in respect to streets for its occupation of which it had not obtained the consent of the city, but that, as to streets occupied by it with such consent, the power to make new contracts was not intended as a repeal of franchises of existing companies, and defendant should be enjoined from running its cars on complainant's tracks, or laying its rails so as to prevent or needlessly impede the running of complainant's cars.

This was a suit by the Citizens' Street-Railroad Company against the City Railway Company to enjoin defendant from interfering with complainant's use of certain streets in the city of Indianapolis, or with the operation and maintenance of complainant's street-car lines in said city, and to establish complainant's rights in the premises. A motion to dismiss the bill was denied (56 Fed. 746), and the cause was heard on the pleadings and proofs.

An ordinance of the city of Indianapolis passed January 18, 1864, contained the following provisions:

"Section 1. Under and by virtue of an act of the general assembly of the state of Indiana, entitled 'An act to provide for the incorporation of street railroad companies,' approved June 4th, 1861, and by virtue of the powers and authority of the common council otherwise by law vested, consent, permission and authority are hereby given, granted and duly vested unto the company, organized with R. B. Catherwood as president, a body politic and corporate, by the name of the 'Citizens' Street-Railway Company of Indianapolis,' and their successors to lay a single or double track for passenger railway lines, with all the necessary and convenient tracks for turnouts, side tracks and switches, in, upon and along the course of the streets and alleys of the city of Indianapolis, hereinafter mentioned; and to keep, maintain, use and operate thereon railway cars and carriages, in the manner, and for the time, and upon the conditions, hereinafter prescribed."

"Sec. 15. The right to operate said railway shall extend to the full time of thirty years from the passage hereof; and the said city of Indianapolis shall not, during all the time to which the privileges hereby granted to said company shall extend, grant to, or confer upon any person or corporation, any privilege which will impair or destroy the rights and privileges herein granted to the said company."

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<sup>1</sup> Rev. St. 1894, § 5450 et seq.

A further ordinance, passed April 7, 1880, provided that section 15, quoted above, be so amended as to read "thirty-seven" years instead of "thirty."

Benjamin Harrison and Miller, Winter & Elam, for complainant.

A. C. Harris and Elliott & Elliott, for defendant.

Before WOODS, Circuit Judge, and BAKER, District Judge.

WOODS, Circuit Judge. In respect to the question of jurisdiction, I am content with the decision heretofore made in this case, and reported in 56 Fed. 746.

The corporate existence and the franchise of a street-railway company organized under the law of 1861 (Rev. St. Ind. 1881, § 4143 et seq.)<sup>1</sup> are derived directly from the state, but are subject to the condition that the consent of the common council shall be obtained to the location, survey, and construction of any street railroad through or across the public streets of any city before the construction of the same shall be commenced. The consent of the common council being required, it is in a sense true that the franchise is granted by the city, since the ultimate right is acquired or becomes effective only upon the giving of that consent. *Andrews v. Pipe Works* (7th Circuit) 10 C. C. A. 60, 61 Fed. 782. The power to construct tracks, switches, side tracks, or turnouts upon the streets, and, by implication, the right to run cars thereon, is conferred by the statute, or, in other words, is derived directly from the state, so that, strictly speaking, the city does not grant the franchise, but simply consents to its exercise. *Detroit Citizens' St. Ry. Co. v. City of Detroit* (C. C. A., 6th Circuit; decided Oct. 2, 1894) 64 Fed. 628. The right to give or to refuse consent implies the right to prescribe terms, and the terms need not, as I conceive, have direct relation to the specified subjects of "location, survey, and construction." They may embrace any reasonable requirement concerning the operation, as well as the construction, of the road, consistent with the statute.

Carefully read, the first and fifteenth sections of the ordinance of January 18, 1864, show the unqualified or absolute consent of the common council given to the Citizens' Company "to lay" its tracks upon the streets named; but its consent to the use of cars on the tracks, or to the operation of the railway, was extended only to the term of 30 years. Is that restriction valid and binding? I am inclined to the view that it is not.

Subject to the reserved power of the legislature to amend or repeal the act, perpetual corporate existence was given in explicit terms; and, in the absence of express or implied limitation thereon, the necessary presumption is that the franchise granted was intended to be of like duration, subject only to legislative revocation. It is not to be supposed that the legislature intended that there should be corporate existence without a franchise,—the only reason for such existence. It is not a question of perpetuity or of irrevocable right. If it were, different rules of construction would prevail. No presumption or inference could be allowed in favor of a perpetual right, and every reasonable intendment against it should be in-

<sup>1</sup> Rev. St. 1894, § 5450 et seq.

duled. But danger in that direction lurks rather in the supposed power of the common council. If it had authority to agree to a franchise for 30 years, it might, with equal conclusiveness, have stipulated for one of 60 or 90 years, or any longer term, imposing upon the city, it might be for generations, the evils of a monopolistic perpetuity. Thirty years are too many for a burdensome or unjust grant. As was said in *Taylor v. Railway Co.*, 80 Mich. 77, 45 N. W. 335, it is highly important that the legislature should retain the power to pass enactments for the control of these quasi public corporations suitable to changed conditions of affairs. The village or small city cannot well provide regulations and ordinances applicable to a large city.

If agreements by common councils like the one in question are authorized and binding, they must, when made, operate to suspend, pro tanto, the reserved power of the legislature, by repealing the act, to terminate the life of companies organized under it. They are inconsistent with that power. On the contrary, if, when made, the agreements create no vested right because made subject to the power of the legislature to revoke or modify them, then in legal contemplation they are without force, and the power of city councils to make them is a mere pretense. It is a delegated power to make an agreement which cannot bind, or ought not to bind, one party, the corporation, because it does not bind the other party, the state. In respect to such powers the city is the agent of the state; and, besides being anomalous, the proposition that the city and company will be bound by such contracts, and the state not bound, is manifestly unjust and unfavorable to the public interests.

The statute is a general one, designed for uniform application to all cities, but by the proposed construction uniformity is impossible. An amendatory act could not affect all cities alike, and even in the same city one company might be amenable to legislative action from which another company would be exempt. It was well to provide, as was done in the twelfth section of the act of 1861, that the exclusive powers of the cities over their streets should remain unimpaired, except as necessarily affected by the presence and operation of the railways authorized to be there. Those powers, it was held in *Eichels v. Railroad Co.*, 78 Ind. 261, did not include the power to grant the use of streets for street railways, and they can be regarded, since the passage of the act of 1861, as having relation, not to the duration or termination of street-railway franchises, but rather to the manner of their exercise. If it could be said that the city had authority in the exercise of local self-government, and by virtue of its general control over streets, to grant such franchises or to consent to their enjoyment, it might follow that a grant for a term of years would be valid, and would confer a vested property right which could not be destroyed by a repeal of the charter of the company to which it was granted. For instance, in New York the title to streets is vested in the city, and by reason of that fact it was held, in *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, that an easement granted by the city of New York to a street-railway company for a limited time con-

stituted an indefeasible title in the land, which was not terminated by a repeal of the railway charter; but that could not be so in Indiana, where the city has no title to the streets, and has not authority by virtue of its general powers, and outside of the street-railway acts, to grant the use of streets to street-railway companies. The general powers of control, as defined in the city charter, are the same from one day to another, and must be of constant application, whether the street railways are operated, and the franchises owned, by one company or another. The power to limit or to terminate such franchises is a part of the power to grant them, and upon reason, as well as authority, belongs to and remains in the sovereign or legislature, unless expressly or by clear inference bestowed elsewhere. The question of local self-government, manifestly, is not essentially involved.

This view involves no fraud or hardship upon the people of the city, because it is always in the power of the legislature to authorize the imposition upon any company of additional restrictions, productive of revenue or other advantage to the public. The case of *Sioux City St. Ry. Co. v. Sioux City*, 138 U. S. 98, 11 Sup. Ct. 226, affords an illustration. In the nature of things, a street railway, once established where needed, will be of perpetual and increasing utility; and there seems to be no good reason why the franchise should cease while the utility lasts, though there may arise from time to time, and within periods much shorter than 30 years, necessity for changing the regulations, limitations, or conditions under which the franchise shall be employed. How far the power to make such changes shall be committed to local authorities is a matter of legislative discretion. Under the act of 1861 it is retained by the legislature. That body may amend, or, if it chooses, it may repeal, the statute, and so end all franchises and corporate life granted under it.

According to some authorities, when a charter is repealed, provision must be made for a disposition of the corporate property without confiscation. In *People v. Boston, etc., Ry. Co.*, 70 N. Y. 570, speaking of the reserved power to alter, amend, and repeal laws authorizing corporations, the court said:

"Under this reserved power the legislature may impose upon railroad corporations such additional restrictions and burdens as the public good requires. It may not confiscate property."

In *Dash v. Van Kleeck*, 7 Johns. 477, it was said:

"It is repugnant to the first principles of justice and the equal and permanent security of rights to take, by law, the property of an individual without his consent, and give it to another."

These expressions are reiterated and approved in *People v. O'Brien*, *supra*. See, also, *Detroit v. Detroit & H. P. R. Co.*, 43 Mich. 140, 5 N. W. 275. But in *Greenwood v. Freight Co.*, 105 U. S. 13, 19, Justice Miller, speaking for the court of the effect of the repeal of the charter of a corporation, said:

"If the essence of the grant of the charter be to operate a railroad, and to use the streets of the city for that purpose, it can no longer so use the streets of the city, and no longer exercise the franchise of running a railroad in the

city. In short, whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the state, is abrogated by the repeal of the law which granted these special rights. Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not, in their nature, depend upon the general powers conferred by the charter, are not destroyed by such a repeal; and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means within their power. The rights of the shareholders of such a corporation to their interest in its property are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights."

In that case, which concerned a street-railway franchise, the repealing act contained express provision for compensation to be made by the corporation, which was authorized to "enter upon and use any part of the tracks of any other street railroad," if the corporations interested could not agree upon "the compensation to be paid therefor;" so that the effect of a repeal without provision for such compensation was not before the court. Nevertheless, the principle declared, I think, must be accepted as sound. The unrestricted right of repeal being reserved by the legislature, a repeal must be regarded as valid and effective, whether or not accompanied with provisions for the just disposition of the corporate property rights. If such provision is not made, "there must remain in the courts the power to protect those rights." But, without statutory provision to that effect, it is not perceived how a court could compel a new company to take the tracks and equipment of the company whose franchise had been terminated.

If, therefore, the right of the Citizens' Street-Railroad Company to occupy the streets of the city and run its cars upon existing lines has ceased, and under its contract the City Railway Company has a right, not, of course, to take possession of and use the tracks of the other company, but to put its own tracks in the place thereof, then we are confronted with a case either of indirect confiscation or of the destruction of property. The Citizens' Company must either remove its tracks, destroying their value, or it must accept such price as the City Company shall choose to give, and that is equivalent to confiscation. While an enactment to that effect would perhaps not be invalid, a construction which leads to such results should not prevail when a reasonable interpretation is possible which involves no wrong or hardship either to the parties or to the public. The decision in *Lewisville Natural Gas Co. v. State*, 135 Ind. 49, 34 N. E. 702, overruling *City of Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575, 28 N. E. 853, is, I think, not without significance in respect to the interpretation of the statute now under consideration.

The power given street-railway companies by the statute to mortgage their property and franchises indicates a purpose that the franchise should be a continuing one. Of what value is a mortgage on a franchise which is to expire before or near the time when the mortgage will be enforceable?

The doctrine that parties may, by their conduct, put an interpretation upon their contracts, is not applicable where adverse pub-

lic interests are involved. The public is not bound by the acts of officers contrary to law, no matter how long maintained or acquiesced in. According to *Reissner v. Oxley*, 80 Ind. 580, to which reference has been made, parties may interpret their own contracts "so long as their interpretation does not result in a contract which, for some reason, is in itself unlawful."

The act of 1891, which affects the city of Evansville alone, cannot be regarded as a legislative construction which should operate to give the act of 1861 a meaning which otherwise, in the judgment of the court, it did not have. That act prohibited the common council and other authorities of that city from extending any franchise or franchises affecting the streets of the city during the term for which they were originally granted by the city councils or other authorities. This presupposes, but does not sanction, the original grant for a term, nor does it confer a new power to make such term grants after the expiration of existing terms. It simply forbids what in this argument has been claimed to have been unlawful without such inhibition, namely, agreements for extending terms before they had expired. If such agreements had been theretofore unlawful, this statute should not be regarded as a legislative declaration of their legality.

If the common council had authority to impose the original limitation of 30 years, then, in my opinion, the 7-years extension was valid. The ordinance of April 7, 1880, granting that extension, if otherwise valid, as I think it is, was not without consideration,—in the mutual obligations and interests of the parties; and granted, as it was, at the request of the company, its acceptance should be inferred.

Upon either view of the council's power, therefore, the complainant has an unexpired franchise, for the protection of which it was entitled to invoke the action of the court; and that, too, I think, without being driven to an election between the two theories. The remedy sought is the same in character, whether obtainable upon one proposition or the other. The same public interest which forbids an interpretation of the contract by reference to the conduct of the parties, excluding the idea of estoppel, bears upon this question, and entitles the plaintiff, upon a proper presentation of the facts, to a decree according to the law as determined by the court; and, even if no public right were involved, it seems to me that an election would not be necessary.

This brings us to a consideration of the rights of the defendant, the City Railway Company, and its alleged doings in derogation of the rights of the complainant.

By the act of March 6, 1891, constituting a new charter for Indianapolis, there was created a board of public works, which was given power "to authorize and empower by contract telegraph, telephone, electric light, gas, water, steam, street car or railroad companies to use any street, alley or public place in such city, and to erect necessary structures therein, and to prescribe the terms and conditions of such use, to fix by contract the prices to be charged to patrons: provided, that such contracts shall in all cases be submitted by said

board to the common council of such city, and approved by them by ordinance before the same shall take effect." Acts 1891, p. 169. Under this power the contract of April 24, 1893, as set out in the ordinance of approval, passed the next day, which is made an exhibit in complainant's bill, was executed. In terms it granted to the defendant company "the right to lay and maintain" its proposed lines of street railway, to be operated by electricity or other improved power, upon certain streets named, many of which are already occupied by the tracks of the complainant, and required the lines to be so located, it is claimed, as necessarily to interfere with the plaintiff's line, and obstruct the running of its cars. The proviso in the fourth section of this contract is noteworthy. It reads:

"Provided, however, that in addition to the lines herein specified, the party of the second part will be granted the right to build the line extending from Washington street to the city limits, both north and south, on such streets as may be designated by the board of public works, and approved by ordinance passed by the common council of said city."

There is here no stipulation, nor, as I think, fair implication, that the additional line so proposed to be granted shall come under, or be in any particular governed by, the agreement made in respect to other lines, and it does not appear that the board made any further agreement on the subject. It simply designated the streets upon which the additional lines should be laid; and, for the apparent purpose of supplying the defect, the common council added to its ordinance of approval, passed May 13, 1893, a clause to the effect that the right so conferred should be subject to the terms, provisions, and conditions of the contract of April 24th, and the ordinance approving that contract.

By the act of 1891, distinct powers are conferred upon the board of public works and upon the common council, respectively, and a just regard for the rights of the public requires that the distinction should be respected. The power of the council in this matter was simply to approve or refuse to approve the contract of the board. If the mere designation by the board of the additional line amounted to a contract, it was the province of the council to approve it in that shape or disapprove it. There is nothing to show that the board intended, and it certainly did not stipulate, either expressly or by necessary implication, that the lines so designated should be held and operated under the previous agreement. The rule is elementary "that, when the mode of contracting is especially and plainly prescribed and limited, that mode is exclusive, and must be pursued." Dill. Mun. Corp. § 449; *City of Superior v. Norton* (C. C. A., 7th Circuit) 63 Fed. 357; *Terre Haute v. Lake*, 43 Ind. 480; *Francis v. Troy*, 74 N. Y. 338. In *Head v. Insurance Co.*, 2 Cranch, 127, 169, Chief Justice Marshall said:

"The act of incorporation is to them an enabling act. It gives them all the power they possess; it enables them to contract; and, when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated." Approved *Merrill v. Monticello*, 138 U. S. 673, 687, 11 Sup. Ct. 441.

While it is not a question which need be decided, I incline strongly to the opinion, upon the showing made, that the City Railway



Company acquired no right to lay its so-called "north and south line."

On the other hand, I am of the opinion that the complainant is not entitled to equitable relief in respect to its alleged right in the street so designated for the use of the defendant. Prior to that designation the complainant had no lines upon those streets except a fragment on Pennsylvania street, which had been practically, if not legally, abandoned. By its own charter, as I construe it,—indeed, according to the plain letter,—it had no right to commence construction on a particular line without first having obtained the consent of the council to the "location, survey, and construction" proposed. The necessity for this consent was not affected, as I think, by anything contained in the ordinance of January 18, 1864, or in the supplemental ordinance of September 18, 1865. Besides, the entry of the complainant upon those streets was in violation of the ordinances of 1889 and 1893; and, if rights were thereby acquired, the complainant, in view of all the circumstances, should rely upon the courts of law for their defense, rather than look to equity for their establishment. The question whether the last-named ordinances are valid or not need not be considered, because by its own charter the complainant had no right to enter upon a street without the consent of the city, and the city was free, with or without reason, to give or withhold its consent.

In respect to other streets, the defendant has denied, by its answer, the assertion of any claim to the present occupancy of the part of any street upon which the tracks of the complainant are laid, or that it desired to lay and operate electric lines on any street on which the complainant was, when its original bill was filed, operating any such electric line, "until after the expiration of its right thereto, if any it has." But from the terms of the contract and ordinance under which the rights of the defendant are asserted, from the notice which it served upon the complainant, from all the evidence upon the point, as well as from the arguments of counsel, it is evident that the defendant has been acting upon the assumption that the complainant's franchise and its right of possession have ended, and that under its contract the defendant may take the possession which the complainant has held of the streets, if not, indeed, of the complainant's tracks.

The power given by the act of 1891 to authorize and empower, by contract, companies of the various kinds named to use any street of the city, I think it clear, was not intended as a repeal of the franchises of existing companies; no more so of street-railway companies than of the various railroad companies whose roads occupy streets of the city. In so far, therefore, as the contract of April 24, 1893, by its terms confers, or attempts to confer, upon the defendant company the right to lay its tracks in the place of the tracks of the Citizens' Company, or to appropriate those tracks, it is an invasion of the rights of the latter company, and should be enjoined. I am not to be understood as meaning that under the act of 1891 the city may not authorize the defendant or any other company to lay its tracks in the same streets on which the complainant's tracks

are laid, but without additional legislation the cars of one company may not, without consent, run upon the rails of another company, nor may the rails of one be so laid as to prevent or needlessly impede the running of the other's cars.

Decree may go accordingly.

**BAKER**, District Judge. The franchise to be a corporation, with the right of perpetual succession, is derived by the complainant directly from the state. Rev. St. Ind. 1881; § 4143 et seq.<sup>1</sup> The statute which imparts to it its corporate faculties confers upon it no right to enter upon the streets of any city to construct and operate a street railroad therein. It is expressly enacted that "all street railroad companies shall first obtain the consent of the common council to the location, survey and construction of any street railroad through or across the public streets of any city before the construction of the same shall be commenced."

It is clear that the state has not undertaken directly to confer upon the complainant the right to occupy and use the streets of the city for street-railroad purposes. Under the franchise and powers granted to it by the state, it is without authority to enter upon the streets of the city to construct and operate a railroad. This right is derivable from the consent of the city alone. Whether consent shall be granted or refused is exclusively within the control of the city. The right to occupy and use the streets of a city for railroad purposes is a franchise, and is wholly distinct from the franchise to be a corporation, which is derived directly from the state. The latter franchise cannot be sold or conveyed unless express statutory authority is granted for that purpose. The franchise to use the streets for railroad purposes—the right of way on which to build and operate a railroad for profit—is the subject of sale and conveyance. *Railroad Co. v. Delamore*, 114 U. S. 501, 5 Sup. Ct. 1009. The consent of the city imparted to the complainant a valuable franchise, which, without such consent, it would not have possessed. The state gave it the capacity to receive and enjoy this right or franchise, provided the city saw fit to grant it. The power to grant or refuse resided in the city alone, and it carried with it the right to impose any terms not forbidden by law. If the city may refuse permission to use the streets at all, it must have the right to fix a limit to the term of their use. The greater power must include the less. He who can give the whole can give a part. He who can grant absolutely can grant with a condition, reservation, or limitation. Whether street railroads shall be permitted to occupy the streets at all is left wholly with the city to determine upon its own judgment of the public convenience and welfare. The ordinance of 1864 was an entirety, to be accepted or refused just as it was, and its acceptance was a condition precedent to the occupancy of the streets. Nothing, therefore, could make the ordinance a consent but the performance of the condition,—the acceptance of the ordinance as a whole. *City of Allegheny v. Millvale, E. & S. St. Ry. Co.* (Pa. Sup.) 28 Atl. 202.

<sup>1</sup> Rev. St. 1894, § 5450 et seq.

The power to determine whether, and how long, street railroads may occupy the streets of a city, primarily resides in the state; but it is a power whose exercise has been wisely delegated to those who are directly interested in these questions. There is less danger of wrong and injustice in committing their determination to the city than there would be if the legislature should determine them directly. The authorities of the city acting upon matters of local concern directly affecting themselves and their fellow citizens are not more likely to abuse their trusts in fixing the terms upon which a street railroad may occupy the streets of the city than the legislature would be. Local self-government and home rule in matters of municipal concern are of the essence of a republican form of government. Abuse of these delegated powers are securely guarded against by the superintending power of the state to correct them. It seems to me that the common council had ample power to grant to the complainant the right to use the streets for 30 years, subject to the paramount power of the state to alter the term.

The fact that the complainant is invested with perpetual corporate existence does not, in my opinion, in any wise affect the power of the city to limit the use of the streets for railway purposes to a definite term of years. A corporation having a limited term of existence may acquire a title to property extending beyond the term of its corporate life. So, on the other hand, a corporation having perpetual existence may acquire property for corporate use for a term of years or in fee, to be determined by the terms of the grant under which its title is acquired.

Nor does the power of the state to alter the term, in my judgment, affect the binding force of the contract between the city and the street-railroad company. The obligation of a contract or a law is not affected or impaired by the mere fact that it may be determined by the happening of some uncertain event in the future. Until the contingency arises, upon the happening of which their existence is to be determined, they are as binding and obligatory as though they were never to terminate. While the power of the state to alter or repeal remains unaffected, neither the city nor the railroad company retains any rightful power to impair or defeat the binding force of the contract evidenced by the ordinance and its acceptance.

Neither does this view result in the confiscation of corporate property, nor in injustice to either the city or the railroad company. Each enjoys exactly what was mutually and understandingly agreed upon. "*Consensus facit jus.*" The denial of this right, on the contrary, would operate as a fraud upon the inhabitants of the city. It cannot be doubted that, if it had been understood at the time the ordinance was adopted that the complainant would thereby acquire the right to use the streets in perpetuity, it would have been required to yield greater returns to the city than were exacted, or it would have been denied the right to use them at all. If it be conceded that the necessity and utility of street railroads will increase with the growth of the city's population, still the supply of such need may be, as it has been, safely committed to those charged

with the conduct of its municipal affairs. Courts ought not to construe the statutes, unless such construction is imperatively demanded, so as to deny to the city the power to determine, upon its view of the needs of the public, when and how long and by whom its streets shall be occupied by railroad tracks. Since the parties, by mutual contract, have agreed on the measure of their respective rights, no question can arise as to what ought to be done with the property of complainant when its contract rights expire by efflux of time, further than to protect the rights of each as fixed by the contract.

Nor does the fact that power was given to mortgage its property and franchises enlarge the right of the complainant to occupy the streets. The mortgagees and bondholders were bound to inquire into the title of the mortgagor, and they will be presumed to have made their investment on the faith of the title as disclosed by the statute of the state and the ordinances of the city. No injustice is done them, for they get precisely what they contracted for. If it should be held that the complainant acquired, under the ordinance, a right to the use of the streets in perpetuity, it would obtain a franchise of inestimable value, contrary to the terms of the ordinance, and in violation of the rights and just expectations of the inhabitants of the city.

In my opinion, the common council had the power to agree with the complainant upon the length of the term, as a condition of its consent to its occupancy of the streets. Having the right to agree upon the term, it follows that it had the right to agree upon an enlargement of the term. In my judgment the enlarged term was validly granted upon a sufficient consideration; and it has been accepted, so that the rights of the parties have become fixed beyond the power of change by them except by mutual consent.

It follows that the complainant has an unexpired franchise, for the protection of which against wrongful impairment it has the right to invoke the aid of the courts. Nor do I think the complainant is remediless because it relies upon inconsistent positions for relief. The theory upon which it seeks to maintain its right to relief is the same whether its franchise to use the streets is perpetual or whether it expires in seven years. The relief obtainable in the present suit is the same in kind whether its rights in the streets are limited or perpetual. A court will not refuse appropriate relief simply because the complainant has asked for greater relief than the facts of the case will warrant.

This brings us to consider the rights of the City Railway Company and its acts in derogation of the rights of the complainant.

The act of March 6, 1891, which constitutes the charter of the city of Indianapolis, confers upon the board of public works, which was thereby created, the power "to authorize and empower by contract, telegraph, telephone, electric light, gas, water, steam or street car or railroad companies to use any street, alley or public place in any such city, and to erect necessary structures therein, and to prescribe the terms and conditions of such use, to fix by contract the prices to be charged to patrons: provided, that such contract shall

in all cases be submitted by said board to the council of such city, and approved by them by ordinance before the same shall take effect." Acts 1891, p. 169, § 59. Under this power the contract of April 24, 1893, which is set out in the ordinance of approval passed the next day, and which is made a part of the bill of complaint, was executed. The contract granted to the defendant company the right to lay and maintain its lines of street railway to be operated by electricity or other improved power upon certain designated streets, many of which are already occupied by the tracks of the complainant, and required the lines of the defendant company to be so located, it is alleged, as necessarily to interfere with the complainant's lines, and to obstruct the running of its cars. The contract further provided "that, in addition to the lines herein specified, the party of the second part will be granted the right to build a line extending from Washington street to the city limits, both north and south, on such streets as may be designated by the board of public works, and approved by ordinance passed by the common council of said city." In May, 1893, the board of public works designated certain streets extending from Washington street to the city limits, both north and south, as the streets on which the defendant company was to be granted the right to lay and maintain a line of street railway. The common council, by ordinance, enacted "that the action of said board of public works in designating said line be and the same is hereby approved, and the said City Railway Company is hereby granted said line and the right to the same in accordance with the terms, provisions and conditions of the contract and ordinance approving the same."

While there is no express stipulation that the additional line should be governed by the contract of April 24, 1893, which governs the other lines, still it seems to me, even without regard to the explicit language of the ordinance of May, 1893, that it must be held that such additional line falls within, and is to be governed by, that contract. Such, manifestly, was the purpose and understanding of the contracting parties, and I do not think their obvious intention can or ought to be defeated by the application of rigid and technical rules of construction. Here are two parties—the city by its board of public works and common council, and the defendant company—capable of contracting. It is too clear for debate that all these parties have agreed to the designation of the north and south line; that such designation has been approved by ordinance, and accepted by the defendant company. It is a fundamental rule in the construction of contracts that it is the duty of the court to ascertain and give effect to the intention of the parties, if lawful, whenever it can be done, "*ut res magis valeat quam pereat*." It seems to me, while the contract in regard to the north and south line is not technically formal, that, taken as a whole, in connection with the ordinance of April 24, 1893, it contains enough to be binding on both contracting parties.

But if I am in error as to the right of the defendant company to the north and south line, it would not aid the complainant. Prior to the designation of the additional north and south streets for the

use of the defendant, the complainant had no lines upon those streets except a fragment upon South Pennsylvania street, which had been practically, if not legally, abandoned. I do not think the complainant, under the ordinance of 1864 or 1865, had any vested right to commence the construction of a particular line without first obtaining the consent of the common council to "the location, survey, and construction" of such proposed line. Therefore, the complainant, having obtained no consent from the city to occupy the streets in question, has no right to complain of their occupation by the defendant company.

Other questions are presented in respect to the streets occupied by the complainant with the consent of the city. The defendant, by its answer, denies that it sets up any claim to the present occupancy of that part of any street upon which the tracks of complainant's railway are laid, or that it intends or threatens to lay and operate lines of electric railway on any street on which the complainant was operating an electric line, at the time suit was brought, "until after the expiration of its right thereto, if any it has." But from the terms of the contract and ordinance under which the defendant company has acquired the rights which it asserts, from the notice served upon the complainant, from the acts of defendant as disclosed in the record, as well as from the claims of its counsel, it seems apparent that the defendant company has been acting on the theory that the complainant's right to occupy the streets has ceased, and that under its contract it may rightfully take possession of them, and expel the complainant therefrom. In my opinion, the defendant company has no such rights. In so far as the defendant company claims the right to interfere with the complainant's free and unobstructed use of its lines of electric railway on all the streets now rightfully occupied by it, its claim is wrongful and injurious. To the extent necessary to protect its quiet and undisturbed use of these lines against invasion by the defendant company, the complainant is entitled to the aid of the court.

I entertain no doubt that the amended bill presents a federal question which gives the court jurisdiction. I have heretofore expressed my views on this question, and I do not think it needful to add anything to what I have already said on the same subject. *Citizens' St. R. Co. v. City Ry. Co.*, 56 Fed. 746.

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HOOK v. AYERS et al.

(Circuit Court of Appeals, Seventh Circuit. December 14, 1894.)

No. 155.

**CORPORATIONS—OFFICERS—RAILROAD BONDS—PLEDGE.**

A railroad company owning 247 bonds of another company pledged 125 of them to cross complainants, while the president of the company, with the knowledge of cross complainants, pledged the other 122 bonds to a syndicate composed of himself, two of the cross complainants, and others. He afterwards bought out the other members of the syndicate, and attempted to take absolute title to the bonds by crediting a certain amount upon the debt of the railroad company. *Held* that, although the transac-

tion might be voidable at suit of the railroad company, its shareholders, or judgment creditors, it could not be attacked by cross complainants. 63 Fed. 347, affirmed.

On rehearing. For former opinion and statement of facts, see 63 Fed. 347.

JENKINS, Circuit Judge. The petition for rehearing would seem to be presented in misconception of our opinion. We have not held that the original pledge by Mr. Hook of the 122 bonds for the benefit of the syndicate, or the subsequent transfer of them to himself, could not be attacked by the Jacksonville Southeastern Railway Company, its creditors or shareholders. We have not determined that as to the company, its creditors or shareholders, the transaction could be upheld. We did not find it needful to consider that question. We held that the appellees, upon the record here, were in no position to make that attack. With that conclusion we are content. The transaction sought to be avoided could have been ratified by the company, could have been sanctioned by its shareholders, could have been confirmed by its creditors. It was therefore voidable, not void. If without original authority, and in contravention of the rights of the company, it was voidable at the election of the company, its creditors and shareholders,—not of a stranger. The cross bill filed by the appellees proceeds upon the postulate that they, as pledgees of 125 other bonds, not as creditors, can rightfully attack the transaction. This, we think, they cannot do. It is true that it incidentally appeared by the testimony of one witness that a judgment had been rendered in favor of the appellees against the company for the loan for which the 125 bonds were pledged, but the cross bill proceeds upon no such ground. The judgment is not referred to in the bill. In a general sense, it appears from the cross bill that the appellees are creditors of the company, but not that they are judgment creditors; and we have held, following the case of *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, that simple contract creditors are not in position to attack such transactions. *Morrow Shoe Manuf'g Co. v. New England Shoe Co.*, 18 U. S. App. —, 6 C. C. A. 508, 57 Fed. 685,—on rehearing, 18 U. S. App. —, 8 C. C. A. 652, 60 Fed. 341.

The 247 bonds issued by the Louisville & St. Louis Railway Company were the property of the Jacksonville Southeastern Railway Company. The latter pledged 125 of these bonds to M. P. Ayers & Co. as collateral to its debt to them for money borrowed to construct the road of the former company, whereby the bonds were earned. M. P. Ayers & Co. had no equitable or legal right to the remaining 122 bonds. They were content with their collateral security, knowing that their 125 bonds were to share with the remaining 122 bonds in the proceeds of the sale of the road, if default should be made in their payment. Possibly, the 122 bonds remaining the property of their debtor, they might, in the distribution of the proceeds of sale of the mortgaged premises, upon which all of the bonds were secured, equitably insist that their bonds should be awarded priority of payment because the Jacksonville Southeastern Railway

Company was liable for the debt to them? And this we understand to be the theory upon which the cross bill proceeds. But it is shown that at the time of the loan M. P. Ayers & Co. knew that the remaining 122 bonds had been transferred by the railway company to the syndicate composed in part of two of their firm, and with such knowledge they sold to Mr. Hook their interest in the syndicate. This interest was acquired by him upon the strength of the fact that the syndicate held the remaining bonds. They have thus sanctioned the arrangement by which the bonds were transferred by the company to the syndicate. The stockholders of the Jacksonville Company and its creditors might properly object to the transfer of the 122 bonds, but not one who contracted his debt with knowledge of, and who has participated in the avails of, the transfer. Petition overruled.

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JENSEN v. NORTON et al.

(Circuit Court of Appeals, Ninth Circuit. November 1, 1894.)

No. 132.

PRELIMINARY INJUNCTION—PRACTICE—CIRCUIT COURT OF APPEALS.

N. brought suit against J. to restrain the infringement of patents belonging to N. Upon the bill, and affidavits supporting its material allegations, to which J. made no reply by answer or counter affidavits, N. obtained a preliminary injunction. On appeal from the order granting such injunction, J. contended that, upon the showing of N.'s own papers, the machine complained of did not infringe N.'s patents. Held, that the circuit court of appeals would not, in advance of a final hearing in the circuit court, attempt to determine, or express any opinion upon, the main question in the case, the complainant having made out a prima facie case entitling him to an injunction, within the rule as laid down in *Blount v. Société Anonyme*, 3 C. C. A. 455, 53 Fed. 98.

Appeal from the Circuit Court of the United States for the District of Oregon.

This was a suit by Edwin Norton and Oliver W. Norton against Mathias Jensen for infringement of certain letters patent. A preliminary injunction was granted by the court below. Defendant appeals.

Wheaton, Kallock & Kierce, for appellant.

Munday, Eyarts & Adcock, for appellees.

Before ROSS, HANFORD, and MORROW, District Judges.

HANFORD, District Judge. This case brings before us for review an order made by the circuit court for the district of Oregon, the substantial part of which is as follows:

"This cause having come on to be heard upon the motion of complainants for a preliminary injunction, as prayed for in the bill, and the court having duly considered thereon, it is now ordered by the court that, pending the final hearing and decree therein, the defendant, Mathias Jensen, his agents, attorneys, servants and employes, be, and they hereby are, enjoined and restrained from either directly or indirectly making, constructing, using, or vending to others to use, any of the machines, devices, or inventions named or described in either of the following letters patent, the same being the letters



patent mentioned and described in the complainants' bill of complaint, to wit: Patent No. 267,014, as to claims one and two thereof; patent No. 274,363, as to claims six and seven thereof; patent No. 294,065, as to claim fourteen thereof; patent No. 322,060, as to claims one, two, six, and seven thereof,—or any other machine, device, or invention constructed and operated in the manner or upon the principles described in said letters patent or either of them, as to said respective claims heretofore mentioned, and particularly from making, selling, or using, or vending to others to sell or use, the machine shown and described in the letters patent No. 443,445, issued to Mathias Jensen, December 23d, 1890."

The bill of complaint, in brief, avers that the complainants (appellees in this court) are the sole owners and have a clear title to all the rights and privileges granted by the several patents numbered respectively 267,014, 274,363, 294,065, and 322,060; that the defendant (appellant in this court), at and previous to the time of commencing this suit, was engaged in the making, selling, and use of a machine constructed in accordance with the specifications and drawings of letters patent No. 443,475, granted to him December 23, 1890; that said machine is a mere improvement upon and infringement of the complainants' patents; that said defendant proposes to continue to manufacture, vend, and use said infringing machine at Astoria, in the district of Oregon, and elsewhere, without license from the complainants, and to their injury; and that in a previously litigated case, to which the defendant was a party, each of said patents owned by the complainants was by said circuit court decreed to be valid, and a machine therefore manufactured by said defendant, which is in all material particulars the same as the one now complained of, was decreed to be an infringement of plaintiff's said patents, which decree was after a full hearing affirmed by this court. The bill is supported by affidavits covering all the material facts, and copies of all the patents referred to, with specifications and drawings, are annexed as exhibits to the complaint and affidavits. A rule to show cause was entered and duly served a reasonable time before granting the provisional injunction, but no answer or other pleading was filed nor counter proof offered by the defendant. By the assignment of errors, and the argument of his counsel in this court, he contends that the complainants have shown affirmatively that his machine differs from the inventions covered by the several patents owned by the complainants, and is not an infringement.

We recognize in the defendant's new machine for bringing together the cylinders and heads or end pieces of tin cans, and crimping the flanges with accuracy and rapidity, a useful improvement. Nevertheless, we must disappoint his hope at this time, for, until a complete determination of the controversy by the circuit court, this court cannot, consistently with good practice, pass judgment upon the main question. This machine does all the work of the previously patented inventions. That is a conceded fact. We must also consider the uncontradicted averments of the bill and the affidavits to the effect that said machine embodies all the elements in the combinations claimed by the complainants and protected by their patents, and that it does infringe said patents. Without allegations or testimony on the part of the defendant, we have no

right to decide that, as a matter of law, use of a new machine which operates so as to produce the same results as previously patented inventions is not an invasion of the rights granted by the patents, unless it appears to us to be so obvious that infringement has been avoided that intelligent persons cannot honestly differ in their opinions upon that subject. When a plaintiff in a court of equity brings a suit in good faith to obtain preventive relief against a threatened injury, and makes a showing of facts sufficient to constitute a cause of action within the jurisdiction of the court, and shows that his adversary intends to, and probably will, ere a hearing can be had, commit acts which may work irreparable injury to him, it becomes the duty of the court to exercise its power at once by issuing an injunction so as to maintain the status quo until the cause can be properly heard and decided. Manifestly, therefore, the court cannot, upon a mere application for a provisional injunction, decide disputed questions affecting the merits of the main controversy. The rule on this subject applicable to cases involving rights claimed under patents granted pursuant to the laws of the United States is so well set forth and supported by authorities in the decision of the United States circuit court of appeals for the Sixth circuit in the case of *Blount v. Societe Anonyme*, 6 U. S. App. 335, 3 C. C. A. 455, 53 Fed. 98, that we might safely dispose of this case for the present by confirming the order appealed from, upon the authority of that case. In view of the admitted facts and the uncontradicted evidence, the defendant's contention appears to us to be unreasonable. Duty does not require this court, in advance of a final hearing in the circuit court, to take up the challenge of counsel to prove by a comparison of the rival machines in detail, and a complete analysis, that they are substantially identical. We leave the circuit court free to decide the case in the first instance, untrammelled by any expression of opinion by this court upon the merits. The cause will be remanded for further proceedings, with instructions to continue the injunction.

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WHEELER v. WALTON & WHANN CO. (DAVIS PYRITES CO.,  
Intervener).

(Circuit Court, D. Delaware. December 1, 1894.)

1. CONTRACT—SALE—CONDITION PRECEDENT.

The W. Co. made a contract with the D. Co. for the purchase of "the sulphur contents" of a quantity of pyrites. By the terms of the contract, the cinder, remaining after the burning of the ore by the W. Co., was to remain the property of the D. Co., and was to be kept for it, and removed by it, from time to time. After the delivery to the W. Co. of a quantity of ore, that company was placed in the hands of receivers, who conducted its business for a short time for the purpose of working up material on hand. When the receivers closed the works of the W. Co., a quantity of unburned ore remained in their hands, which they claimed the right to sell as part of the assets of the W. Co. *Held*, upon petition of the D. Co. for delivery of such ore to it by the receivers, that, such contract not being an ordinary contract of sale, where nothing remained to be done but to pay the price, but the vendee, before it became entitled to any part of the ore, being obliged to perform conditions

which neither it nor the receivers could perform, the ore did not become part of the assets of the W. Co. in the receivers' hands, and should be returned to the D. Co.

2. SAME—ASSIGNABILITY.

The contract containing no express words permitting its assignment, but containing stipulations as to dealings of both parties with the ore and its resulting products, after its first delivery to the vendee, which excluded the idea that an assignment by the vendee was contemplated by the parties, *held*, that the contract was not assignable.

This was a petition by the Davis Pyrites Company for an order directing the receivers of the Walton & Whann Company to deliver to the petitioner a quantity of Small's pyrites.

Wm. C. Spruance and Arthur W. Spruance, for petitioner.  
Bradford & Vandegrift, for receivers

WALES, District Judge. This is an application for an order on the receivers of the Walton & Whann Company to deliver to the petitioner 1,300 tons of Small's pyrites, which came into the possession of the company in the manner hereinafter stated. The Walton & Whann Company had been for many years prior to the 6th day of June, 1894, large manufacturers of fertilizers. On that day the company was proved to be insolvent, and its property and effects passed into the hands of receivers appointed by this court. The receivers, under the direction of the court, continued the business of the company for the purpose of compounding and working up the materials they found on hand, and by selling the manufactured product, until the 1st day of September, 1894, when the works were shut down. The petition sets out in full a contract made between the petitioner and the Walton & Whann Company, dated January 31, 1894, whereby the petitioner agreed to sell, and the Walton & Whann Company agreed to buy, "the sulphur contents in about five thousand tons" of Small's pyrites. After stipulating the price to be paid per ton, the place of delivery, and the terms of payment, the contract provided further:

"The cinder from the above ore after burning to be the property of sellers, and to be stored by buyers free of cost until sent for. The cinder to be kept separate and apart from other cinder, and free from dirt and contamination with any other material, and to be stored in a readily accessible place. Accumulation not to exceed at any one time about 2,000 tons. And it is hereby understood and agreed that the sellers or their representatives shall always have access to the place where the ore and cinder are stored. Buyers agree to load cinder f. o. b. cars or boat for shipment, at a cost of not exceeding 17½c. per ton."

Pursuant to the contract, the petitioner, prior to the 1st day of May, 1894, had delivered to the Walton & Whann Company 305 tons of ore, all of which has been burned, and the sulphur contents thereof were paid for by the Walton & Whann Company, and the cinder thereof returned to the petitioner by the receivers. After the delivery and reduction of the first lot of ore, as just mentioned, and before the appointment of the receivers, the petitioner delivered additional quantities of ore, amounting to 2,339 tons, of which about 1,039 tons were burned by the Walton & Whann Company and the receivers; and there now remain, in the possession of the

receivers, at the works of the company, about 1,300 tons of unburned ore. The cinder of the 1,039 tons of the ore which were burned by the company and its receivers has been delivered to the petitioners. The receivers claim the unburned ore now in their possession as a part of the assets of the company, and they admit that they do not intend to use any portion of the ore or to extract the sulphur therefrom, and also that they propose to sell the ore in its present condition for the benefit of the general creditors of the company.

Of the several questions which were discussed by counsel at the hearing, it is unnecessary to consider more than one. The contract of January 31, 1894, was an executory one, and is not assignable to a third party. "The sulphur contents" of the ore, and not the ore, were sold to the Walton & Whann Company, and the receivers hold possession of the ore on the same terms and conditions on which it was delivered to the company. One of the conditions of the sale was cash, or what was equivalent to it, on delivery; but this condition appears to have been waived by the petitioner after one or two deliveries, and the insistence of the respondents' counsel is that, as the sale and delivery of the unpaid-for ore were on credit, the petitioner stands in the same relation to the insolvent company as any other unsecured creditor, and has no right to reclaim the ore. But, as has been already indicated, this was not the ordinary case of goods sold and delivered, and where nothing remained to be done but the payment of the price. Here certain conditions were made a part of the contract, which were obligatory on the vendee to perform before the contract could be executed, and which have not been performed by the Walton & Whann Company or by its receivers. As to the 1,300 tons of ore now remaining in the hands of the receivers the contract is still executory. The receivers claim the right to dispose of this property without complying with the conditions of sale, and it is not a sufficient answer to the demand of the petitioner, that, in case the ore is sold, the petitioner can have a remedy by an action for breach of contract. Such an action against an insolvent concern would be productive of a very small percentage of the value of the ore. The present application is made to reclaim the possession of property which belonged to the vendor, and the right to which has been forfeited by the vendee in consequence of its failure and inability to fulfill its contract. Even admitting that the Walton & Whann Company had a good title to "the sulphur contents," they clearly had no title to the cinder. The two things are inseparable until the ore has been subjected to the process of burning, and the vendee and the receivers are no longer able to apply that process. The vender sold one part or ingredient of the ore, and reserved the other. The receivers cannot complete the title of Walton & Whann Company to "the sulphur contents" until the latter have been extracted from the ore, and reduced to possession; and this the receivers do not propose to do, but intend to sell the raw material without regard to the rights of the petitioner. Moreover, this contract is not an assignable one. It contains no express words permitting the vendee to assign, and nothing can be inferred from it which would imply that an assignment was con-

templated by either of the parties. The ore was to be delivered at a designated place, and the vendors or their representatives were to have free access to the place where the ore and cinder were stored. These and other conditions named in the contract exclude all idea of any intention of the parties that the vendee would be at liberty to transfer the contract to a third party. The sale of the ore was not an absolute one. The petitioner fulfilled its part of the contract up to the time of the insolvency of the Walton & Whann Company, when it was released from further deliveries of the ore. The ore in its present condition does not constitute a part of the assets of the Walton & Whann Company. The petitioner is out of possession, but it cannot be said to have parted with its title to the property. If the receivers can neither reduce nor sell the ore, no other or juster disposition can be made of it than by its delivery to the petitioner. It could be of no possible benefit to the general creditors to let the ore remain in the possession of the receivers as it now is; and, on the other hand, they would lose nothing by its being returned to the petitioner.

The mode of procedure which has been adopted by the petitioner is a proper one. Where property or funds are in the hands of a receiver, and claimed by persons not parties to the action in which he was appointed, a petition or motion may be presented to the court for an order on the receiver to deliver over the fund or property to the claimant. High, Rec. § 39. If authority is needed to sustain the position that this contract is nonassignable, it may be found in *Arkansas Val. Smelting Co. v. Belden Min. Co.*, 127 U. S. 387, 8 Sup. Ct. 1308, and the cases there cited. In the principal case, Mr. Justice Gray, speaking for the court, said:

"At the present day, no doubt, an agreement to pay money or to deliver goods may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him or by some other stipulation, which manifests the intention of the parties that it shall not be assignable. But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent."

See, also, *Benj. Sales*, § 59; *Robson v. Drummond*, 2 Barn. & Adol. 303; *Bauendahl v. Horr*, 7 Blatchf. 548, Fed. Cas. No. 1,113.

An order will be made in accordance with the prayer of the petition.

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#### STONE v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1894.)

#### No. 153.

#### 1. JUDGMENT—RES JUDICATA—ACQUITTAL OF CRIMINAL CHARGE.

An acquittal of a person indicted for unlawfully and feloniously cutting and removing timber from public lands in violation of Rev. St. § 2461, is not a bar to an action by the United States against such person to recover the value of such timber, as being wrongfully cut and converted. *Coffey v. U. S.*, 6 Sup. Ct. 437, 116 U. S. 442, distinguished.

**2. SAME—PROPER TEST.**

A proper test, in determining whether a prior judgment between the same parties concerning the same matters is a bar to a subsequent action, is to ascertain whether the same evidence which is necessary to sustain the second action would have been sufficient to authorize a recovery in the first suit, if it had been given therein.

**3. APPEAL—REVIEW—AVAILABLE ERROR.**

Where two actions by the same plaintiff are consolidated and tried together, the defendant in one of such actions, who is also a defendant in the other action, and who exercises all the peremptory challenges allowed by law in his case, cannot, on appeal of his case, avail himself of an error of the court in overruling a peremptory challenge by defendants in the other case.

**4. RAILROAD COMPANIES—CONSTRUCTION OF ROAD—RIGHT TO TIMBER ON ADJACENT PUBLIC LANDS.**

Act March 3, 1875 (18 Stat. 482), which grants to railroad companies the right of way through public lands, and the right to take from the public lands "adjacent to the line of said road" timber necessary for its construction, does not authorize the taking of timber for the construction of a road from public lands 50 miles distant from the road.

**5. PUBLIC LANDS—SETTLERS—CUTTING AND SELLING TIMBER—LIABILITY OF PURCHASER.**

Where settlers on public lands file declarations under the pre-emption or homestead laws, with intent to defraud the government by removing and selling the timber thereon, and then leaving them, a purchaser of such timber is liable to the government for its value.

**6. SAME—ACTION FOR VALUE OF TIMBER PURCHASED—BURDEN OF PROOF.**

In an action by the United States to recover the value of timber cut from public lands, where defendant claims that he purchased the timber from settlers on such lands under the pre-emption and homestead laws, the burden is on him to show the good faith of such settlers, and their right to cut and sell such timber.

**7. SAME—INSTRUCTION.**

In such action, it is proper to refuse an instruction which withdraws from the jury evidence that defendant's vendors abandoned the land after cutting the timber, and leaves the question of their good faith to rest on the fact of their actual residence on the land when the timber was cut.

**8. APPEAL—REVIEW—OBJECTIONS WAIVED.**

The circuit court of appeals will not review an assignment of error based on any portion of the charge, when the record fails to affirmatively show that timely exceptions were taken thereto "while the jury was at the bar."

**9. SUNDAY—JUDICIAL PROCEEDINGS—SUBMITTING INTERROGATORIES TO JURY.**

In an action by the United States to recover the value of timber cut from public lands, the case was fairly and impartially submitted to the jury on Saturday. On Sunday the jury was brought into court, and the court submitted to them certain interrogatories, which the court requested them to answer if they could, stating that he desired answers "for the use of the government in other litigation." It was left optional with the jury to answer such questions, and the court declined to instruct them further. *Held*, that any objection to these proceedings should have been made at the time, and that there was nothing in the proceedings prejudicial to defendant.

**10. SAME—RECEIVING VERDICT.**

A verdict may be received on Sunday, though there is no statute authorizing it in the state in which the action is tried.

In Error to the Circuit Court of the United States for the District of Washington.

Action by the United States of America against John H. Stone to recover the value of certain timber cut and removed from public

lands. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

This action was brought to recover the value of certain timber alleged to have been taken from the public lands of the United States, and converted by the defendant (plaintiff in error) to his own use. There was pending at the same time a similar action, wherein the United States were plaintiffs, and John H. Stone, Edward Noonan, and W. G. Kegler, doing business as the Spokane Fuel Company, were defendants, which was consolidated and tried with this action. Both cases were tried together before a jury, and a verdict rendered in this action in favor of plaintiffs (defendants in error) for the sum of \$19,000, and in the second action in favor of plaintiffs for \$3,000. The verdict in the second action was, on defendants' motion, set aside. Only the first action, against Stone individually, is here for review upon its merits. The complaint alleges the ownership of the lands from which the timber was taken, and of the timber taken and converted, to be in plaintiffs; its value; the unlawful taking and conversion by defendants,—and prays for judgment for its value. The answer consists of a general denial of all the allegations of the complaint, except as to the quantity of timber alleged to have been sold to the Spokane Mill Company. As affirmative defenses, the answer avers, in substance: (1) That between the months of August, 1888, and November, 1890, the defendant had certain contracts with his customers for the supply of railroad ties, and timber for the manufacture of lumber, at points along the line of the Northern Pacific Railroad, in the state of Washington, adjacent to the region mentioned in the complaint; that he procured timber, for the purpose of filling these contracts, from the lands embraced in the grant to aid in the construction of the Northern Pacific Railroad, made by acts of congress for that purpose, and by contract with that company, and that he had not at any time cut timber on any other land, except such as belonged to said railroad company; that he purchased timber and ties suitable for railroad uses from other persons, but, upon information and belief, alleges that all such ties and timber were either cut from railroad lands, or were lawfully cut and sold to him by such other persons, and that no part thereof was cut or taken from lands of the United States; that the ties which he purchased were for the use of, and were used in, the construction of the Spokane & Palouse Railroad and the Central Washington Railroad, both corporations being organized and constructing their roads under and in compliance with grants made to them by the act of congress of March 3, 1875; that such taking was not a trespass, but was by authority of law. (2) That in the month of April, 1891, at a term of the United States district court for the district of Idaho, the defendant was indicted for the commission of all the wrongs and trespasses for which this action was brought, under section 2461 of the Revised Statutes of the United States, as an offense against the penal laws of the United States; that he was arraigned upon said indictment, and pleaded not guilty; that he was afterwards tried upon said indictment, acquitted by the verdict of the jury, and discharged therefrom; and that said acquittal and discharge constitute a bar to this action. The plaintiffs replied to all of the averments in the answer, except the second affirmative defense, and to this they demurred upon the ground that the defense therein stated as a bar did not state facts sufficient to constitute a defense to the action. This demurrer was sustained. Upon the trial, defendant offered to prove this defense by the production of the record of his acquittal and discharge. This evidence was refused. There are 18 specific assignments of error, which will be noticed under appropriate heads in the opinion.

John R. McBride, for plaintiff in error.

Wm. H. Brinker, U. S. Atty., for defendants in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge (after stating the facts). 1. Did the court err in sustaining the demurrer to that part of defendant's an-

swer which pleaded the indictment, trial, and verdict of acquittal in the Idaho court, and in excluding the same when offered in evidence?

That the judgment of a court of competent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence, conclusive between the same parties upon the same matter directly in question in another court, is too well settled to require discussion. It is also well settled that the plea of *res adjudicata*, except in certain special cases, is not only conclusive upon the questions which the courts were required to form an opinion and pronounce judgment on, but upon every point which properly belonged to the subject of litigation, and which was, or might properly have been, brought forward in the former suit. One of the safest rules for courts to follow in determining whether a prior judgment between the same parties, concerning the same matters, is a bar, is to ascertain whether the same evidence which is necessary to sustain the second action, if it had been given in the former suit, would have authorized a recovery therein. Under this test, is the judgment in the criminal case a bar to this action? What facts were required to be proven in order to sustain the respective actions? The criminal case in Idaho was instituted and prosecuted by the United States against the defendant for an alleged willful violation of a statute which, among other things, provided that:

"If any person shall cut, or cause or procure to be cut, or aid, assist, or be employed in cutting or shall wantonly destroy, or cause or procure to be wantonly destroyed, or aid, assist, or be employed in wantonly destroying any live oak or red cedar trees, or other timber standing, growing, or being on any lands of the United States \* \* \* shall pay a fine \* \* \* and be imprisoned not exceeding twelve months." Rev. St. U. S. § 2461.

The indictment charged that defendant, at the time and place and upon the public lands therein mentioned, "did then and there, unlawfully, willfully, and feloniously, cut and remove, and cause and procure to be cut and removed, from said lands, fifty thousand timber trees then and there being and growing upon said lands," etc. This was an essential averment, which was necessary to be proven in order to convict the defendant. The present action was brought to recover the value of the timber cut from the same lands. In order to sustain this action, it was only necessary, after establishing the title of plaintiffs to the lands, and the value of the timber taken therefrom, to prove that the defendant received and converted the timber to his own use. In other words, it was necessary, in the criminal case, to prove that the defendant, with knowledge that the lands belonged to the United States, and with the intent and purpose to defraud the government, either personally cut and removed the timber, or, with such knowledge and intent, caused and procured the timber to be cut and removed; while, to maintain this action, it was only necessary to prove that the timber belonged to the government, and that the defendant came into possession of it, and converted it to his own use without authority from the government. If, in establishing these facts, the evidence showed that the defendant was only an unintentional—not willful—



trespasser, or an innocent purchaser for value, or the purchaser from a trespasser without notice, the government would, under the principles announced in *Wooden-Ware Co. v. U. S.*, 106 U. S. 432, 1 Sup. Ct. 398, be entitled to recover. It will therefore readily be seen that, if the same evidence which was necessary to sustain the present action had been given in the former suit, it would not have authorized a conviction therein; and, under the test which we have stated, it would necessarily follow that the former judgment of acquittal is not a bar to the present action.

Is the test stated established by authority?

Freeman, in his work on Judgments, says:

"The best and most invariable test as to whether a former judgment is a bar is to inquire whether the same evidence will sustain both the present and the former action. If this identity of evidence is found, it will make no difference that the form of the two actions is not the same. \* \* \* Whatever be the form of action, the issue is deemed the same whenever it may, in both actions, be supported by substantially the same evidence. If so supported, a judgment in one action is conclusive upon the same issue in any other suit, though the cause of action is different. On the other hand, if different proofs are required to sustain two actions, a judgment in one of them is no bar to the other. If the evidence in a second suit between the same parties is sufficient to entitle plaintiff to a recovery, his right cannot be defeated by showing any judgment against him in any action where the evidence in the present suit could not, if offered, have altered the result." 1 *Freem. Judgm.* § 259.

This principle is recognized in *Miller v. Manice*, 6 Hill, 121, cited by defendant, and is fully sustained by numerous authorities. *Gayer v. Parker*, 24 Neb. 643, 39 N. W. 845; *Taylor v. Castle*, 42 Cal. 371; *Gilmer v. Morris*, 30 Fed. 483; *Riker v. Hooper*, 35 Vt. 457; *Ireland v. Emmerson*, 93 Ind. 2; *Gordon v. State*, 71 Ala. 315; *Percy v. Foote*, 36 Conn. 102. But it is contended by defendant that the precise question involved in this case has been decided in his favor by the supreme court in *Coffey v. U. S.*, 116 U. S. 442, 6 Sup. Ct. 437. That opinion does not support the position taken by defendant, and is not in any respect opposed to the conclusions we have reached. Coffey was a distiller of liquors, and a criminal information was filed against him for the violation of certain sections of the internal revenue laws. He was tried by a jury, and acquitted. Afterwards, a civil proceeding against the defendant to forfeit the property, under the same section of the statute, was instituted. The former judgment of acquittal was properly held to be a bar. Why? The decision of the court makes it perfectly plain, and, in our opinion, shows clearly and distinctly the difference between the facts of that case and this. In rendering the opinion, the court said:

"The principal question is as to the effect of the indictment, trial, verdict, and judgment of acquittal, set up in the \* \* \* answer. The information is founded on sections 3257, 3450, and 3453; and there is no question, on the averments in the answer, that the fraudulent acts and attempts and intents to defraud, alleged in the prior criminal information, and covered by the verdict and judgment of acquittal, embraced all the acts, attempts, and intents averred in the information in this suit. The question, therefore, is distinctly presented, whether such judgment of acquittal is a bar to this suit. We are of opinion that it is."

If the same things could be said in this case with reference to the criminal prosecution, then our conclusions would be the same as reached by the court in that case. Again, further on in the opinion, it is said:

"The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding, and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts cannot be again litigated between them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts."

That case came clearly within the rules and principles announced in the *Duchess of Kingston Case*, 20 How. St. Tr. 355, which, as before stated, is the settled law everywhere recognized and followed. We are of opinion that the rulings of the court, under review, were correct.

2. The next question relied upon for a reversal of this case is more technical than sound. The two cases were consolidated. The authority of the court to order them to be tried together is not denied. The right to do this when the cases involve substantially the same issues, and delay and expense would thereby be avoided, is unquestioned. *Insurance Co. v. Hillmon*, 145 U. S. 293, 12 Sup. Ct. 909, and authorities there cited. No objection is urged on that account, but it is claimed that the court erred in refusing to allow the defendants in the other case to peremptorily challenge a juror, and that defendant is entitled to avail himself of that error in the present case. The facts are that the defendant in this case had exercised three peremptory challenges, which were all that he was entitled to; "that thereupon the defendants Stone and Noonan peremptorily challenged John Giffin, one of the jurors, upon the ground that the defendants were entitled to challenge peremptorily, in each of the cases on trial, three jurors, and that they desired to exercise said challenge upon said juror in the said cause, No. 89, on behalf of said defendants." Conceding that under the principles announced in *Insurance Co. v. Hillmon*, supra, the two causes of action remained distinct, and required separate verdicts and judgments, and that no defendant in either case could be deprived, without his consent, of any right material to his defense, whether by way of challenge of jurors or of objection to evidence, to which he would have been entitled if the two actions had been tried separately, it does not necessarily follow, as claimed by counsel, that the defendant in this case was prejudiced by the ruling of the court in the other cause. How could the defendant have been injured by such ruling? The two cases, although consolidated, were separate and distinct. Defendant had exercised all the rights and privileges he was entitled to in this case. If the case had been tried by itself, he could not have claimed but three peremptory challenges. He was not entitled to any more by reason of the consolidation. It is true that the defendants in the other case were entitled to three additional peremptory challenges, and that if that privilege had been granted to them the result might

have been that this defendant would have had the benefit of six challenges; but that result would follow by the circumstance of the consolidation, and the fact that he was a party defendant in both actions, instead of by virtue of any legal rights given to him by the law as a defendant in this action. He had exhausted his rights in this case, and he should not be permitted to complain because the court committed an error in the other case which did not deprive him of any substantial right, under the law, as a defendant in this action.

3. It is claimed that the court erred in excluding from the jury, as evidence, the appointment of defendant as the agent of the Central Washington Railroad Company and of the Spokane and Palouse Railway Company, (1) because said corporations having been organized under the laws of the territory of Washington, and having filed their articles of incorporation and proofs of organization with the department of the interior, which had approved the same, were authorized by the laws of the United States to take the timber included in this action, and such taking by them through their agent was not unlawful, and the proof shows that the ties which are sued for were used by the said railroad companies in the construction of their roads; (2) for the further reason that, if said railroad ties were cut and taken by defendant in the honest belief that the cutting and taking were authorized by law, the measure of damages would be different from other unlawful taking.

It appears from the record that the Spokane & Palouse Railroad commenced at Marshall Junction, on the line of the Northern Pacific Railroad, and ran from that point in a southwest direction; that the Central Washington Railroad commenced at Cheney, about eight miles west of Marshall Junction, on the line of the Northern Pacific, and ran therefrom in a northwesterly direction; that no timber fit for ties was found along the line of either of these roads; that both of them penetrated a barren region, almost entirely destitute of timber; that the timber was cut from lands along the line of the Northern Pacific, about 50 miles distant from the eastern end of the other roads, which was the nearest point where available timber could be found. The question whether the court erred in excluding the testimony is to be determined by an interpretation of the act of March 3, 1875, which grants to railroad companies the right of way through the public lands of the United States; "also the right to take from the public lands adjacent to the line of said road, material, earth, stone and timber necessary for the construction of said railroad." 18 Stat. 482. If the timber taken was not "adjacent to the line" of the railroads in question, then the fact whether defendant was the agent of the railroad companies was wholly immaterial and irrelevant. Upon this subject the court charged the jury as follows:

"The act of congress under which this claim is made does not undertake to provide the materials necessary for the building of railroads. It does not provide that if there is not any timber convenient, or within a convenient distance to the building and construction of a new railroad, that the railroad company has a right to require the United States to provide them with ma-

terial, or go upon distant lands and procure the material that they require. That is not the scope of the law, and so I have decided that 'adjacent lands' means lands in proximity, contiguous to or near to the road, and that lands so far distant from the railroad, and mentioned as the lands in Kootenai county, Idaho, where it is claimed that railroad ties were cut, were not 'adjacent lands,' within the meaning of the law."

Some differences of opinion have been expressed by the courts as to the true purpose, intent, and object, and proper construction, of this act. Judge Hallett, in *U. S. v. Denver & R. G. Ry. Co.*, 31 Fed. 886, held that the language of the act was intended to indicate such timber and other materials as could be conveniently reached by ordinary transportation by wagons. Judge Deady, in *U. S. v. Chaplin*, 31 Fed. 890, declared that land is adjacent to the line of the road, within the purpose and intent of the act, when, by reason of its proximity thereto, it is directly and materially benefited by the construction of the railroad. While Judge Knowles, in *U. S. v. Lynde*, 47 Fed. 300, expressed the opinion that it was left in doubt as to what should be considered adjacent land to the line of the road, and came to the conclusion "that it must be determined by the evidence in the case." In *Denver & R. G. R. Co. v. U. S.*, 34 Fed. 841, certain views were expressed upon this subject, directly applicable to the facts of this case, which we consider sound and just. It was there stipulated that the lands from which the timber was cut were adjacent to the line of railway, and Judge Brewer, for this reason, said, "I shall not stop to consider how near land must be to be adjacent,—whether half a mile or ten miles." But he immediately added his individual views, as follows:

"I certainly do not agree with the idea, which seems to be expressed elsewhere, that the proximity of the lands is immaterial, or that congress intended to grant anything like a general right to take timber from public land where it was most convenient [which is the direct contention of defendant in this case]. The grant was limited to adjacent lands, and I do not appreciate the logic which concludes that, if there be no timber on adjacent lands, the grant reaches out, and justifies the taking of timber from distant lands,—lands fifty or a hundred miles away."

The case was taken to the supreme court of the United States, and there affirmed. *U. S. v. Denver & R. G. R. Co.*, 150 U. S. 11, 14 Sup. Ct. 11. But, under the stipulation, this question was not there passed upon. We are of opinion that, under the facts presented in this case, it could not fairly be said, under any reasonable construction of the language of the act, that the timber was taken from lands "adjacent to the line" of either of the roads in the construction of which it was used; that the court did not err in excluding the evidence of defendant's agency; and that the charge of the court, withdrawing this question from the jury, was not erroneous.

4. To further sustain his defense, the defendant relied upon the fact that he had bought a portion of the timber from certain parties who had settled upon the public lands, and filed their declaration as settlers in the land office. It is contended that the court erred in permitting the attorney for plaintiffs to cross-examine the defendant and other witnesses as to whether some or all of the claimants to these lands had continued to reside upon the lands

since the timber was cut; that the court erred in giving certain instructions to the jury relative to the rights of such claimants, and in refusing to give instructions which were asked by the defendant, to the effect that, (10) when a pre-emption or homestead filing has been made by a settler, the effect of such action, combined with an actual settlement on the public land, is to sever the land from the public domain, and, subject only to the loss by the claimant of his rights by failure to comply with the subsequent conditions of the land, the settler becomes the owner of the land, and, except as between him and the government, he is entitled to exercise all the rights of the owner; (11) that the legal presumption arising from the lawful entry made upon land by a claim under the law, as a homestead or pre-emption, and occupation as such, is that the claimants acted in good faith, and the burden of proving bad faith and attempting to defraud the government is upon the plaintiff; (12) that if the jury should find that the claimants of the land, who sold timber cut from the land to defendant, were at the time residing upon it, having claimed it under the homestead and pre-emption laws, and were so improving their land as to indicate to the jury that they intended to acquire title by compliance with the law, and that the sale of the timber was made under such circumstances as to lead the purchaser to believe that the parties selling it were acting in good faith, then such sale was lawful, and the plaintiffs would not be entitled to recover anything for the timber so sold. The court, after clearly and correctly stating the issues which were involved in the suit, and announcing the principles of law which govern the right of property in public lands, and the manner in which settlers upon the public lands could acquire title thereto, and their rights in the premises, to which no exceptions were taken, charged the jury as follows:

"A settler who takes up a claim on public lands, intending to perfect his right to it, until he has perfected his right, has no right to cut the timber, except so far as it is necessary and reasonable to prepare so much of the lands for cultivation as he intends to cultivate. A man of limited means, who goes upon a claim, and is able, during the first year, to cultivate only a few acres, is only authorized to cut the timber off the few acres that he intends to cultivate and is able to cultivate. If he cuts down the timber off forty acres, it should be in pursuance to a definite plan that the plow shall follow the ax, and that the entire forty acres shall be put to use for the purpose of cultivation, or in such manner as a farmer makes use of land that is tillable land. The balance of the timber on the 160 acres, if it is a timbered claim (a claim covered with timber), should remain as a preserve (a timber preserve) for the future benefit of the land, and should be removed only so fast as the settler finds it necessary to remove it in order to put in cultivation the lands he means to cultivate and intends to cultivate in good faith. But a man whose primary purpose is to cut the timber on a piece of land is no more authorized to go and cut that timber, by reason of his having filed in the land office a declaration of his intention to take the land under the pre-emption law, than if he goes and cuts it without filing any declaration. Unless the declaration is an honest declaration, and is supported by compliance with the requirements of the law, by making a home upon the land, actually living upon it, and actually proceeding in the regular way by regular process of improving the land and putting it in cultivation, and until he has perfected his right by full compliance with the law, he has no right to cut down and sell the timber on other portions of the land, which he is not intending to immediately put into cultivation."

This portion of the charge must be considered in the light of the fact that the court had, at great length, correctly charged the jury as to the rights of bona fide settlers upon the public lands, and that, under the peculiar facts of this case, it became the duty of the court to charge the jury as to the limitations and exceptions to certain general rules he had enunciated, and to submit to the jury the question whether the persons from whom defendant had purchased the timber were actual settlers in good faith, and whether they had, under the pre-emption or homestead laws, acquired any right to the lands. The testimony was to the effect that the settlements had been made upon lands that were not well adapted for cultivation; that the improvements which had been made were very slight, consisting only of small cabins; that there was no such clearing of the land as to indicate that the timber had been cut and removed for the purpose of cultivating the soil; that the cutting of the timber had been done indiscriminately all over the claim; that the limbs and brush and tops of the trees had been left upon the ground; that the parties who had filed their declarations of settlement, after cutting and selling the timber off the land, had departed therefrom, etc. It is conceded by the defendant that all the testimony which tended to establish fraud and bad faith of these settlers was admissible in evidence. It would have been error to exclude any testimony which tended to establish such facts. *U. S. v. Steenerson*, 1 C. C. A. 552, 50 Fed. 504, and authorities there cited. The charge of the court, under consideration, was applicable to the facts of the case, and, in our opinion, correctly stated the principles of law that applied to such facts. *U. S. v. Cook*, 19 Wall. 591; *U. S. v. Williams*, 18 Fed. 475; *U. S. v. Ball*, 31 Fed. 668. The instruction 10, drawn by defendant, was erroneous in this: that it proceeded upon the assumption that the settler acquires title, and "all the rights of ownership," by the mere fact of the filing of his declaration and making settlement. This is not the law. *U. S. v. Ball*, *supra*; *Schoofield v. Houle* (Colo. Sup.) 22 Pac. 781; *Thrift v. Delaney*, 69 Cal. 193, 10 Pac. 475, and authorities there cited. The court did not err in refusing to give the instruction asked by defendant, that "the burden of proving bad faith and attempting to defraud the government is upon the plaintiffs." This was not an issue raised or presented by the plaintiffs as part of their case. The issue as to the good faith of the settlers from whom the defendant bought timber was presented by the defendant as a defense. The court correctly charged the jury that:

"The party who alleges the fact, and undertakes to establish the case by reason of certain facts which he says exist, has resting upon him the burden of proof; and he is required to establish what he alleges by evidence sufficient to outweigh all the evidence to the contrary, and unless there is a fair preponderance in his favor the jury should render a verdict against him."

The other instruction (12) asked by defendant was calculated to mislead the jurors in this: that it withdrew from their consideration the facts that the claimants of the land from whom defendant bought timber abandoned the land after cutting the timber, and

left the question of their good faith upon the fact of their actual residence at the time the timber was cut. But it is a complete answer to this—as well as the last—instruction to say that the charge of the court, to which no specific objection was taken, covered all the material questions involved in these instructions. The court, among other things, charged the jury that:

“As between the government and the settler, the title to the land, until the conditions of the law are fulfilled, remains in the United States, but in the meantime, if the settler is engaged in improving the land as required by law, and disposes of any surplus timber without intent to defraud the government, and the purchaser buys the timber under the belief that there is no intent or purpose to defraud the government, the sale is lawful, and the purchaser is protected. The fact that claimants to lands under the homestead and pre-emption laws, after occupation, for a time abandon the lands, is not, alone, proof that they intend to defraud the government, although in the meantime they have cut and sold the timber from the lands during the occupation; but the jury should judge of the intent of the parties so acting by all the circumstances surrounding each case, and if these circumstances satisfy the jury that the claimants of the land were acting in good faith at the time they sold the timber, and the purchaser had no reasonable grounds to believe otherwise, then such sale would be lawful.”

5. We decline to review any assignment of error based upon any portion of the charge or instructions of the court, wherein the record fails to show affirmatively that timely exceptions were taken thereto “while the jury was at the bar.” *Phelps v. Mayer*, 15 How. 160; *U. S. v. Breitling*, 20 How. 252; *French v. Edwards*, 13 Wall. 506; *Stanton v. Embrey*, 93 U. S. 548; *U. S. v. Carey*, 110 U. S. 51, 3 Sup. Ct. 424; *Hunnicut v. Peyton*, 102 U. S. 333.

6. It is claimed that “the court erred in giving any instructions to the jury on Sunday.” It is doubtful if this alleged error is presented in such a manner as to require this court to pass upon it. The record shows that the jury retired on Saturday to deliberate upon their verdict; that on the following day (Sunday) the jury were brought into court, upon the court’s own motion (counsel for both parties being present), and asked if they had agreed upon a verdict; that the reply was in the negative; that the judge remarked that he hoped the jury would be able to agree, and stated that he desired the jury to answer some questions in the nature of special findings. These questions were:

(1) “Did the defendant, Stone, receive any saw logs which had been unlawfully taken from any part of the lands specified in the complaint?” (2) “What sum does the jury award as damages on account of saw logs?” (3) “Did the defendant, Stone, receive any ties which had been unlawfully taken from any part of the lands specified in the complaint?”

The court informed the jury that the answers to these questions should be given in accordance with previous instructions about the measure of damages, and that the questions were submitted “in the same way that the whole case was submitted to you, to be answered if you can.” Thereupon, the attorney for the United States requested the court to explain to the jury certain matters as to the ties and saw logs, which the court declined to do, but stated that the jury had been specifically instructed upon these subjects, and he declined to instruct them further, and said that

he desired an answer to the special questions "for the use of the government in other litigation." The jury retired, and thereafter, on the same day, came into court, and rendered a general verdict against the defendant, and also answered the special questions submitted by the court, and were then discharged. On Monday, at the opening of court, counsel for defendant stated that he would like to have an exception entered "to the jury having been sent out on Sunday, and to the receiving of the verdict on Sunday." The court stated that a bill of exceptions would be signed, which recites "the exact facts as they occurred." From this statement it appears that no exceptions were taken on Sunday to any of the transactions that occurred on that day. It is questionable if the proceedings which took place could be fairly classed as instructions to the jury, but if they could be so considered, and the court had any power to give instructions on Sunday, it was the duty of the defendant to have then and there excepted, if he had any objections thereto. It is evident that the defendant was not prejudiced by any thing that transpired in court on that day. All that was said had reference to the finding of a special verdict, which could not have affected the result as to the general verdict. The remark of the court that the answers were required for use in other cases might very properly have been omitted, but we are unable to see how it could have had any tendency to influence the jury against the defendant. The whole case was fairly and impartially submitted by the court in its general charge given to the jury on the day before, and the court, on Sunday, declined to give any further instructions, and informed the jury that the answers to the special questions should be given in accordance with the previous instructions. It was left optional with the jury to answer these questions, although the court requested them to do so if they could.

There is no statute in the state of Washington, as in most of the other states, which authorizes the courts to receive a verdict on Sunday, and it is for this reason claimed that all the proceedings on Sunday were void. It is true that, by the common law, Sunday is dies non juridicus, and that all judicial proceedings which take place on that day are void. It is certain that under the rules of the common law no trial could be had or judgment rendered on Sunday. *White v. Pergue*, 15 Nev. 146; *Pearce v. Atwood*, 13 Mass. 347; *Chapman v. State*, 5 Blackf. 111; *Freem. Judgm.* § 138, and authorities there cited. But no trial was had nor any judgment rendered in this case on Sunday. Did the court have any authority to receive the verdict on Sunday? We are of opinion that this question must be answered in the affirmative, whether it is authorized by statute or not, upon the authority of *Bail v. U. S.*, 140 U. S. 131, 11 Sup. Ct. 761. In that case the supreme court said:

"On Sunday, the third of November, the record shows the return of the verdict, finding 'the defendants J. C. Ball & R. E. Boutwell guilty as charged in this indictment, and we find M. Fillmore Ball not guilty,' which is followed by these words: 'It is therefore considered by the court that the defendants



J. C. Ball and R. E. Boutwell are guilty as charged in the indictment herein, and as found by the jury; and it is ordered that they be remanded to the custody of the marshal, and be by him committed to the county jail of Lamar county to await the judgment and sentence of the court. It is further ordered that the defendant M. F. Ball be discharged, and go hence without day.' If this could be regarded as the judgment of the court, it was void because entered on Sunday. *Mackalley's Case*, 9 Coke, 61b; *Swann v. Broome*, 3 Burrows, 1595; *Baxter v. People*, 3 Gilman, 368; *Chapman v. State*, 5 Blackf. 111. But it is clear that it cannot be treated as a judgment, and is in effect nothing more than a remand for sentence."

The judgment of the circuit court is affirmed, with costs.

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PHILADELPHIA & R. R. CO. v. SMITH.

(Circuit Court of Appeals, Third Circuit. November 26, 1894.)

No. 2.

1. NUISANCE—CONTRIBUTORY NEGLIGENCE.

An embankment had been erected by defendant's lessor in such a position as to prevent the flow of water through a small run, fed by springs, on plaintiff's land, and a ditch had been constructed to conduct such water along the embankment, and into a river. *Held*, in an action for damages to plaintiff's land, caused by defendant's allowing the ditch to become obstructed (the defendant contending that such damages were caused, in whole or in part, by plaintiff's failure to keep the run on his own land in proper condition), that the doctrine of contributory negligence had no application, but each party was responsible for the damage caused by his own conduct.

2. SAME—LIABILITY OF PURCHASER.

Where the owner of land erects upon it a structure which is a nuisance to the owner of adjoining land, a purchaser or lessee from him who erects the nuisance is not liable for continuing to maintain the offending structure, without notice from the adjoining owner, and a request to remove it.

In Error to the Circuit Court of the United States for the District of New Jersey.

This was an action by Abraham Smith against the Philadelphia & Reading Railroad Company to recover damages for a nuisance. On trial in the circuit court, the plaintiff had a verdict. A motion by defendant for a new trial was granted, unless the verdict was in part remitted. 57 Fed. 903. Judgment was entered for plaintiff. Defendant brings error.

John R. Emery, for plaintiff in error.

R. V. Lindabury, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and WALES, District Judge.

DALLAS, Circuit Judge. On May 14, 1879, the Delaware & Bound Brook Railroad Company leased its railroad to the Philadelphia & Reading Railroad Company, plaintiff in error, and the latter company entered under the lease. Long prior to the demise, an embankment forming part of the roadbed had been so constructed as to prevent the flow of water through a small run, fed by springs, on

land of the plaintiff below; and a ditch had been dug along the foot of the embankment to conduct the water to the Raritan river and there discharge it. The first count of the declaration avers that this ditch "fails altogether to drain the water of said springs from the plaintiff's said farm"; and, on behalf of the plaintiff, evidence was adduced to show that the defendant allowed it to become filled, and that, although the plaintiff had cleaned his spring run out once after the railroad ditch was dug, such cleaning proved to be useless, because the spring run had no outlet. This was contradicted by the witnesses for the defendant, and upon the question thus presented the court instructed the jury that, if any portion of the plaintiff's damage was due to his failure to keep the run in proper condition on his own land, "he could not recover for such portion"; "that if he, by any act of omission or commission, permitted the ditch upon his own property to become so clogged up or filled up that the water, instead of going down to the property of the defendant, went out over his own property, soaked through the ground, and over the top of it, so as to render it acid or boggy, for that part of the damages he cannot recover." The defendant was not satisfied with this, but asked for further instruction "that the plaintiff was bound to keep open his spring-run ditch upon his own land, and if the situation of the ditch was such that, from freshets or other causes, the ditch became filled, he cannot recover, if his negligence to keep the ditch open contributed to his injury." This point was evidently framed upon the theory that if the plaintiff's neglect had caused him any damage, he could not recover at all,—not even for that which had been caused wholly by the defendant; and it was disaffirmed upon the ground that failure to keep his spring run open would not bar his right of recovery to the extent of any damage which actually resulted solely from the defendant's wrong, even if the plaintiff had been additionally damaged through his own want of care. In this there was no error. The doctrine of contributory negligence has no application. One who decisively contributes to bring a mischief on himself may not impute it to another, but he who does hurt to his neighbor cannot escape liability for the damage thereby occasioned by showing that the person he has injured has also sustained other or additional damage of the same character through separate acts or omissions of his own. In such cases, each party is chargeable with the consequences of his own conduct, and neither of them is at liberty to shift his burden to the shoulders of the other. This view of the law was appropriately applied by the court below, and therefore the second assignment of error is not sustained.

The remaining assignments relied upon relate to the cause of action set out in the second count. That count alleges that the embankment already mentioned diverts the ancient course of the water of the Raritan river, in times of freshet, to the injury of the plaintiff's land, and this allegation is to be now accepted as true. It also avers that the defendant became the lessee and possessor of the railroad after the embankment had been erected, but "has since continued, used, and maintained it," and of these facts there is no

doubt. It further alleges, however, that the plaintiff "requested the said defendant to remove the said obstruction," but of such request no proof whatever was made or evidence offered, and thus arises the more important question in the case, viz. is the appellant liable, without request or notice, for the damage caused to the appellee by the existence of this embankment, although the appellant did not erect it, and has maintained and used it only as a part of its roadway?

From the report of Penruddock's Case, 5 Coke, 101, it appears that the house of the defendant had been built by his feoffor on his own freehold, but so near to a house which was afterwards, and before suit brought, conveyed to the plaintiff, that the former discharged water upon the latter. The plaintiff brought his action quod permittat, and one of the points presented and considered was whether the action would lie against the feoffee of him who had erected the house which caused the nuisance, and it was held by the king's bench, affirming the judgment of the common pleas, that it would, but only after request for abatement. The court said:

"And if it be not reformed after request made, the quod permittat lies against the feoffee, and he shall recover damages if he do not reform it; but without request made it doth not lie against the feoffee, but against him who did the wrong it lies without any request made, for the law doth not require any request to be made to him who doth the wrong himself."

The judgment in the Case of Rolf, which was decided about 15 years earlier, seems to have been to the same effect, but the Penruddock Case has, for about three centuries, been regarded as the leading one on the subject, and as settling the law of England with respect to it. Pollock on Torts, which was first published in 1886 or 1887, has already passed through three editions, and in the latest of these its eminent author still retains his citation of that case as authority for the proposition, which he lays down without hesitancy or qualification, that "if one who has erected a nuisance on his land conveys the land to a purchaser who continues the nuisance, the vendor remains liable, and the purchaser is also liable if, on request, he does not remove it." If it had been deemed necessary, other authorities might have been added in support of this statement, and among them the case of Jones v. Williams, 11 Mees. & W. 176, in which Baron Parke followed the Case of Penruddock, and quoted with approval Jenkins' Sixth Century, case 57 (where he assumes the Penruddock Case to have been referred to), for this recital of the law:

"A. builds a house so that it hangs over the house of B., and is a nuisance to him. A. makes a feoffment of his house to C., and B. a feoffment of his house to D., and the nuisance continues. Now D. cannot abate the said nuisance, or have a quod permittat for it, before he makes a request to C. to abate it, for C. is a stranger to the wrong. It would be otherwise if A. continued his estate, for he did the wrong. If nuisances are increased after several feoffments, these increases are new nuisances, and may be abated without request."

It is not necessary to make any further reference to the English Reports. The industry of appellee's counsel has not enabled him to show that the doctrine maintained in the cases we have mentioned

has been discarded by the English courts, and it is entirely safe to assume that it has not been. It is, however, contended that it has been departed from, or materially qualified, in this country, and especially in the state of New Jersey, where the subject-matter of this controversy is situated. If this was so, it would, we think, be unfortunate; for, in our opinion, the requirement of notice in cases of this sort imposes no hardship upon plaintiffs, and is, in fairness, due to defendants. A grantee should not, of course, be held responsible for the creation of an injurious structure by his grantor, and, if not notified of objection, he may be ignorant of its harmful nature, or may legitimately presume that it is voluntarily submitted to; and therefore a plaintiff ought not to be permitted to recover damages for injury alleged to have been done to him by the maintenance of a pre-existing condition during a period when, with full knowledge of his hurt, he had made no complaint of it, nor requested the removal of its cause. As was said in *Central Trust Co. of New York v. Wabash, St. L. & P. Ry. Co.*, *infra*, "The subject has been fully considered by the courts both in England and in this country," and with the same result, viz. "that, where the party was not the original creator of the nuisance, he must have notice of it, and a request must be made to remove it, before any action can be brought." There may be some divergence in expressions of different judges, but that this is a correct statement of the effect of the decisions there can be no doubt. *Central Trust Co. of New York v. Wabash, St. L. & P. Ry. Co.*, 57 Fed. 441; *Plummer v. Harper*, 3 N. H. 88; *Curtice v. Thompson*, 19 N. H. 471; *Carleton v. Redington*, 1 *Post* (N. H.) 291; *Johnson v. Lewis*, 13 Conn. 303; *Noyes v. Stillman*, 24 Conn. 14; *Conhocton Road v. Railroad Co.*, 51 N. Y. 573; *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193; *McDonough v. Gilman*, 3 Allen, 264; *Nichols v. City of Boston*, 98 Mass. 39; *Grigsby v. Water Co.*, 40 Cal. 396; *Castle v. Smith* (Cal.) 36 Pac. 859.

It is, however, further contended that in this particular case notice was not requisite—First, "because the defendant has made use of the embankment ever since it acquired possession of the same, with a knowledge of its injurious results; and, second, because the defendant has actively maintained and continued the embankment by repairing and stoning the same." The assertions of law and of fact embodied in these propositions have had our careful consideration, but we have not been convinced that either of them is well founded. We are by no means satisfied that knowledge by a defendant of the damage caused to a plaintiff renders a request to abate unnecessary. The general principle that ordinarily actual knowledge supersedes a requirement of notice is not overlooked, but here not only is notice required to direct attention to the damage occasioned by the nuisance alleged, but a request to abate is also needed to inform him who continues it that it is not assented to. As was said in *Johnson v. Lewis*, *supra*, the plaintiff "should be presumed to acquiesce until he requests a removal of the nuisance"; and, if this view be correct, knowledge of the injury done, even if tantamount to notice of that fact, is still not equivalent to all that is requisite, for it does not rebut the presumption of acquiescence.

But it is not necessary to pass upon this point, and we do not do so. For the present purpose, it is sufficient to say that we find upon the record before us no evidence whatever that the appellant actually knew of the hurt done by the embankment, and that nothing appears which, in our opinion, would warrant us in charging it with constructive knowledge of it.

As to the second proposition, it must be admitted that the appellant has maintained the embankment; that it uses it as part of its roadbed, and for that use has repaired and preserved it. Does it follow that this action, though brought without notice or request, can be maintained? There certainly is nothing in the *Penruddock Case*, or in any of those which follow its lead, upon which an affirmative answer to this inquiry could be based. There are cases to the effect that a feoffee or lessee is liable, without request, where he increases the nuisance; but where this is shown he is held to be liable to the extent of the increase only, and this upon the ground that to that extent the nuisance is a new one, and arises from his own act. This principle of liability has been applied, too, in cases where the cause or means of nuisance was not added to, but where the use made of it was such as to be in itself a nuisance, and, consequently, a new wrong. Of these, *Moore v. Browne*, 3 Dyer, 319, is an example. It was an action on the case for diverting the water of a conduit pipe. It appeared that the husband of the defendant had attached to the main a small pipe with a cock, thereby drawing water, at his pleasure, to serve his house. The wife continued to draw after his death, and for this she was held liable as for a new diversion. The distinction between such a case and that now under consideration is manifest. Continuance in the active commission of a wrong, by the use of pre-existing means, is one thing, but the use of a wrongful structure in a manner and for a purpose wholly disassociated from the wrong is quite another and a very different thing. The use of this embankment by maintaining tracks on it neither renders it more injurious, nor inflicts any separate injury. If it had been constructed for the purpose of accumulating water, and the appellant had used the water so accumulated, the cases would be more like; as it is, they are essentially dissimilar. If the complaint was, not merely of the maintenance of the embankment by the defendant, but that the defendant backed up and used the water, there would have been no necessity to allege who erected it, or that request had been made for its removal, because the conduct of the defendant itself would have been the basis of the action, and not the presence of an embankment which it had not constructed. There is another class of cases, represented by *Irvine v. Wood*, 51 N. Y. 228, in which it is held that, where a positive legal duty is attached to the possession of property, a failure on the part of its possessor to discharge that duty is not justified by the fact that its performance was rendered necessary by the condition in which the property had come into his hands. But what duty with respect to this embankment, either to the appellee or to the public, has the appellant neglected? It is not only admitted, but is insisted, that it has been kept in repair, and it is not pretended that

the appellant has been guilty of any want of care to the damage of the appellee. No, it is the existence of the embankment which is complained of, and to assert that there is, in the absence of request, a duty to remove it, is to beg the question at issue, not to solve it. *Irvine v. Wood*, and other like cases, do not determine it, for they did not involve nor induce its consideration.

But it has been insisted that, although the views we have expressed may prevail in England, and throughout the United States generally, they are not in accord with the law of New Jersey, and therefore we have given to the decisions of the courts of that state especial consideration. The earliest of these is to be found in the report of the case of *Pierson v. Glean* (1833) 14 N. J. Law, 36. There the question was whether a party upon whose land a dam had been erected by a prior owner was, without request, liable for the nuisance thereby occasioned, and it was held that he was not. The defendant had set up, by pleas, that no request had been made, and to those pleas the plaintiff demurred. In the opinion of the court (*Hornblower, C. J.*), the law on the subject is said to have been then settled; and the *Penruddock Case*, and others, are referred to as supporting this statement and conclusion:

"As well, then, upon the good sense and common justice of the case, as upon the ground of unquestioned authority, I am of the opinion that the demurrer ought to be overruled."

In *Beavers v. Trimmer* (1855) 25 N. J. Law, 97, the defendant demurred to the declaration, assigning for cause:

- (1) That there is no allegation that the defendant erected the dams, etc.;
- (2) that there is no averment of a request to remove them."

And as to these two causes the court, citing *Pierson v. Glean* and other authorities, said:

"Where the action is brought for the erection or continuance of a nuisance, it is necessary to allege that the defendant erected or continues it; and if the action is not brought against the original erector, but against the feoffee, lessee, etc., a special request to remove it must be alleged."

Then followed the decision in *Canal, etc., Co. v. Ryerson* (1859) 27 N. J. Law, 457; and it is argued that by it the two preceding cases were overruled, or at least so modified and limited as to render them ineffective in the present case. The first of these suggestions encounters the objection that no intention to supplant the earlier cases is expressed in the later one; and the alternative position rests upon a construction of the judgment in the *Ryerson Case* which is inaccurate and inadmissible. *Pierson v. Glean* was explained and distinguished,—not overruled; and, although the learned judge who delivered the opinion had concurred in the judgment in *Beavers v. Trimmer*, that case was not even mentioned. In *Canal, etc., Co. v. Ryerson*, the action was brought for damage done to the plaintiff's land by the defendant's use of, and omission to repair, certain works of its canal, for the creation of which it was not responsible; and in a single sentence of the opinion of the court we have the substance of the utmost which it contains to give color to the view which the appellee asks us to take of it as a whole. That sentence is, "An ac-

tion may be maintained against a party who continues a nuisance erected by another, without a request to abate it"; and the question which confronts us is, what is the precise thought intended to be expressed by this inexplicit language? In what sense were the words "continues a nuisance" used; or, to put it differently, what was in mind as constituting a continuance of a nuisance? If this question can be satisfactorily answered, all difficulty as to the true purport and effect of the opinion may be overcome. In the first place, it may be said that it is scarcely conceivable that a different significance was purposed to be ascribed to the term "continuance of a nuisance" from that which had been theretofore attached to it. The Penruddock Case was not rejected, and the decisions which uphold its rule, though to some extent critically discussed, were not disapproved. It was said that Penruddock's Case does not support the doctrine which was contended for in the case which was under consideration, but it was not intimated that the doctrine which it does support is not in conformity with the law of New Jersey. It was pointed out that it was not necessary to question the correctness of the decision in *Pierson v. Glean*, for, admitting its authority in its broadest extent, its principle was not pertinent. Indeed, the opinion in the *Ryerson Case* cannot be carefully read without discerning that the object of its author was, not to discard or overthrow an established doctrine, but to demonstrate its inapplicability to a particular case. The right of the defendant to maintain the works there in question was upheld (page 467), and the instruction of the trial judge that there was no liability except for faulty construction or failure to repair was approved, the court saying:

"Although one of the counts of the declaration claims damages resulting from the erection of the dam and embankment, yet the charge of the court clearly excludes from their consideration all damages resulting from that cause alone."

In short, the defendant's liability was maintained (irrespective of the omission to repair, which was the actual basis of the decision) solely upon the ground of continuance of nuisance; and, as we have before said, the only question is as to what was in contemplation as evidencing or constituting a continuance. If it was intended to affirm that any use whatever of a structure which had been wrongfully erected amounts to a continuance of the wrong, even though the acts of user are not themselves injurious, and do not newly cause or add to the original injury, then indeed this opinion would conflict with the uniform current of authority. But we do not think that it is fairly subject to such interpretation. It contains this defining language:

"Whether there be in fact a continuance of the nuisance by the defendant is a question of evidence. If the defendant, by any active participation of his, assent to the wrong, \* \* \* he continues the nuisance."

There must be assent to the wrong, and to establish this there must be evidence of active participation in the wrong. Use of the thing complained of, for a purpose entirely apart from the hurt it occasions, is not enough. Such a use is, with respect to the injury, passive, and not active. It involves no participation in, no adoption or

partaking of, the wrong committed by the creator of the injurious thing. The illustrations which accompany the definition we have quoted make this very clear. It is said:

"If, for instance, he [defendant] repairs the dam, and holds back the water upon his neighbor for use of his own mill or canal, he continues the nuisance; \* \* \* but, if the defendant simply suffer a dam erected upon his land by a former owner to remain without being used by him, it is no continuance of the nuisance."

The distinction is obvious. One who by repairing a dam causes water to accumulate on another's land, and uses that water for his own mill or canal, actively participates in the wrong itself, and partakes of the very element of direct injury. He continues, not the dam merely, but the nuisance committed by its means. But where a dam is suffered to remain without being used as or for the purposes of a dam (and the character of use referred to in both illustrations must be taken to be the same), there is no use of it as a wrongdoing agency, and consequently there is not a continuance of the nuisance. What has been said makes it unnecessary for us to further comment upon the opinion in *Canal, etc., Co. v. Ryerson*. The following passages from it do not require explanatory discussion. They indicate its general tenor, and support, we think, our apprehension of its import. In speaking of *Moore v. Browne*, supra, it is said:

"The clear principle of the case is that an act of hers, appropriating the water to her use, thus recognizing and sanctioning the wrongful act of her husband, was a continuance of the wrong."

Of the *Penruddock Case*, it is said:

"It is obvious that the defendant did no act assenting to the wrong, or appropriating it to his use, and thereby adopting or continuing the nuisance. He was therefore no more liable for the injury than he would have been if a stranger had entered upon his premises, and placed a nuisance there without his assent. The case is in strict accordance with the principle adopted in *Hughes v. Mung*,<sup>1</sup> viz. that the defendant's living in the house did not amount to a continuance of the nuisance by him."

With respect to *Beswick v. Cunden*, *Oro. Eliz.* 402, it is observed:

"But, the case being again argued, the court held that the action could not be maintained, on the ground that there was no offense done by the defendant, for he did not do anything; and therein the case was distinguished from the case in 4 Assiz. pl. 3, for there the using was a new nuisance."

And in discussing *Pierson v. Glean* it is remarked:

"It is not the erection of a dam, but the holding back of the water upon the plaintiff's land, that constitutes the nuisance; and had the plaintiff, instead of demurring to the plea, replied that the defendant had so held back the water, and had, by means of the gates, from time to time, overflowed the plaintiff's lands, the case would have been brought directly within the authority of *Moore v. Browne*."

A few lines further on it is stated that the complaint in the *Ryerson Case* was—

"Not that the defendants wrongfully maintained the dam, but that they neglected to maintain and keep in repair the guard bank erected to secure the plaintiff's land from injury resulting from the erection of the dam. If

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<sup>1</sup> 3 Har. & McH. 441.



it was the defendant's duty to maintain and keep in repair the guard bank, no notice can be necessary to sustain an action for damages resulting from neglect of such duty."

So that it appears that the point which is controlling here was not necessarily for consideration there; and the circumstance that the facts of that case did not require that the agency of nuisance should be distinguished from the nuisance committed by the use of the agency no doubt accounts for the frequent, but not universal, employment in the opinion of the word "nuisance" to designate the instrumentality by means of which the wrong is effected, as well as to denote the wrong itself,—the injurious use. That this indiscriminate application of the word "nuisance" was not, however, made in deliberate disregard of its distinctive appropriateness in cases where the wrong is committed by use, is evidenced by the remark before quoted,—that "it is not the erection of a dam, but the holding back of the water upon the plaintiff's land, that constitutes the nuisance."

In conclusion, we do not doubt that, not only in England but in the United States as well, and especially in the state of New Jersey, the rule of *Penruddock's Case* is firmly established; and we are satisfied that it has not undergone any modification nor been subjected to any qualification which renders it inapplicable to the present case. We are therefore of opinion that in refusing to apply it upon the trial, there was error; and solely upon this ground the judgment of the circuit court is reversed.

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LONDON & SAN FRANCISCO BANK, Limited, *v.* PARKE & LACY  
MACHINERY CO. (BUDKE MANUF'G CO. Intervener).

(Circuit Court, D. Oregon. November 28, 1894.)

No. 2,153.

**SET-OFF—LIEN—PERSONAL DEBT.**

The B. Co. consigned goods to the P. & L. Co. upon an agreement that the P. & L. Co. should pay freight thereon, and, upon sale of the goods, account to the B. Co. for the price at which they were consigned. A receiver of the property of the P. & L. Co., having been appointed, took possession, among other things, of certain goods consigned under this agreement, on which the P. & L. Co. had paid \$234.66 in freight. At the time the freight was paid the P. & L. Co. owed the B. Co. \$2,000 on other consignments. *Held*, that the goods should be delivered by the receiver to the B. Co., and that if the B. Co. was under an obligation to pay the freight, as a condition precedent to its right of possession, it might be set off against the debt due the B. Co.

This was a suit by the London & San Francisco Bank, Limited, against the Parke & Lacy Machine Company. The Budke Manufacturing Company claimed a lien on certain goods held by the receiver, and prayed for an order for the delivery of the same.

Charles H. Woodward, for intervenor, Budke Manuf'g Co.  
Wirt Minor, for receiver of the Parke & Lacy Machinery Co.

**BELLINGER**, District Judge. The petition of the Budke Manufacturing Company prays for the delivery to them of certain goods consigned by them to the Parke & Lacy Company, and now in the hands of the receiver. The goods were consigned to the Parke & Lacy Company upon the understanding that the consignee should pay all freight and storage charges, and, upon sale of the goods, should account to the consignor for the price at which they were consigned. The consignee paid freight to the amount of \$234.66 upon the goods in question, which the receiver contends must be paid by the consignor before delivery can be had. At the time this freight was paid, the Parke & Lacy Company had in its hands, belonging to the Budke Company, over \$2,000, proceeds of sales of other consigned goods, which sum has not been paid, and on account of which the latter company asks a set-off to the freight charges paid by the Parke & Lacy Company. The receiver contends that, inasmuch as the freight paid by the consignee company is not a debt of the consignor company, the right of set-off does not exist, and that, therefore, the Budke Company must pay him the amount so paid as freight by the Parke & Lacy Company before delivery of the consigned property can be had, notwithstanding the fact that the latter company is indebted to such consignor in a sum much larger than the freight claim. In other words, the contention is that, because Parke & Lacy could not have maintained an action against the Budke Company to recover a personal judgment for the freight advanced, the Budke Company cannot set off a debt due them from Parke & Lacy against the claim of the latter upon the goods of the Budke Company for freight. The payment of freight charges, which are a lien upon goods, by the owner, is not a voluntary payment. It is a debt which the owner must pay to protect his property, and, being thus obligated, he may discharge the lien with what is due him from the lienholder. The question of liability of the Budke Company to a personal judgment does not affect their right to apply their money in Parke & Lacy's hands in discharge of the latter's lien upon the former's goods. The debt of goods pledged is the debt of the owner, when he takes possession of the goods; and without this the owner may waive his personal exemption from liability, if he sees fit to do so. Neither the Parke & Lacy Company nor the receiver is prejudiced by the Budke Company's assumption of payment of this lien. The arrangement by which Parke & Lacy were to look to the goods for advances of freight was not for their benefit, but for the benefit of the consignor company, whose right to assume payment cannot be denied, and whose assumption of payment does not prejudice the company to whom payment is made. I doubt whether the Parke & Lacy Company or the receiver is entitled to have this freight paid, as a condition to the delivery of the goods to the consignors; the conditions upon which the consignment was made not having been complied with by the consignee, and it not appearing, so far, that there is any equitable ground upon which such payment can be demanded from them, as a condition precedent to their right of possession. The prayer of the petition of the Budke Company is granted.

## NORTH AMERICAN ACC. ASS'N v. WOODSON.

(Circuit Court of Appeals, Seventh Circuit. November 27, 1894.)

No. 187.

## 1. EVIDENCE—RES GESTAE.

Upon the trial of an action against an insurance company upon a policy insuring one K. against injury or death caused solely by external violence and accidental means, a witness testified that he and K. had been making some repairs to a gutter on K.'s house, using a ladder for the purpose; that after completing the same, and returning to the house, K. went out for the purpose of testing this work by putting water into the gutter, leaving the witness in the house; that he heard a grating sound on the side of the house, sounding like the fall of the ladder, and, through the window, saw K. on the ground, pale and half bent over; that he went to him, and K. said, "I fell from that ladder," and, a few minutes afterwards, "I fell right on my neck and shoulders." *Held*, that K.'s declarations of the cause of the accident were properly admitted as part of the *res gestae*.

## 2. EXPERTS—HYPOTHETICAL QUESTION.

It is reversible error to admit the answers of expert witnesses to hypothetical questions which assume the existence of facts of which no evidence is offered.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This was an action by Archilaus M. Woodson, executor of C. C. Kemper, deceased, against the North American Accident Association, upon a policy of insurance. On trial in the circuit court, the plaintiff had a verdict, and judgment was entered in his favor. Defendant brings error.

W. H. Barnum, A. B. St. John, S. A. French, and D. W. C. Merriam, for plaintiff in error.

W. M. Jones, D. V. Samuels, and W. I. Culver, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge. This is an action brought by the defendant in error, a citizen of Missouri, against the North American Accident Association, a corporation organized under the laws of Illinois, and a citizen of that state, doing business and having its office at the city of Chicago, upon a policy of insurance dated October 6, 1891, issued by said association, insuring C. C. Kemper, then a citizen of Edgerton, Mo., now deceased, against the effects of bodily injury caused solely by external violence and accidental means. The policy, after providing for insurance against injuries of a temporary character, contains this provision:

"(6) Or, if such injury alone shall result in the death of the insured within ninety days thereafter, the association will pay \$5,000 to his estate, if surviving, or, in the event of prior death, to the legal representatives of the insured members, according to the by-laws."

The declaration charges that during the continuance of the policy, on the 23d day of April, 1892, Kemper sustained bodily injury, of

the character defined in the policy, which resulted in his death on or about the 2d day of May, 1892, and demands judgment for the sum of \$5,000. The defense is that Dr. Kemper did not come to his death as the result of bodily injury caused by external violence, but as the result of disease or suicide. A trial by jury resulted in a verdict and judgment for the plaintiff.

There are 25 assignments of error, but we do not deem it necessary to consider them all. The first one relates to the admission of the decedent's own declaration, made shortly after the supposed accident, as to the cause of the injury. The theory of the plaintiff's case is that the insured, on the 23d day of April, 1892, at his house at Edgerton, Mo., went upon a ladder at the back of his house for the purpose of fixing an eaves trough; that while on the ladder it slipped, and he fell to the ground, receiving an injury, from the effect of which he died on the 2d day of May following. The account of the supposed accident is shown by the testimony of W. B. Munford, in the following transcript from the record:

"It was in the afternoon of the 23d of April. Dr. Kemper and I were together. We talked about a gutter running along the west side of his house to this little portion of it which I was telling about,—about it leaking. He wanted to raise that little gutter so as to force the water towards the north end of the house. He took a piece of board about the length of that photograph, and measured it so as to set it on the corner of the house. Then we went outside, and took a ladder and some nails and a hammer, and put the ladder up against the side of the house, and Dr. Kemper went up the ladder with this little piece of board and nails and hammer. He nailed it there, and then came down the ladder and went into the house. When we got into the house, he said: 'I don't think that you set that gutter right. I don't believe you elevated it high enough.' 'O, yes, I am satisfied of that,' I answered. But he said: 'I don't think so. I am going to get some water and pour it into that gutter, and see.' He filled a cup with water, and went out the back door of the house, and went around the north side of the house, and came around, directly through the house, to the west room. Leading out from the west room was a window, and I saw Dr. Kemper go around the house when I was in this west room. I heard a grating sound on the side of the house; as a matter of fact, right at the house,—right at the window where we had left the ladder; and I heard a sound, a grating sound, on the side of the wall; sounded like the fall of the ladder on the ground; and through the window I saw Dr. Kemper, pale and half bent over. He kind of half straightened up and started around the house. I started hurriedly back through the house to him. He looked as though he was hurt. Getting into the door, I said, 'You are hurt, Kemper.' He said, 'I fell from that ladder. \* \* \* I saw that he was pale, and I put my hand on his shoulder and said, 'I think you are hurt very badly, Kemper.' He was standing perfectly still after he entered the door. I didn't see anything at first. I examined his head here (indicating the back), if I mistake not. He was standing there. He did not tell me where he had fallen, and I naturally examined the man, as that used to be my business. I have practiced as a physician. \* \* \* I saw— I am not definite, for myself, whether it was on the right or left side, but my impression is that it was on the right side of the cheek, here, and face, over there (indicating), was a red spot, first fiery red, and puffed and red, and I said, 'You have hurt yourself,' and he said, 'Yes'; and I walked around then into the other portion of the house, and I said, 'Kemper, if you will sit down, I will go and get you some liniment, or something, to rub your neck for you.' He says, 'Yes, I fell on my neck and shoulders.' He said, 'I fell right on my neck and shoulders,' and I said, 'You had better let me get you some liniment, and rub you.' He said, 'No, no.' He would not permit me to do it. He says: 'I will get over it shortly. I am getting over it.' And we then proceeded to straighten up these rooms. Q. Did you go outside, and see if the ladder had

fallen? A. Not at that moment; not at that time. It was possibly an hour after I went out of the house; a half an hour after I went out of the house and saw it. I saw it before I went out of the house. Well, we went and straightened up these rooms I am telling you about,—these two rooms,—the back room and the front room. Dr. Kemper and myself had been straightening up things generally on that day; house-cleaning ever since morning; just straightening up the house. I was helping him as I had done for two or three years. I straightened up the back room, and went into the front room, and was fixing things there, and Dr. Kemper was lying around during all of that time, and I said: 'You had better let me do these things. I can do it.' 'No'; he insisted upon helping, you know. He went to get an old picture. It looked about three feet, I reckon, two feet, or about two and one-half feet,—and was going to hang it up. Then he set it down behind the chair, against the wall. On the chair he put the box. He was a short man. He was going to get upon that chair and hang that picture up. He got up onto the chair, and then upon the box, and then he reached down for this picture, and lifted it up to hang it up. He fell again right on the floor. I was in the room at the time piling on top of a bookcase a lot of old Puck's magazines, and one thing another. I turned to him, and I says: 'Kemper, I told you you were hurt, and you had no business to go on top of that box. I will do it myself.' I says: 'Keep away from these things. I want to hang the picture up.' He went into the back room, and I went to the cistern to get a drink of water. I don't remember doing anything more that day. It was pretty well along in the afternoon."

The witness also testified that the ladder was eight or nine feet long. Also, as follows:

"When we went to supper, Dr. Kemper sat down beside me, and I noticed that he sat down with difficulty. He was stiff when he sat down. He didn't say anything. We had our supper and got up to go. He said nothing about his injury at that time to any one. He had the appearance of a man who was stiffened up. He sat down with difficulty, and got up with difficulty. I stayed with him that night, and remained until Monday morning. Q. Now, state what his physical condition was up to the time you left him. A. I saw no change in the man. He was still stiffened up. He sat down with difficulty, and got up with difficulty. Q. To refresh your recollection, did you ever see him hold his head, or complain of dizziness, or anything of that kind? A. I do not remember about that. The condition was the same, as I remember it. I asked him Monday morning how he was feeling, and he said nothing to me. I asked him how he felt, and he said, 'As to the soreness on my back, it is all gone. but my neck and shoulders still hurt me.' That is all."

All the testimony in regard to Dr. Kemper's own declaration of the cause of the accident was objected to by defendant's counsel, admitted against such objection, and exception duly taken. The first assignment of error relates to the admission of these declarations, it being contended by the defendant's counsel that such testimony was incompetent. We think it was properly admitted as part of the *res gestae*, within the principles of *Insurance Co. v. Mosley*, 8 Wall. 397.

Seven assignments of error, numbered from the fifth to the eleventh, inclusive, relate to the admission of evidence of expert witnesses concerning the cause of Dr. Kemper's death, in answer to hypothetical questions framed upon a supposed state of facts not appearing in evidence at the time the questions were put, and not proven at any time on the trial. This testimony, against defendant's objection was introduced by means of depositions which had been taken before the trial, mainly in the state of Missouri. Several physicians residing in Missouri were examined, and their testimony

taken, presumably on the supposition that the supposed facts upon which the answers were predicated would be proven by means of other witnesses on the trial. Some of these facts were proven, while others were not, but the answers were admitted by the court, the same as though all the facts stated in the hypothetical questions had been proven. This we think was error for which the judgment must be reversed. These several assignments of error are so much alike that it will not be necessary to notice more than two or three, though we are of opinion that they are each and all well taken. All the material facts upon which the answers are predicated not being proven, it is impossible for the court to assume that the answers would not have been different if the assumed facts, which were not proven, had been left out of the hypothetical questions. According to the eighth assignment of error, this question was asked the witness John E. Owens, a physician and surgeon residing at Chicago:

"Q. I will now read the question, and hear what you have to say to the jury in answer. Suppose a vigorous, energetic, hearty, healthy man, of very cheerful and jovial disposition, forty-one years old on April 23, 1892, about four o'clock in the afternoon, should fall from or near the top of a ladder nine feet high, striking upon the back of the head and shoulders, either upon the ground itself, or upon some object upon the ground, with sufficient force to cause, within a few moments, the lower part of the back of the head and neck to become very red, and look puffed up and inflamed, and the person himself to become pale and weak; and suppose that in about an hour after such injury the person should stand upon a chair to hang a picture, and, in the absence of any known cause, should fall off the chair upon the floor; and suppose that the man, ordinarily a hearty eater, ate but a little supper, and complained of pain in the back of his head and shoulders, accompanied by a stiffness of the head and shoulders; and suppose that thereafter the man made daily and frequent complaint about its hurting him to get up when he sat down, and about such pains and stiffness, accompanying such complaint at times by holding his hand upon the back of his head and neck, which continued up to the 1st of May, 1892; and suppose that after such injury the man's disposition changed, so that he became reserved, and very different in manner from what he had been before, and did not give the same attention to his business that he did before, and seemed to lose his energy that he had before, although he gave general attention to his business; and suppose that on the morning of May 2, 1892, he was found dead in his room, lying upon his face, at the side of a lounge, with a very slight cut at the corner of the eyebrows, and another at the corner of the mouth, and a bruise or contused wound, which appeared to be not of recent date, about an inch long and about a half an inch wide, on the back of his head, at the right side, upon or near the occipital bone; and suppose that by him, in his handwriting, was found the following, written upon the back of an envelope: 'My head feels very queer, especially at the base of the head, so queer, I do not mind to die, but now is so inconvenient, good-bye.' Now, I will ask you, doctor, in the absence of any other known cause of his death, what would you say caused it? A. It would look like the injury was productive of his death. Q. That would be the probability, as you understand it? A. I think so."

The facts assumed in the question, but not proven on the trial, were these, given in the language of the question: (1) "About four o'clock in the afternoon should fall from, at, or near the top of a ladder about nine feet high, striking upon the back of his head and shoulders." There is evidence that he fell from a ladder nine feet high, but none whatever that he fell from the top, or near the top, nor that he struck upon the back of his head. (2) "And complained

of pains in the back of his head and shoulders. That thereafter the man made daily and frequent complaint about its hurting him to get up when he sat down, and about such pain and stiffness, accompanying such complaint at times by holding his hand upon the back of his head and neck, which continued up to the 1st day of May, A. D. 1892." None of these facts appear in the testimony. On the contrary, witness Munford testified that he said nothing about his injury at any time to any one. And W. H. Kemper, a brother, testified: "He did not say a word about suffering. I did not notice anything about him as to stiffness, or as to whether he was pale or not." (3) "And suppose that by him, in his handwriting, was found the following writing upon the back of an envelope," etc. There was no evidence that this envelope was found on Dr. Kemper. On the contrary, the evidence shows that his body was taken from the floor and placed on the bed at about 7 o'clock in the morning, and that some time in the afternoon (witness Hall says about 1 o'clock) this envelope was found on the floor of the room. This, as the evidence shows, was after the room had been visited by many people.

The question put to T. E. Potter, physician and surgeon, embodied in the ninth assignment of errors, is much like the preceding, except that it has this statement in addition:

"About an hour and a half or two hours after the first fall, he went to the bank of which he was cashier, and there complained of the shock and injury which he had received from the fall, complaining particularly of pain in the back of his head. He made the same complaint at the supper table, and afterwards, for eight days, complained of pain in the back of his head, frequently placing his hand to the back of his head, near the base of his skull; also, complaining of difficulty in arising from a chair while sitting down."

The answer to the question was, "Well, I should think that the fall was the prime cause of his death." We have searched the record in vain for any evidence of the above statement of fact.

In the eleventh assignment of errors, in a similar question put to witness C. H. Wallace, is the following assumed fact, in which there seems to be not a particle of proof in the record: "On the next day he hurriedly left the dinner table and went out into the yard, and sat down, and held his head in his hands, and complained of excessive pain in the back of his head."

The fifth assignment contains this statement embodied in a hypothetical question put to witness E. D. McCoffey, a physician and surgeon residing at Platte City, Mo., who knew Dr. Kemper in the army: " \* \* \* And experienced sensations of dizziness, which continued, more or less, in the aggregate, for a week, and that on the night of his death the feelings mentioned were so intensified as to cause him to seek the aid of physicians. \* \* \* "

In the sixth assignment is a similar statement of fact in a question put to witness William J. Overbeck, another physician and surgeon residing at Platte City.

The importance of these supposed facts is apparent when it is considered what the plaintiff's claim was,—that Dr. Kemper had met with a fall, which caused extravasation of blood into the base of the brain, producing death nine days afterwards. With an in-

jury of this character, dizziness would naturally be expected. Hence, the importance of proving a symptom which might, with some certainty of finding, be looked for in such a case. But we find no evidence of its existence in the record. These hypothetical questions were well and ingeniously framed to elicit the answers actually given to them, and the materiality and importance of the testimony can hardly be overestimated when we consider that the plaintiff's case rested in great part upon the testimony of these experts, who, in general, knew nothing about the case itself, and were giving their opinion upon an assumed state of facts as to the cause of the death; and when it is further considered that the evidence showed that from the time of the supposed fall from the ladder and the second fall in the house, up to the day of his death, Dr. Kemper continued to attend to his usual and daily business at the bank, and that the witnesses for the defendant, physicians and surgeons residing in Chicago, testified that in their opinion it was not possible that the fall from the ladder, causing extravasation of blood at the base of the brain, could have caused the death, but that in their judgment the death was more likely to be caused by poisoning, or possibly by a sudden attack of heart disease. Dr. Henry M. Lyman, professor of theory and practice of medicine in Rush Medical College, in answer to the same hypothetical question put to Dr. Owen, made this answer:

"I should state that I could not tell what was the cause of his death, from that statement. It was not certainly from the injury. There is nothing to indicate that the injury caused his death."

He further says, in answer to the question:

"Q. How do you physicians go about it to find out whether a man has, or has had, a hemorrhage? A. By observation of the symptoms that exist. When a hemorrhage takes place in the brain, there is paralysis following,—paralysis of some part of the body. That paralysis is the best sign of the injury,—that hemorrhage has taken place. If the hemorrhage is into one side of the brain, paralysis is on the opposite side of the body. Paralysis becomes apparent by the impossibility of moving the paralyzed parts. If hemorrhage takes place into the left side of the brain, the arm and leg will be paralyzed upon the opposite side of the body. Q. If a man had a hemorrhage in his brain somewhere on the 23d day of April, 1892, in consequence of having a fall, or anything else, is it your observation and experience and knowledge that that man would be able to go on and transact business,—his ordinary business,—with more or less attention, for a week, and then die of that hemorrhage? A. No, it is not. Q. Why not? A. Because he would have been disabled by the original injury and hemorrhage. An injury that would have been severe enough to produce such a hemorrhage would have paralyzed him, and rendered him incapable of going about, and he would have been laid up in bed entirely."

To the same question put to Dr. Harold M. Moyer, of Chicago, the following answer was given:

"There is nothing in the hypothetical question by which a man could predict an opinion, with any accuracy at all, as to how that death came about, except that, taking the facts hypothetically as they stand, one can absolutely say death was not the result of those falls."

The following question, which had been previously put to some of the plaintiff's witnesses, was then put to Dr. Moyer, with the answers following:



"Q. Now, Dr. Moyer, I will put to you the same question again, precisely as it was, with this addition: Suppose, at the hour of one o'clock in the morning of May 2, 1892, Dr. C. C. Kemper, spoken of in this question, crossed over the street from his house to the house of Dr. Lewis, and asked Mrs. Lewis for Dr. Lewis, and told her that he had done a foolish thing two hours before; that he had gotten upon a chair to get a book from the bookcase, and had fallen from the chair, and had struck his head against a box, and that his head pained him,—and while telling her this he had his hand to the back of his head, and that he desired her husband, Dr. Lewis, to make an examination of him, and that she told him that Dr. Lewis had gone into the country, and would not be back for some time, but that when he came back she would have him go over and see Dr. Kemper, and that Dr. Kemper replied, 'No, no, you need not mind. If I want him, I will come for him again,' and that then the Dr. walked back to the house (his house), and was found dead in the morning, at 7 o'clock of May 2d, on the floor at the foot of a sofa, a book (a magazine) near one of his hands, and there was found on the floor at about that spot, later in the day, the envelope on which was written the words in the handwriting of Dr. Kemper, being the words included in the hypothetical question, and in the hypothetical question read to you, which envelope and writing thereon I show you (handing witness envelope). Now, then, adding this new matter to my previous hypothetical question, and assuming that Dr. Kemper wrote what you see on that envelope, excepting these words, 'Exhibit A,' at the bottom,—now, what do you say to that enlarged hypothetical question? And, in the absence of any other known cause, what would you say caused his death? A. I should say, on the state of facts shown in this hypothetical question, the man probably died of some poison. Q. Was there other things from which he might have died, including the note and all? A. I don't think there is any one thing that this man could have died of, excepting some poison, including this note and all the other facts."

Further testifying:

"The most frequent of all causes of certain sudden deaths, including, perhaps, more than nine-tenths, are from heart disease. The next, perhaps most important, are poisons. The least of all is some injury to the brain. A hemorrhage into the brain the least frequent. I am basing my answer largely on my own experience."

This being the kind of case the plaintiff must make out,—that Dr. Kemper had had a fall which had produced extravasation of the blood in the brain,—the importance of the facts detailing the symptoms contained in the hypothetical questions becomes obvious. It is a proposition too simple to require any citation of authorities that the material facts assumed in a hypothetical question must be proven on the trial, or rather that there must be evidence on the trial tending to prove them. Otherwise, it is error to allow them to be answered. How can we say that either the answers to the questions or the verdict of the jury would have been the same if the statements contained in the questions, and not proved, had been omitted? Evidence of experts who are allowed to give an opinion is always attended with a sufficient degree of uncertainty and danger when founded upon an assumed state of facts which appear on the trial, or which the evidence tends to prove, and which the jury must find proven. If counsel can, in advance of knowing what he will be able to prove on the trial, frame his questions as he pleases, putting into them supposititious statements from his own invention and ingenuity, wholly unsupported by evidence, then the danger of this rather unreliable kind of testimony will be increased a hundred fold. *Hovey v. Chase*, 52 Me. 313; *People v. Foley*, 64 Mich. 148, 31 N. W. 94; *Reber v. Herring*, 115 Pa. St. 599, 8 Atl. 830; *Fox v. Color*

Works, 92 Mich. 243, 52 N. W. 623; *Turnbull v. Richardson*, 69 Mich. 400, 37 N. W. 499; *Loucks v. Railway Co.*, 31 Minn. 526, 18 N. W. 651; *Gueting v. State*, 66 Ind. 94. Judgment reversed and case remanded, with directions to the court below to award a new trial.

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PFITZINGER v. DUBS et al.

(Circuit Court of Appeals, Seventh Circuit. November 27, 1894.)

No. 186.

**LIBEL—LANGUAGE ACTIONABLE PER SE.**

An article in a newspaper, consisting of a letter in which it is said, of and concerning the plaintiff: "You cannot get P. down any lower than he is; he is low enough; you can't get him down any lower; you can't spoil a rotten egg,"—is grossly libelous per se, even without innuendoes to explain the meaning of the language used, and no allegation of special damage is necessary.

Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Action on the case by Michael Pfitzinger against Rudolph Dubs, August Haeefe, and the Volksblatt Printing Company. Defendants obtained judgment on demurrer to the declaration. Plaintiff brings error.

Francis J. Woolley and Wm. Richie, for plaintiff in error.

James Lane Allen and Samuel E. Knecht, for defendants in error.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge. This is an action brought by the plaintiff in error, a minister of the gospel, and a citizen of Buffalo, N. Y., against the defendants, citizens of Chicago, Ill., for printed libel. The defendants are, respectively, editor, manager, and publisher of a German religious newspaper published at Chicago, Ill., called the *Deutsche Allgemeine Zeitung*. On the 22d day of September, 1893, they published in the said paper a communication of and concerning the plaintiff, purporting to be a letter from one H. Horn, of Syracuse, N. Y., in the German language, and which, translated into English, is as follows:

"From the State of New York.

"Dear Bro. Dubs: The Lord be with you. In the D. A. Z. there was recently asked, among other questions, one directed to L. Heinmiller, of Buffalo, New York. As it appears, L. Heinmiller will not answer this question. Why he will not answer it, he knows best. The question is, why does the preacher, L. Heinmiller, of Buffalo, N. Y., compare M. Pfitzinger with a rotten egg, if he has unwavering confidence in M. Pfitzinger? Who the questioner is, I do not know. Perhaps Bro. Heinmiller knows to how many other persons he has made this comparison, and since he does not answer the question I thought it my duty to answer this question myself, for there is a great deal connected with the question that I will not mention just at this time. Well, for the answer to this question: At the time when Pfitzinger was preparing to get me down, and I was preparing to meet him, I opportunely met L. Heinmiller. It was at the time when his brother, G. Heinmiller, was on

the way from Germany to the conference at Indianapolis, and passing through Syracuse, and preaching in the evening at the Salem church. After the Divine service, when we, I and Heinmiller, had greeted each other, he at once said to me, 'Bro. Horn, do you think you can get Bro. Pfitzinger down?' I answered: 'I can and will prove my case.' Then Bro. Heinmiller replied: 'Bro. Horn, you cannot get Pfitzinger down any lower than he is. He is low enough. You cannot get him down any lower.' I was amazed to hear such a remark from the man, and said, 'Heinmiller, what do you say?' He said: 'It is a fact, he is low enough; you can't get him down any lower; you can't spoil a rotten egg unless you open it and sh— in it.' I was still more amazed, and said: 'Why, Heinmiller! how you do talk!' He said: 'That is true.' I was so amazed that I scarcely knew what to say, and wished him good night. This is what Bro. Heinmiller said to me of Pfitzinger, and, as it seems, he has made the same comparison to other persons. I hope that Bro. Heinmiller will not deny this, for a time will come when he cannot deny it. I think still more of Bro. Heinmiller. Still so much. When the conference in Indianapolis was held, and Pfitzinger got no office, I thought, so Bro. Heinmiller really knew why he spoke to me in such a manner of Pfitzinger, for what he knew his brother, G. Heinmiller, also knew; and what he knew and believed, those who were chosen as delegates to the Indianapolis conference also knew and believed. Brother Heinmiller, a word to you: Say also freely and openly that you have asserted to others that you have unwavering confidence in Pfitzinger, that you have been drawn into this current, your inner conviction is exactly the opposite, judging from your expressions.

H. Horn, Syracuse, N. Y."

The declaration contains two counts,—the first charging that the article is a libel upon the plaintiff as an individual; the second, that the same words are a libel upon him in his special character as a minister of the gospel,—each count having appropriate colloquium, inducement, and innuendoes. No special damage is averred in either count, but only general damages are claimed. There were innuendoes contained in the declaration setting out this letter, showing the sense in which the most offensive portion of the charge would be understood, and the true meaning thereof to be that the plaintiff was totally unfit to be and remain a minister of the gospel, and that he had already fallen to the lowest possible degree of moral, physical, and intellectual filthiness and degradation. There were general and special demurrers put in to the declaration. Upon hearing, the general demurrer was sustained by the court; and, the plaintiff, choosing to stand by the declaration, judgment was entered against him, dismissing the action on the ground that, there being no averment of special damage, and the declaration not charging any specific character of dishonesty, crime, or immorality, the publication was not libelous, and the action could not be sustained.

The only question in the case is whether the demurrer was properly sustained,—that is to say, whether the words set out in the declaration are actionable, being published of and concerning the plaintiff in a public newspaper; and that depends upon the question whether the words are fairly capable of the construction put upon them by the plaintiff in his declaration. If they are, then the question of the meaning should have been submitted to the jury. It is only where the words are incapable of a construction injurious to the plaintiff's character that the court is justified in taking the case from the jury. Townsh. Sland. & L. (4th Ed.) p. 576; Byrnes v. Matthews, 12 N. Y. St. Rep. 74. The question of the meaning of the words

is one of fact, for the jury, unless the court can see at a glance that they are incapable of a construction injurious to the plaintiff's character, and the court should understand the words in the same manner that other persons reading the published article would naturally understand them. That is to say, they are to be taken in their usual acceptation and meaning. Under the first count, if the words, taken in their usual and ordinary sense, as they would be understood by persons reading them, tend to injure or degrade the plaintiff morally or socially, then they are actionable per se. It is not essential that the words should impute dishonesty, crime, or immorality of any specific kind or character. If they tend to degrade or dishonor him, or injure his character, or hold him up to scorn, contempt, or ridicule, or render him of less esteem in the community, morally or socially, then the words are actionable when printed. Of course, the rule is different in slander, or mere spoken words, where it is necessary that some offense known to the law should be imputed. One of the leading cases in New York upon the subject is that of *Cooper v. Greeley*, 1 Denio, 347. There the words which Horace Greeley had published of and concerning Fenimore Cooper, were these:

"At all events, having published the letter excepted to as a matter of intelligence, without any sort of feeling towards Mr. Cooper, but such as his conduct in the case seemed to excite, we have at all times stood ready to publish cheerfully any correction or contradiction he might choose to send us. He chooses to send none, but a suit for libel instead. So be it then. Walk in, Mr. Sheriff! There is one comfort to sustain us under this terrible dispensation. Mr. Cooper will have to bring his action to trial somewhere. He will not like to bring it to trial in New York, for we are known here; nor in Otsego, for he is known there."

The declaration was demurred to, and the contention was that the words were not libelous. Of course, the charge is very indefinite. No particular crime or immorality is alleged. But it was contended by the plaintiff that the words contained a charge that he was in bad repute in the county of Otsego, in consequence of being known in that county, and that on that account he would not like to bring a libel suit to trial there. The words were held to be libelous, and their true meaning to be fixed by the innuendo, and the demurrer was overruled.

In *White v. Nicholls*, 3 How. 266, the United States supreme court lay down the rule thus:

"With regard to that species of defamation which is effected by writing or printing or by pictures and signs, and which is technically denominated a 'libel,' although in general the rules applicable to it are the same which apply to verbal slander, yet in other respects it is treated with a sterner rigor than the latter, because it must have been effected with coolness and deliberation, and must be more permanent and extensive in its operation than words, which are frequently the offspring of sudden gusts of passion, and soon may be buried in oblivion. *Rex v. Beare*, 1 Ld. Raym. 414. It follows, therefore, that action may be maintained for defamatory words, published in writing or in print, which would not have been actionable if spoken. Thus, to publish of a man, in writing, that he had the itch, and smelt of brimstone, has been held to be a libel. Per Willmot, C. J., in *Villers v. Monsley*, 2 Wils. 403. In *Cropp v. Tilney*, 3 Salk. 225, Holt, C. J., thus lays down the law: 'That scandalous matter is not necessary to a libel, it is enough if the defendant induces an ill opinion to be had of the plaintiff, or make him contemptible and ridiculous.' And Bayley, J., declares in *McGregor v. Thwaites*, 3 Barn.

& C. 33, "that an action is maintainable for slander either written or printed, provided the tendency of it be to bring a man into hatred, contempt, or ridicule."

In a very recent case decided by the supreme court of Wisconsin, and reported in 58 N. W. 245 (*Kay v. Jansen*), the complaint alleged that the plaintiff was the mother of Duncan Kay, who was committed to the Wisconsin Industrial School for Boys, August 15, 1893, and was still an inmate thereof; that plaintiff was a tenant of defendant at that time, and up to September 1, 1893; that defendant, knowing these facts, published on two large placards on either side of his express wagon, and for many days carried the same through the principal streets of Waupun, a false and scandalous libel of and concerning the plaintiff as follows: "We know the tree by the fruit,"—meaning, according to the innuendo, that the son of the plaintiff was at the Wisconsin Industrial School for Boys, at Waukesha; he was therefore vagrant or a criminal, or incorrigible or vicious in conduct; and that she, the plaintiff, was likewise a vagrant or a criminal, or incorrigible or vicious in conduct. The court held that a general demurrer to the complaint was properly stricken out, the words placed upon the placards being, under the facts stated by way of innuendo, fairly susceptible of the opprobrious meaning ascribed to them in the innuendo. This case is in line with the former case by the same court. *Buckstaff v. Viall*, 84 Wis. 129, 54 N. W. 111. In that case the plaintiff whose name was Buckstaff, was a state senator residing in Oshkosh. In a newspaper article published in that city, the defendant had referred to the plaintiff as "Senator Bucksriff," and spoke of the "divine favor of Senator Bucksriff," "the legislative god of Winnebago county"; "His majesty Bucksriff"; "We are sensible, O dearly-beloved Bucksriff, of thy great wisdom and power, and humbly beseech thee," etc.; "Know, then, O divine senator, compared with whom all other senators are merely cyphers," etc. The declaration was demurred to, and the demurrer overruled, and the supreme court sustained the ruling, holding the article grossly libelous; and yet no specific charge of crime or immorality was made. The court held that the nickname itself was a term of reproach, as being in the similitude of, and suggesting, the name of "Pecksniff," one of Charles Dickens' most hated and offensive characters. It was held that the whole article, in its general scope and meaning, was calculated to injure the plaintiff in his reputation and character, both as a citizen and senator, by bringing him into shame, disgrace, hatred, scorn, ridicule, and contempt.

In *Hake v. Brames*, 95 Ind. 161, words quite as indefinite and uncertain in their meaning were held libelous. Defendant had written a letter in which he said of the plaintiff:

"I know this same Brames. I was unfortunate enough to have him in my employ at one time as a bookkeeper. He is a liar. I would not believe him under oath."

Each of these sets of words was held libelous, although charging no crime, and the court quotes with approval from *Folkard's Starkie on Slander* (section 154) as follows:

"As to those libels which by holding a person up to scorn or ridicule, and, still more, to any stronger feeling of contempt or execration, impair him in the enjoyment of general society, and injure those imperfect rights of friendly intercourse and mutual benevolence, which man has with respect to man, it is chiefly in this branch of libels, that the action for words spoken and for words written substantially differ."

So in *Rice v. Simmons*, 2 Har. (Del.) 417, it was said that:

"To make a publication libelous, it need not contain a direct and open charge. Though the law requires the imputation of something that will dishonor or degrade a man, or lessen his standing in society, it does not require that such imputation should be in express terms. If it did, it would extend but little protection to reputation. The character of a libel is to be judged by the effect it produces upon the mind. It does not always happen that you can at once put your finger upon the libelous matter, and the attempt to show in what it consists may depend much upon inferential reasoning, while yet the impression may be distinct upon the mind of every reader, and all the damage result to character that would arise from a plain and direct charge."

In *Solverson v. Peterson*, 64 Wis. 198, 25 N. W. 14, it was held that to state, in writing, of a man, that he "has turned into an enormous swine, which lives on lame horses, and that he will probably remain a swine the rest of his days," is libelous per se.

In *State v. Smily*, 37 Ohio St. 30, it was held by the supreme court of that state that where one falsely and maliciously publishes of and concerning another, that his house had been searched, under legal process, for the discovery of goods secretly stolen, and supposed to be secreted therein, he was guilty of libel, and that, where the language complained of as libelous will bear the meaning ascribed to it by the innuendo, whether such was the meaning intended is a question of fact, for the jury. In *Massuere v. Dickens*, 70 Wis. 83, 35 N. W. 349, the defendant had published the plaintiff as a "skunk," with accompanying epithets. The article was held libelous per se, though containing no more specific charges of immorality.

In *Cerveney v. News Co.*, 139 Ill. 345, 28 N. E. 692, the supreme court of Illinois held it libelous to publish that a man failed of an election because he was an anarchist. The court say:

"An action for libel may be sustained for words published which tend to bring the plaintiff into public hatred, contempt, or ridicule, even though the same words, spoken, would not have been actionable. And it would seem so apparent that an individual may be brought into hatred, contempt, or ridicule, within the meaning of the law, by professing vicious, degrading, or absurd principles, that it can need no discussion."

In *Price v. Whitely*, 50 Mo. 439, the following publication was held to be libelous:

"I found an imp of the devil, in the shape of Jim Price, sitting upon the mayor's seat; and now, sir, that imp of the devil, and cowardly snail, that shrinks back into his shell at the sight of the slightest shadow, had the bravery to issue an execution against me."

Here the charge is quite as general as could well be, and yet it was held calculated to injure the plaintiff in the eyes of the community, and therefore libelous.

In *Gaither v. Advertiser Co.* (Ala.) 14 South. 788, a publication to the effect that plaintiff was discharged from the superintendency of an office of the Farmers' Alliance because of a loss in the business,

and that the books of such office, when balanced, showed a net profit of \$5,000 on a much smaller business, and that the showing simply proved plaintiff to be a man of small business capacity, was held to be libelous per se, as reflecting on plaintiff's business capacity, though it could not be construed, by means of an innuendo, to charge dishonesty in conducting the office. In *Pledger v. State*, 3 S. E. 320, the supreme court of Georgia held that a newspaper article charging a real-estate agent with objecting to a negro tenant, who was thereby compelled to sell out his business at a loss, and advising colored people not to patronize the said agent, but to leave the "old skunk to himself, to stink himself to death," was libelous. In *Hayner v. Cowden*, 27 Ohio St. 292, it was held that words charging a minister of the gospel with drunkenness were actionable per se, without alleging special damage, when spoken of him in his official capacity. The same ruling was made in *Chaddock v. Briggs*, 13 Mass. 248. In *Ritchie v. Sexton*, 64 Law T. (N. S.) 210, defendant had written a letter containing this passage:

"Supposing, for example, I sent a question, based on hearsay evidence, to the effect that I heard from a gentleman, whom I would not think of doubting, that you were in a state of delirium tremens, or suppose I had added to that further stories I had heard, that you were utterly intoxicated in the streets."

It was held that the words were fairly capable of being reasonably understood in a libelous sense, and that, therefore, there was a question to go to the jury.

In *Teacy v. McKenna*, 4 Ir. Com. Law, 374, the plaintiff declared upon a letter published in defendant's paper, in which it was alleged that the plaintiff, being an hotel and job coach proprietor by trade, and a Presbyterian in religion, had, from mere motives of intolerance, refused the use of his hearse for the funeral of his own deceased servant because the body was about to be interred in a Roman Catholic burial ground. It was held, on demurrer, that the court could not so clearly see that the letter could not be, in any view, libelous, as to justify them in withdrawing the case from the jury.

In view of these authorities, and many others which the court has examined, we have no hesitation in holding that it was error to withhold this case from the jury. Moreover, we think the publication of the letter declared upon to be grossly libelous per se, whether published, as charged in the first count, of the plaintiff as an individual citizen, or, as in the second count, as a minister of the gospel. The whole tenor and scope of the article, from first to last, is calculated to injure and degrade the plaintiff's character, and to hold him up to ridicule and contempt, and it was hardly necessary to introduce innuendoes to show the injurious character of the charges. The words, with the entire context, are to be taken and construed in their ordinary and natural meaning, as they would be most likely to be understood by persons reading the article; and if, in so construing them, they are not grossly libelous, it is difficult to conceive what language could be so. Take these words in connection with what precedes and follows:

"After the divine service, when we, I and Heinmiller, had greeted each other, he at once said to me: 'Bro. Horn, do you think you can get Bro.

"Pitzinger down?" I answered: "I can, and will prove my case." Then Bro. Heinmiller replied: "Bro. Horn, you cannot get him down any lower than he is. He is low enough. You cannot get him down any lower." I was amazed to hear such a remark from the man and said: "Heinmiller what do you say?" He said, "It is a fact, he is low enough; you can't get him down any lower; you can't spoil a rotten egg. \* \* \* I was still more amazed, and said: 'Why, Heinmiller, how you talk.' He said, 'That is true.' I was so amazed that I scarcely knew what to say."

It needed no innuendo to show the meaning of such language. "Bad egg" is a well-known and commonly understood colloquium in this country for a bad or worthless person, and is so defined in the Century Dictionary (page 1853). The context also shows plainly the sense in which the words were used here. Where words have a well-understood meaning, an innuendo to show the injurious sense in which they are used is unnecessary. And the court should not be the only one that cannot understand and apply the proper meaning. The remarks of the English judges in the case of Hoare v. Silverlock, 12 Adol. & E. (N. S.) 624, seem quite as applicable to this case. The plaintiff, being the daughter of a deceased naval officer, had applied to the Royal Navy Benevolent Society for pecuniary assistance. Referring to this, defendants published of her that they were sorry to see her case had been reopened, and that the officer who reopened it had not heard her former application, and had thus missed hearing \* \* \* the recantation of some who were her warmest friends, and who, in giving up their advocacy of her claims, had stated that they had realized the fable of the frozen snake. There was a verdict for the plaintiff. Upon a motion in arrest of judgment Lord Denman said:

"The third count (as above) is certainly good. \* \* \* They are words well understood. There is no doubt they are commonly known in a libelous sense. It must have been left to the jury to say whether they were used in that sense or not."

Coleridge, J., said:

"As to the necessity of innuendo the jury and court, in such a case as this, are in an odd predicament, if they, alone of all persons, are not to understand the allusions complained of. Suppose the libel had said plaintiff had acted like a Judas; must the history of Judas have been given by innuendo? We ought to attribute to court and jury an acquaintance with ordinary terms and allusions, whether historical or figurative or parabolical."

And Earl, J., said:

"We cannot arrest the judgment unless we can see, on reading the whole passage complained of, that there could be no ground for the construction they have adopted. Nothing is easier than to bring persons into contempt by allusion to names well known in history, or by mention of animals to which certain ideas are attached; and I may take judicial notice that the words 'frozen snake' have an application very generally known indeed, which application is likely to bring into contempt a person against whom it is directed."

The publication of such an article as the one in the case at bar can be accounted for only upon one or other of two grounds,—either that the publishers were declaring the truth, and only the truth, of and concerning the plaintiff, for the good of others, and with a commendable zeal to impress such truth upon the minds of their readers by strong and apt language, or that they were trying by



the vilest means to degrade and blacken the plaintiff's character for virtue and morality, and to bring him into disgrace and contempt with the community as a citizen, or with his church and congregation as a minister of the gospel; and as, by the demurrer, the falsity as well as malice of the publication is admitted, the latter interpretation is the only one that is open to adoption by the court, even if the declaration contained no innuendoes showing the injurious character and meaning of the language. But in view of these innuendoes, charging the meaning to be libelous, it seems quite clear the case should not have been withheld from the consideration of the jury. The judgment is reversed, and the case remanded to the circuit court for further proceedings in accordance with this opinion.

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## ONONDAGA COUNTY SAVINGS BANK v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. December 3, 1894.)

## No. 8.

**BILLS AND NOTES—LIABILITY OF INDORSER—FORGERY OF PRIOR INDORSEMENT.**

The O. Savings Bank indorsed, and collected from the assistant treasurer of the United States, two drafts, issued by a United States pension agent, payable to one W., whose name appeared upon the drafts when they were received by the bank. The indorsement of W. proved to be a forgery; W. being dead when the drafts were issued, and some one having personated her in signing the affidavits and vouchers to procure the drafts. *Held*, that the bank was liable to the United States for the amount it had received upon the drafts, with interest from the date of demanding repayment, notwithstanding it had acted in good faith, upon an apparently sufficient identification of W.'s signature.

In Error to the Circuit Court of the United States for the Northern District of New York.

Judgment was entered in the district court of the Northern district of New York in favor of the United States, the defendant in error, against the savings bank, for \$2,943.51, on June 23, 1890, the recovery being for the amount of two drafts, dated August 31, 1882, for \$924.80 and \$1,000, respectively, with the interest from August 31, 1882, and costs. A writ of error was taken to the circuit court, which court modified the judgment by "deducting therefrom the sum of \$241, to wit, the amount of the interest upon the drafts complained upon from August 31, 1882, the date thereof, until September 15, 1884, the date of demand of repayment." As so modified, the judgment was affirmed, and the action of the circuit court now comes up for review.

Chas. L. Stone, for plaintiff in error.

W. A. Poucher, for the United States.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. This sum of \$1,924.80 was collected by the savings bank from the assistant treasurer of the United States at New York on or about August 9, 1882, upon two drafts

issued by T. L. Poole, United States pension agent, payable to the order of one Alma Wood. The drafts, when presented to the assistant treasurer, bore the indorsement of the name of the payee, Alma Wood, and were further indorsed by Sylvester Wood, her husband, and by the plaintiff in error, with the instructions, "Pay First National Bank of New York or order for account of Onondaga County Savings Bank." The signature "Alma Wood" was a forgery. She had died before the drafts were sent to her, and some person falsely personating her had signed the affidavit and the receipts accepted by the pension agent as the proofs or vouchers upon which he issued the drafts, and in the same handwriting had signed her name in indorsement upon the back of the drafts themselves. The bank concededly acted in good faith. Its officers did not know the signature either of Alma Wood or of Sylvester Wood. The latter called at the bank with one John O'Brien, who was one of its depositors, and known to its officers as engaged in procuring pensions. O'Brien stated that he was the attorney of the pensioner in this case. He identified Sylvester Wood, and stated that the indorsement "Alma Wood" was correct. In the presence of the paying teller, Sylvester's indorsement was put upon the drafts; the fact being noted thereon that he was "identified by John O'Brien, of Caughienoy." Relying upon this identification, the bank indorsed and caused the drafts to be presented as above stated. They were paid by the assistant treasurer. Upon discovery of the forgery, the defendant in error demanded a return of the money so paid, with interest, and subsequently brought this action.

The law applicable to such a state of facts is correctly and succinctly stated in the opinion of the district judge:

"Money paid under a mistake of fact may be recovered back. Negligence of the plaintiff in making the mistake does not give the defendant the right to retain what is not his, unless such negligence has so misled and prejudiced him that it would be inequitable to require him to refund. A party who transfers a bill of exchange by indorsement warrants that the instrument is genuine, and is liable upon the warranty if any of the names prior to his own are forged. *National Bank of Commerce v. National Mechanics' Bank*, 55 N. Y. 211; *White v. Bank*, 64 N. Y. 316; 1 *Edw. Bills & N.* §§ 242, 273, 274; 2 *Pars. Notes & B.* 597."

The plaintiff in error contends, however, that under the facts proved in this case it should not be required to respond. It is argued that the loss was the natural and proximate result of negligence in issuing the drafts. It appears, however, that they were issued only upon the receipt of vouchers regular in form, apparently subscribed by Alma Wood and by two witnesses, with a certificate by a notary public that all three of them had, on August 2, 1882, appeared personally before him, and made oath to the truth of their respective statements, and that he believed them to be credible persons. With such vouchers before him, it was certainly not negligence on the part of the pension agent to send checks for the amount receipted for to the person inscribed on his roll as a pensioner, at her post-office address. The government had a right to rely upon the fact that the assistant treas-

urer would pay out no money on the draft except to Alma Wood personally, upon proof of her identity, or to some responsible person presenting her indorsement and guarantying its genuineness; and it is no defense to a claim that an indorsee who has, by a forged indorsement, received from the drawee money to which he is not entitled, shall refund the same, to show that the same person who deceived him into paying money on the forged indorsement of the draft also induced the government to issue the draft on a forged signature to the voucher.

On the back of the drafts was printed the following notice:

"The payee's indorsement on this check must correspond with the signature to the voucher for which the check was given. If the payee cannot write, his or her mark should be witnessed, and the witness state his or her residence in full."

It is contended that the effect of this is to make the draft payable, not to the individual named as payee, but to whoever might indorse it with the same signature as that affixed to the vouchers. There is no force in this contention. The notice was, as the district judge held, intended only to insure greater accuracy and precision, and was for the benefit of all who might thereafter deal with the drafts. The requirement that Alma Wood should indorse the drafts with the same signature with which she signed the vouchers did not operate to change the designation of the payee. It was still the "order" of Alma Wood, and of Alma Wood only, which was required to authorize the payment of the money to any one other than herself. Moreover, it in no way misled or deceived the bank, which made no effort to ascertain whether or not the signature corresponded, but cashed the drafts on the simple assurance of its depositor that the signature of Alma Wood was correct.

The fact that the government did not discover the forgery for two years after payment of the drafts is no defense. Where the genuineness of the signatures to the vouchers was duly certified by a notary public, as the statute required, and the genuineness of the signatures to the drafts was guarantied by a responsible banking corporation, which had presumably informed itself before presenting the paper, there was nothing to excite the suspicion of the government officers. How it came about that suspicion was finally awakened, and the fraud discovered, does not appear; but the mere fact that this did not happen until two years afterwards will not support the contention that it was negligence not to discover it before the bank had lost the opportunity of itself recovering from the individual who had swindled it. The proof shows that the bank was notified some three days after the forgery was discovered, which was certainly a reasonably prompt notice. The refusal of the defendant in error to return the drafts has in no way prejudiced the plaintiff in error, or deprived it of any remedy against those who defrauded it. The judgment of the circuit court is affirmed, with costs.

**FISHER v. TRADESMEN'S NAT. BANK.**

(Circuit Court of Appeals, Second Circuit. December 3, 1894.)

No. 17.

**NATIONAL BANKS—CASH RESERVE—FRAUD.**

The S. National Bank of Philadelphia obtained from the T. National Bank of New York the discount of a large amount of commercial paper, under an agreement by the S. Bank that it would not draw against the apparent proceeds of such discount, and that the paper might be charged back before, at, or after maturity. In reports subsequently made to the comptroller of the currency, the S. Bank included the proceeds of such discount, on deposit in the T. Bank, as part of its lawful money reserve, one-half of which it was permitted by statute to keep in "cash deposits" in New York. Held that, though such report, representing a deposit not immediately available as a cash deposit, was a fraud on the part of the S. Bank, the legality of its contract with the T. Bank was not affected by such fraud, and the T. Bank could not be required to pay over the proceeds of the discount in advance of the maturity of the paper.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action by Benjamin F. Fisher, as receiver of the Spring Garden National Bank, against the Tradesmen's National Bank, to recover a balance of deposit. Judgment was rendered in the circuit court for the defendant. Plaintiff brings error.

Silas W. Pettit, for plaintiff in error.

Charles E. Rushmore and Elihu Root, for defendant in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The Spring Garden National Bank of Philadelphia was taken possession of by the bank examiner by direction of the comptroller of the currency on May 8, 1891, it being then insolvent. The plaintiff in error was duly appointed its receiver. On the day of its failure there was standing to the credit of the Spring Garden Bank on the books of the Tradesmen's National Bank of New York a balance of deposit account amounting to \$88,592.36. To recover that sum this action was brought.

The evidence shows that the sum thus standing to the credit of the Spring Garden Bank was the proceeds of the discount of three separate lots of notes, amounting in each case to about \$50,000, made on December 31, 1890, January 31, 1891, and April 7, 1891, respectively, and that such discounts were obtained under an agreement by the Spring Garden Bank that it would not draw against the apparent proceeds of the discounts, and that the notes discounted could be charged back "before, at, or after maturity." By exceptions, duly noted, to the admission of evidence of this agreement, and to the direction of a verdict for the defendant, plaintiff in error raised the point that such agreement was a fraud upon the banking act, contrary to public policy, and therefore void. The national bank act provides that every national banking association in Philadelphia "shall at all times have on

hand, in lawful money of the United States, an amount equal to at least twenty-five per centum of the aggregate amount of its notes in circulation and its deposits" (Rev. St. U. S. § 5191), and also that it "may keep one-half of its lawful money reserve in cash deposits in the city of New York" (Id. § 5195); and, the better to enable the comptroller of the currency to see that these provisions are complied with, such banks are required to "make to the comptroller of the currency not less than five reports during each year, according to the form which may be prescribed by him."

\* \* \* Such report shall exhibit in detail, and under appropriate heads, the resources and liabilities of the association at the close of business on any past day by him specified, and shall be transmitted to the comptroller within five days after the receipt of a request or requests therefor from him, and in the same form in which it is made to the comptroller shall be published in a newspaper published in the place where such association is established." Id. § 5211. It appears that the Spring Garden Bank entered upon its books the proceeds of these discounts thus deposited with the Tradesmen's Bank as part of its "lawful money reserve" on deposit in New York City, and so reported them in its returns made to the comptroller of the currency. But such action by the Spring Garden Bank, subsequent to the making of the contract and the discount of the notes, in no way affected the legality of that contract. It was not unlawful or contrary to public policy for it to agree with defendant that the latter should credit it with the proceeds of the discounts, but should not be required to pay them over, except as the discounted paper might itself be paid. That it afterwards took advantage of the transaction to represent to the comptroller of the currency and the public that a deposit not immediately available to it was an actual cash reserve was a fraud; but the Tradesmen's Bank was no party to such fraud, and the rights which it acquired under its contract with the Spring Garden Bank are in no way impaired by the latter's subsequent dishonesty. At the time of the failure, therefore, the Spring Garden Bank was not entitled to demand payment of the \$88,592.36, or any part thereof, in advance of the maturity of the discounted notes, and the receiver stands in no better position. The judgment of the circuit court is affirmed.

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#### FISHER v. CONTINENTAL NAT. BANK.

(Circuit Court of Appeals, Second Circuit. December 3, 1894.)

#### No. 9.

#### **GUARANTY—COLLATERAL SECURITY.**

The S. bank, in order to procure the discount of paper by the C. bank, executed a contract by which it guarantied such paper, and agreed that any of its property which might at any time be held by the C. bank might be treated as collateral to its loans, or indebtedness or liability to the C. bank. *Held*, that the C. bank was entitled to treat a deposit balance to the credit of the S. bank at the time of the appointment of a

receiver of that bank in insolvency proceedings as collateral to its liability then or at the maturity of the notes, and the receiver of the S. bank was entitled to recover only the surplus of such deposit balance after the lien upon it was discharged.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action by Benjamin F. Fisher, as receiver of the Spring Garden National Bank, against the Continental National Bank, to recover a balance of deposit. Judgment was rendered in the circuit court for the defendant. Plaintiff brings error.

Silas W. Pettit, for plaintiff in error.

John L. Cadwalader, for defendant in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Plaintiff in error, who was plaintiff in the court below, was duly appointed receiver of the Spring Garden National Bank of Philadelphia on May 21, 1891. That bank was taken possession of by the bank examiner, by direction of the comptroller of the currency, on May 8, 1891, it being then insolvent. The Spring Garden Bank kept a deposit account with the Continental National Bank of New York City, which on May 8, 1891, showed a balance to the credit of the Spring Garden Bank of \$6,537.87. This action is brought by the receiver to recover that balance. On that day (May 8, 1891) the Continental Bank held sundry notes, formerly the property of the Spring Garden Bank, amounting in the aggregate to \$21,900, which it had theretofore discounted, and the proceeds of which had gone to the credit of the Spring Garden Bank in its deposit account. Upon learning of the failure, the Continental Bank transferred the balance to the credit of the Spring Garden Bank on the deposit account to its credit on the collateral account, in which these discounted or rediscounted notes stood charged, claiming the right to hold said balance as against the liability of the Spring Garden Bank upon the notes which it had discounted as stated. The plaintiff insisted that defendant cannot be permitted to do so, but the circuit court held otherwise, and to review its decision this writ of error is sued out.

The able and exhaustive brief of the plaintiff in error discusses questions as to bankers' liens, as to set-off, and as to evidence of insolvency prior to May 8, 1891, which need not be passed upon. In the express written contract made by the two banks when the notes were discounted, we find sufficient to sustain the judgment. The contract in question was one prepared by the defendant bank on one of its printed guaranty blanks, and submitted by it to the Spring Garden Bank to be executed as a condition of making the discount requested. It was accepted by the latter, and, as executed, reads as follows:

"New York, March 24, 1891.

"For value received, we hereby guaranty to the Continental National Bank the payment of the obligations named below, with the same effect as if indorsed by us; and the same, together with all costs, may be charged to our account if not paid when due,—demand, protest, and notice waived.

And we agree that all collaterals or property belonging to the said loans or indebtedness, or any which may at any time be held by or in possession of said bank, may at all times be treated as collateral to all our loans or indebtedness or liability to said bank, with power to sell the same at any broker's board, or at public or private sale, at the option of said bank, with or without notice, paying all such indebtedness and returning any surplus. This agreement to be continuing, and to bind our heirs, executors, administrators, and assigns. [Here follows a list of the notes.]

"The Spring Garden Bank of Philadelphia.

"[Signed]

Francis W. Kennedy, Pt."

Inasmuch as the first clause of this agreement provides that the discounted notes were to be "charged to the account" of the Spring Garden Bank "if not paid when due," and as it appears that none of the notes were in fact due on May 8, 1891, plaintiff in error contends that the Continental Bank had no right on that day to charge them to the account of the Spring Garden Bank. The mere fact, however, of "charging" the amount to one account or another upon the books is not material. The only question presented here is whether, in view of the above-quoted agreement, the receiver was entitled to require payment of the balance apparently due the Spring Garden Bank on the deposit account on May 8, 1891, until the transaction initiated under the agreement had been terminated, and the fact ascertained whether or not the Spring Garden Bank was debtor to the Continental Bank upon its contract of guaranty. It will be noted that, besides its individual guaranty of the discounted notes, the Spring Garden Bank pledges with the defendant certain property as collateral security for their payment. Besides the specific collaterals and property belonging to the said loans and indebtedness, the Spring Garden Bank pledges any collaterals or property of its own which may at any time be held by or in possession of the Continental Bank, stipulating that the same "may at all times be treated as collateral to all [its] loans or indebtedness or liability to said bank." Any balance to the credit of the Spring Garden Bank on its deposit account with the Continental Bank was certainly "property" of the former bank, and as such was on May 8, 1891, when that bank failed, pledged as collateral for any liability by reason of the nonpayment of the discounted notes then or at maturity. No reason is shown, or even suggested, why it was not within the power of the Spring Garden Bank thus to pledge its deposit balances. The contract plainly so pledges them, and the appointment of the receiver in no way changes the situation. He takes the property incumbered with all the liens placed upon it before failure. It is only the surplus of the deposit balance, if any be left, after the liens on it are discharged, that he is entitled to receive from the Continental Bank. And, as the evidence shows that the amount of such liens exceeded the amount of the balance thus pledged, plaintiff in error is entitled to recover no part of the deposit balance. The judgment of the circuit court is affirmed.

## FISHER v. UNITED STATES NAT. BANK.

(Circuit Court of Appeals, Second Circuit. December 3, 1894.)

No. 36.

## FALSE REPRESENTATIONS—SOLVENCY OF BANK.

K., the president of the S. bank, in order to induce the U. bank to discount certain paper, told the president of that bank that the S. bank was in good condition, whereas, at the time, the S. bank was hopelessly insolvent, in consequence of the malversation of K. himself. *Held*, that such misrepresentation constituted a fraud upon the U. bank, and entitled it to recover back from the S. bank the proceeds of the paper discounted upon the faith of such misrepresentation.

In error to the Circuit Court of the United States for the Southern District of New York.

This was an action by Benjamin F. Fisher, as receiver of the Spring Garden National Bank, against the United States National Bank, to recover a balance of deposit. Judgment was rendered in the circuit court in favor of the defendant, upon a counterclaim, in the sum of \$24,042.59, with interest and costs. Plaintiff brings error.

Silas W. Pettit, for plaintiff in error.

John Hotman, for defendant in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The Spring Garden National Bank of Philadelphia was taken possession of by the bank examiner, by direction of the comptroller of the currency, on May 8, 1891, it being then solvent. The plaintiff in error was duly appointed its receiver. Among the assets of the Spring Garden National Bank, the receiver found upon its books an account of the United States National Bank of New York, which, as kept by the Spring Garden Bank, showed a balance due it by the United States National Bank of \$27,530.26, which sum this action was brought to recover. Upon the trial it appeared that \$25,000 of the above sum was a credit upon special account, and it was excluded from the consideration of the jury, because not sufficiently averred in the pleadings. No question with regard to it is raised under this writ of error. As to the remaining sum of \$2,530.26, the evidence showed that at the close of business on May 8, 1891, the balance in favor of the Spring Garden Bank was \$2,530.26, as shown by the books of the defendant. It furthermore appeared that this balance was the result of a discount made on March 2, 1891, by defendant, for the Spring Garden Bank, of some 19 promissory notes, amounting on their face to \$44,322.25. None of these had matured on that day, but subsequent thereto, and prior to the time of the trial, there had been collected on these notes the sum of \$17,772.35; and it appeared that the bank held, uncollected and apparently uncollectible, the remainder of the said notes. The Spring Garden Bank had opened an account with the defendant in October, 1890, and these particular notes were offered for dis-



count on February 28, 1891. It was the contention of the defendant that the Spring Garden Bank was insolvent for five or six years prior to its seizure by the bank examiner; that that fact was well known to its officers; and that they concealed it from the defendant when the account was opened and the notes were discounted, with the intent to defraud the defendant, which discounted the notes, relying upon the solvency of the Spring Garden Bank. At the close of the case, counsel for plaintiff in error expressly waived his right to go to the jury, and stated that he left it to the court to pass upon the question whether the defendant was thus induced to discount the notes for the Spring Garden Bank. The court then ruled that the money obtained from the discounts, and which was then to the credit of the Spring Garden Bank on the books of the defendant bank, was obtained by fraud, and, upon the defendant's counterclaim, directed a verdict for defendant, against the receiver, for the balance of the sum thus loaned to the Spring Garden Bank, after deducting the amount collected on the notes, and the balance on deposit account in the hands of defendant on May 8, 1891.

There are eight specifications of error, but the only point argued upon the brief filed in this court, and therefore the only one which need be considered, is whether there was sufficient evidence to show a false representation as to the condition of the Spring Garden Bank, upon which defendant relied. The law of the case is sufficiently set forth in *Railway Co. v. Johnston*, 133 U. S. 576, 10 Sup. Ct. 390:

"This bank was hopelessly insolvent when the deposit was made,—made so, apparently, by the operations of a firm of which the president of the bank was a member. The knowledge of the president was the knowledge of the bank. *Martin v. Webb*, 110 U. S. 7, 15, 3 Sup. Ct. 428; *Bank v. Walker*, 130 U. S. 267, 9 Sup. Ct. 519; *Cragie v. Hadley*, 99 N. Y. 131, 1 N. E. 537. In the latter case it was held that the acceptance of a deposit by a bank irretrievably insolvent constituted such a fraud as entitled the depositor to reclaim his drafts or their proceeds. And the *Anonymous Case*, 67 N. Y. 598, was approved, where a draft was purchased from the defendants, who were bankers, when they were hopelessly insolvent, to their knowledge; and the court held the defendants guilty of fraud in contracting the debt, and said their conduct was not like that of a trader 'who has become embarrassed and insolvent, and yet has reasonable hopes that by continuing in business he may retrieve his fortunes. In such a case he may buy goods on credit, making no false representations, without the necessary imputation of dishonesty. *Nichols v. Pinner*, 18 N. Y. 295; *Brown v. Montgomery*, 20 N. Y. 287; *Johnson v. Monell*, \*41 N. Y. 655; *Chaffee v. Fort*, 2 Lans. 81. But it is believed that no case can be found in the books, holding that a trader who was hopelessly insolvent, knew that he could not pay his debts and that he must fail in business, and thus disappoint his creditors, could honestly take advantage of a credit induced by his apparent prosperity, and thus obtain property which he had every reason to believe he could never pay for. In such a case he does an act, the necessary result of which will be to cheat and defraud another, and the intention to cheat will be inferred.' And it was decided that 'in case of bankers, where greater confidence is asked and reposed, and where dishonest dealings may cause widespread disaster, a more rigid responsibility for good faith and honest dealings will be enforced than in the case of merchants and other traders,' and that 'a banker who is, to his own knowledge, hopelessly insolvent, cannot honestly continue his business and receive the money of his customers; and, although having no actual intent to cheat and defraud a particular

customer, he will be held to have intended the inevitable consequences of his act, i. e. to cheat and defraud all persons whose money he receives, and whom he fails to pay before he is compelled to stop business.' "

It will be remembered that the plaintiff did not ask to go to the jury upon the question of fraud, but was "perfectly willing to leave it to the court"; and, where questions of fact are left to the trial court, its findings are binding in the appellate court, "if there be any evidence to support them." *Runkle v. Burnham*, 153 U. S. 216, 14 Sup. Ct. 837.

In the case at bar, Kennedy, the president of the Spring Garden Bank, made the arrangements for rediscount of its paper with the president of the United States National Bank in October. At that time he stated that his bank "was in good condition, and was only temporarily pressed, by reason of the close money times, and the Baring troubles coming on." The evidence shows, not only that the bank was insolvent for five or six years before it closed its doors, but that at the very time this statement was made its capital and surplus were all gone, and possibly 25 per cent. of its deposit; and this condition of affairs had been brought about by the malversation of Kennedy himself, who had misapplied the funds of the bank to his own use, and made false returns to the comptroller of the currency, and is now serving a term of imprisonment, upon conviction for his crime. Under these circumstances, it will not do to say that there was a reasonable hope of the bank's retrieving its fortunes, upon the theory that if Kennedy was solvent he would probably repay to the bank the sum of which he had plundered it. The decision of the circuit court is within the authority of *Railroad Co. v. Johnston*, supra, and should be affirmed. The objection that the original notes discounted were not returned or tendered seems not to have been raised below. Judgment affirmed.

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#### WITTKOWSKI v. HARRIS et al.

(Circuit Court, W. D. North Carolina. October, 1894.)

##### 1. FACTORS—DEL CREDERE COMMISSIONS.

The right to a del credere commission exists only when expressly contracted for, and extends only to sales on credit.

##### 2. PLEADING—RELIEF NOT ASKED.

Under Code N. C., allowing judgment for any relief to which the facts alleged and proved entitle a party, one may sue on an express contract, and recover on an implied obligation.

##### 3. FACTORS—ACCOUNT CURRENT—RENDITION—FAILURE TO OBJECT.

In an action at law by a factor against his principal, involving accounts of dealings between them, evidence that an account current rendered by plaintiff to defendant had not been objected to within a reasonable time is admissible to show an admission of its correctness, but is to be considered with the circumstances attending their previous dealings, tending to show their feelings and relations with each other.

##### 4. SAME—ADVANCEMENTS—INTEREST.

Where a factor guaranties his principal the cost of goods consigned to the factor, and at the same time furnishes the principal money to secure

part of such amount, the factor is not entitled to interest thereon, but if there is no guaranty, and the advancement is made as a loan, the factor is entitled to interest,—the amount to be determined by the fact that the proceeds of sale, as received by the factor, should first be applied to necessary expenses and commissions; then to interest and principal of the advancement; any balance of the advancement remaining to bear interest till fully paid.

5. SAME.

Where a factor makes advancements as a loan to his principal in America, on goods to be consigned the factor for sale in Australia, the rate of interest is that allowed at the place where the loan is made, unless it is expressly provided that it be repaid in Australia with the interest there allowed.

6. SAME—CONTRACTS—SOLE AGENCY—MANUFACTURED TOBACCO.

Under a contract by which plaintiff was to be defendant's sole agent in Australia for sale of manufactured tobacco, to be manufactured in a particular manner, he was not entitled to commissions on stemmed leaf tobacco put up in small packages and consigned to another person in Australia, there to be manufactured by the purchasers into cigars and cigarettes.

An action at law to recover a balance of an account current duly rendered, alleged to be due plaintiff, as factor of defendants, for cash advancements and commissions on the sale of certain shipments of manufactured tobacco consigned to him by defendants for sale in the Australian provinces and New Zealand.

L. M. Scott and Dillard & King, for plaintiff.

Mebane & Scott, P. D. Johnston, and James E. Boyd, for defendants.

DICK, District Judge (charging jury). The defendants concede that the paper writing styled "Public Notice" was executed by them, and duly constituted the plaintiff as their sole factor to make sale of their manufactured tobacco in the Australian provinces and New Zealand. If no further express contract had been made by the parties, the law would have implied a contract that the factor should employ reasonable effort, in the market of consignment, to make a fair, honest, and profitable sale of the tobacco, and faithfully and promptly render a full and correct account of his dealings, and remit to defendants net proceeds of sale, after deducting proper expenses, cash advancements, and such commissions as were usually retained by factors for similar services in the markets of sale. Both parties insist that there was a further express contract made by them before the tobacco was manufactured and shipped to Australia, but they very materially differ as to the terms of such contract. As the parties do not agree as to the express terms of their contract, and the evidence is conflicting, you will have to ascertain the terms from the preponderance of the evidence introduced by the respective parties. In order to assist you in performing your difficult and important duty, I will endeavor to give you a brief outline of the contentions and views of the parties, as they appear in the pleadings, the evidence, and the argument of counsel.

The plaintiff insists that the express contract contained the following terms of positive agreement: First. That he was to be the sole factor of the defendants for the sale of their manufactured

tobacco in the Australian provinces and New Zealand, and was to receive, by way of compensation, 5 per cent. commissions on proceeds of sale,—2½ per cent. del credere commissions, and 2½ per cent. for necessary expenditures and cash advancements which might be made to defendants in the course of dealings. Second. That the tobacco was to be manufactured at the lowest possible cost price, and so invoiced to him at the port of consignment; was to be, in quality, manner, and style of manufacture, in conformity with certain furnished samples, under express directions given by him to Alex. Wells, the foreman agreed upon by both parties. The plaintiff fully advised the defendants, and they clearly understood, that no other kind of manufactured tobacco could be successfully brought into competition with other brands of American tobacco which had already acquired high reputation in the markets of Australia and New Zealand. Third. That the first shipment of tobacco was to be of the amount, kind, and quality as set forth in a written agreement of defendants, drawn up and signed for them by their bookkeeper, Hurdle, and delivered to plaintiff in their presence, and with their approval and consent. It was at that time further agreed that no other shipment was to be made until the plaintiff had tested the Australian markets, and had given express order for further manufacture and shipment; and defendants expressly agreed to sustain all loss that might be incurred by the dangers of the sea,—by incidental damages to tobacco on the voyage, and by failure of successful competition in the markets of Australia after reasonable exertions had been made by plaintiff; and he was only liable for the usual legal responsibilities of an honest and diligent commercial factor, except when he had sold on credit under his del credere commission. Fourth. That at the time when the contract was made there was no agreement for any cash advancements by the plaintiff, but at a subsequent time, when the first lot of tobacco was nearly manufactured for shipment, plaintiff agreed, as a favor to defendants, and at their urgent request, to advance £1,000, and gave them a letter of credit on a bank in London, which enabled them to draw for that amount; and they expressly agreed to pay 10 per cent. interest on such cash advancement, which rate of interest was allowable by the laws of Australia, the place where the money was to be repaid out of the proceeds of the consigned tobacco. Fifth. That he did not order the manufacture and shipment of the second lot of tobacco consigned to him, in Australia, in a few weeks after the first shipment; and he did not authorize the second draft of £1,000 drawn by defendants on the bank in London, as he had no funds in bank to meet such draft, and he would not have honored and paid the same, except upon the earnest and urgent request of defendants contained in the letter introduced in evidence by plaintiff, showing that they knew that they had no authority to draw, and agreeing to pay additional compensation for advancement. Sixth. That the two shipments of tobacco consigned to plaintiff were invoiced at a largely excessive cost price, and were not of the quality, manner, and style of manufacture agreed upon; and, by reason of their excessive invoiced cost price and inferior

quality, they were not suitable to be brought into successful competition with other, cheaper, and better manufactured American tobacco, of long-established brands, which had acquired readiness of sale in the markets of Australia and New Zealand. That plaintiff, in a few days after consignments were received, fully informed the defendants by letter (a copy of which was shown in evidence) that the tobacco was not manufactured in accordance with the terms of their contract, was not suitable for ready and remunerative sale, and that he would hold the same subject to their order, upon repayment of cash advancement and interest. That defendants, in a subsequent letter in reply, requested him to make sale of the tobacco to the best advantage, and save them from as much loss as possible. That plaintiff at once undertook to comply with such request, and made the most careful and diligent efforts, by frequently traveling thousands of miles in trying the various and widely separated markets of Australia and New Zealand. Seventh. That defendants, without the knowledge and consent of plaintiff, and in gross violation of their contract with him, sold or consigned large shipments of manufactured tobacco to other persons in Australia and New Zealand; and he insists that under the terms of said contract he is entitled to recover 5 per cent. commissions on the proceeds of sale realized by defendants from such shipments. Eighth. That, although plaintiff has declared in this action upon a special contract made previous to the manufacture and shipment of the tobacco by defendants, he is still entitled to offer evidence of the acts and correspondence of the parties tending to show subsequent changes and modifications of such contract; and, if the exact terms of the original contract are not fully established to the satisfaction of the jury, he may yet recover judgment for any relief to which the facts alleged and proved entitle him, although not demanded in his prayer for relief.

Defendants' view of the case: The defendants insist, by way of defense and counterclaim: First. That the paper writing offered in evidence by plaintiff, purporting to be signed by them, is no part of their contract, as it was written, under the sole direction and dictation of plaintiff, by their bookkeeper, Hurdle, and was by him signed in their name and delivered without their knowledge and assent, and without any authority vested in him. Second. That the terms of the contract between the plaintiff and defendants were not in writing, but consisted of oral agreements definitely made and mutually understood by the parties. They were made with the view of establishing a continuous trade in tobacco in the Australian provinces and New Zealand for the mutual benefit of the parties, and was to be kept up by frequent consignments of tobacco to the plaintiff, manufactured in accordance with certain directions given by him, as he alone had knowledge of the kinds of tobacco that could be readily and profitably sold in such markets. Third. That the plaintiff carefully examined the large stock of leaf tobacco in the factory of defendants, and said that the material was of very fine quality, and if properly manufactured, in accordance with his directions and the furnished samples, it would be remarkably well suited

to the Australian markets, and would, under his management and sale, net defendants 56 cents per pound; and he agreed to guaranty cost price of 40 cents per pound, which, at his suggestion, had been carefully made, and was expressly agreed upon in the contract. That to secure the proper manufacture of the tobacco the plaintiff went to Richmond, Va., and procured the services of Alex. Wells as manager, and recommended him to defendants as a very intelligent and skillful manufacturer, who had, by long experience, acquired the peculiar knowledge that qualified him to manufacture tobacco suitable for the Australian markets. That defendants employed Mr. Wells as manager at a large salary, and gave him entire charge of the manufacture of the tobacco to be shipped to plaintiff, and, at considerable expenditure, purchased new machinery which he suggested and required. Fourth. That the contract contained no express stipulations as to rate of commissions to be paid plaintiff for negotiating sales, but it was fully understood between the parties that the plaintiff would obtain satisfactory compensation for his services out of the profits that would be realized by him over and above the price which he assured defendants that they would receive from the sale of the tobacco. Fifth. That the tobacco shipped to the plaintiff was manufactured out of the fine quality of leaf tobacco, which had been examined with entire satisfaction by the plaintiff, and was carefully and skillfully manufactured under the direction of Mr. Wells, and was of the quality, manner, and style of the furnished samples. Sixth. That, after the manufacture of the first lot of tobacco for shipment was nearly completed, the plaintiff again visited their factory, and carefully examined the boxes and contents, and said that they were manufactured in accordance with his directions, and were entirely satisfactory, and cordially assured them that they had accomplished in 60 days results that had required Williams 10 years to achieve. That plaintiff was so much pleased with their work that he then voluntarily offered to advance funds to the defendants to enable them to carry out their contract with him, to the amount of the three-fourths guarantied cost price of tobacco, and gave them a letter of credit on a bank in London. Under such letter of credit, they obtained £1,000, as the three-fourths advancement of cost price agreed to be made on the first shipment of tobacco. That, in accordance with the express terms of their contract, they made a second shipment of tobacco, and again drew on the bank in London, and promptly obtained another £1,000,—the three-fourths cost price of the second shipment. Seventh. That defendants made no express contract with the plaintiff to pay him 10 per cent. interest on cash advancements, and they insist that, if they should be held liable for interest on money advanced to insure the payment of the plaintiff's guaranty of cost price, then they are only liable for such rate of interest as is regulated by the laws of this state,—the place where the advancements were made, and where the money was employed by the defendants in carrying out their contract with plaintiff, and where the defendants could only readily recover satisfaction upon the plaintiff's contract to guaranty cost price. Eighth. That both lots of tobacco were

truly invoiced at cost price, and properly shipped in conformity with contract, were heavily insured for benefit of plaintiff, and reached port of destination in fine condition, and that the failure of ready sale at remunerative prices was caused by the unfaithful and fraudulent management of the plaintiff, and his bad reputation among purchasers and reliable business men in commercial circles. Ninth. That defendants never sold or consigned any manufactured tobacco to other persons in Australia or New Zealand, but sold and consigned several lots of leaf tobacco to a party in New Zealand, prepared for the purpose of manufacture into cigars and cigarettes, and not for the purpose of immediate sale to consumers. Tenth. That the plaintiff having declared upon an express contract, and in his subsequent pleadings having relied upon such contract as still existing and unchanged, and having, in his complaint, demanded no other relief, as was allowable at common law in an action of assumpsit, he is not entitled to recover in this action unless he proves such special contract to the satisfaction of the jury. Eleventh. The defendants insist that in their counterclaim they are entitled to recover the cost price of the tobacco manufactured and shipped to plaintiff under the express contract of guaranty made by him as an inducement to such manufacture and shipment, and also for damages sustained by them by reason of loss of profits on the sale of the tobacco, occasioned by the unfaithful and fraudulent conduct of plaintiff in the management of their business in a foreign and distant market.

Gentlemen of the jury, the court has presented to you a brief but sufficient statement of the views and contentions of the parties to this action. You must carefully consider and determine the merits of this controversy from a preponderance of the conflicting evidence. To enable you to do so correctly, certain issues of fact have been prepared by counsel of both parties, with the approval of the court, which present in direct and intelligible form the questions of dispute involved. To guide you in your deliberations, I will now state some rules of evidence and modes of procedure which have been devised and observed by courts of justice in ascertaining the terms of unwritten contracts when the evidence of the respective parties is in conflict:

First. You must determine the credibility and weight of the evidence by carefully considering the proved general character of the witnesses, the manner in which they have testified, their personal interest in the result of the controversy, and the motives by which they may have been influenced.

Second. You must inquire into the purposes of the parties in making the contract, the relation intended to be established between them, and the benefits which they respectively expected to realize. In doing so, you may consider the circumstances surrounding the transaction calculated to throw light upon the subject, and show the intentions of the parties. On this point, I will briefly call to your attention the general scope of the evidence offered by the parties. The evidence of the plaintiff tends to show that he had resided in Australia 44 years as a commission merchant engaged in the sale of tobacco, and during that period had often visited America for the

purpose of obtaining consignments of tobacco for sale on commission, and had procured numerous consignments from manufacturers in Richmond and Petersburg, Va.; that he had been agent for the sale of Williams' brands of tobacco, which had acquired considerable popularity in Australian markets, and such agency had been discontinued; that in the spring of 1888 he came to Richmond, Va., for the purpose of securing the manufacture and consignment of new brands of tobacco, with which he could successfully compete with the Williams brands; that he had no intention of going to Reidsville, N. C., until the defendants sought him in Richmond, and induced him to visit their factory to examine their leaf stock, and their methods and facilities of manufacture; that he fully advised defendants that tobacco of a certain quality, manufactured into plugs which could be properly cut off for smoking, was the only kind suitable and readily salable in Australia, as the people principally used tobacco for smoking; that he examined the defendants' stock of leaf tobacco, was pleased with its quality, furnished samples, and gave full direction as to the manner of manufacture, and secured them the services of Alex. Wells as manager, whom he believed, from former experience, to be fully qualified for the objects contemplated; that he informed defendants of the difficulties and risks of bringing new brands of tobacco into competition in the markets with old and well-established brands; that defendants were very anxious to make a venture in the Australian markets, with a view of obtaining a lucrative trade in future, resulting in large profits, and they expressed entire willingness to incur all the difficulties and risks of a first experiment; that defendants readily agreed to pay him, by way of compensation, 5 per cent. commissions on sales,—2½ per cent. del credere commissions, and 2½ per cent. on any cash advancements; that after the first lot of tobacco was manufactured he loaned £1,000 to defendants, at their urgent request, and they expressly agreed to pay him 10 per cent. interest on such advancement until repayment was made.

The evidence of defendants tends to show a state of facts and circumstances, in most respects, different from the evidence of the plaintiff: That plaintiff examined and was fully satisfied with the tobacco after it was manufactured from the stock of leaf tobacco which he had previously seen and approved, which had been manufactured in conformity with his furnished samples by a skillful manager of his own selection, and he assured defendants that tobacco would net them 56 cents per pound in the markets, and expressly guaranteed the payment of cost price of manufacture, and voluntarily offered to advance three-fourths of such guaranteed cost price, and gave them a letter of credit on a bank in London, by which they were enabled to obtain £2,000,—the three-fourths cost price of the tobacco manufactured and shipped by them to plaintiff in Australia; that no stipulation was required or made as to commissions on proceeds of sale, or as to interest on cash advancements, and at request of plaintiff the tobacco on shipment was largely insured by defendants for his benefit.

The evidence which I have briefly recapitulated tends to show



the terms of the first contract made by the parties. There was other evidence upon the same points, which you probably recollect and will fully consider, and you must not regard as unimportant because I have not called the same to your special attention. I have only attempted to give the general scope of the evidence. You should also consider the subsequent acts and correspondence of the parties as proper evidence to enlighten your minds as to the construction and interpretation put upon the original contract by the parties, and as to the changes and modifications subsequently made by them as variations in substitution of some of the terms of their first contract. You should also consider the probability and reasonableness of the terms of the contract as respectively contended for by the parties, in the light of all the circumstances that appear in evidence as to their objects and business relations and transactions. The contract, as contended for by the plaintiff is, in most respects, similar to those implied by law, or usually made in commercial transactions between principal and factor when goods and merchandise are consigned for sale in home or foreign markets. If you find the terms of the contract as contended for by defendants, then the plaintiff, by his express guaranty, assumed the responsibility of a purchaser, to the extent of the cost price of manufacture, the expenses of shipment, and the dangers and damages of the voyage. If plaintiff guaranteed that defendants should realize 40 cents per pound on the tobacco, they were entitled to such amount as soon as the tobacco was manufactured and delivered to the common carrier to be transported to the place of consignment; and such sum could not be diminished by subsequent expenses, damages, and failure of remunerative sale in the Australian markets. If such were the terms of the contract, the defendants were very fortunate and skillful in negotiating an arrangement with an old and experienced factor, by which they could make a first venture in finding a new and desirable foreign market. They were safe as to cost price of material and manufacture, secured by cash advancements; and they incurred no liabilities for commissions or interest on advancements, and no risk, except as to profits over and above cost price.

Gentlemen of the jury, I will now give you instructions upon some legal questions which have been ably discussed by counsel during the progress of this long, extended trial. I have already instructed you as to the nature of the contract which the law implies between principal and factor when the parties have not made an express contract embracing all the terms of their agreement, on entering into such relations with each other.

In this place I deem it proper to explain to you the nature of a *del credere* contract of agency, as such contracts have not been much considered in the courts of this state. A *del credere* factor is one who, in consideration of a higher compensation, expressly engages to pay to his principal the price of all goods sold by himself, if the purchaser fails to do so. This obligation always arises under an express contract, and is not implied by law. If the goods are sold for cash, and he receives the purchase money, he is not

entitled to del credere commissions, as he incurred no personal liability of payment to his principal, and the del credere contract was without consideration as to such cash payments.

The counsel of defendants insisted that the plaintiff having declared on an express contract, and without asking relief upon any implied promise or obligation, he cannot recover unless he has proved to the satisfaction of the jury the special cause of action stated in his complaint. This strict rule of common-law pleading has been abolished by the code system adopted in this state, and the new and more liberal rule of pleading has been established, "that a party may recover judgment for any relief to which the facts alleged and proved entitle him, although not demanded in his complaint."

The plaintiff introduced evidence tending to show that he completed the sales of all tobacco consigned to him in May, 1891, and he promptly advised defendants of his action; and in March, 1892, —10 months afterwards,—he sent them by mail an account current, showing a balance due him, and received no reply making objections. The plaintiff, in his personal testimony, gave reasons for his long delay in sending his account current after his letter advising defendants of the closing sales of their tobacco in May, 1891. There is much evidence tending to show that the previous dealings between the parties had not been harmonious and satisfactory, but far otherwise. The counsel of plaintiff now insist that the account current so rendered without objection should have the force and effect of a stated account. Courts of equity, in adjusting mutual dealings between merchants, established the rule that the rendition of an account, and its retention by the party to whom sent without objection within a reasonable time, should have the force and effect of a stated account, and be presumed correct until the contrary is clearly made to appear. This rule is also applied in equity in adjusting account of a factor with his principal, upon the ground that such business relation is of a confidential character, and it is the legal duty of an agent to render prompt and correct account of his dealings, and the conduct of the principal is generally construed liberally in favor of the agent. A principal who is promptly advised of acts done by his agent must give notice of dissent within reasonable time, or his silence will give rise to a presumption that the agent's reported acts are assented to and ratified. Such presumption may be fully rebutted by evidence that the previous dealings between the parties had not been confidential, harmonious, and satisfactory, and that the agent had control of the property of the principal, who had no means of adequate relief as to wrongful acts of his unfaithful and dishonest agent in a distant and foreign market. In trials at law involving accounts of dealings between parties other than merchants, the rule applicable to most cases is that where an account current has been rendered by one party, and no objection has been made by the other within a reasonable time, evidence of such fact is admissible to show an implied admission of and acquiescence in its correctness, to be considered by a jury under all the circumstances attending the

previous dealings between the parties tending to show their feelings and relations with each other.

The defendants admit that they obtained £2,000 from plaintiff, but they insist that such money was received by them as a partial payment under the plaintiff's agreement to guaranty the cost price of the manufactured tobacco consigned to him. If you should find that the plaintiff guarantied the cost price of the tobacco, and such cash advancements to secure the payment of the three-fourths amount of cost price to induce shipment, then he is not entitled to recover interest, for when the tobacco was shipped and consigned to him the defendants could properly apply the money received by them in partial payment of the guarantied cost price. Such payment cannot be regarded as advancements made by a factor, to be accounted for, with interest, on final settlement of the dealings of the parties. If you should find that such advancements of money were made as a loan to the defendants, to be repaid by proceeds of the consigned tobacco, and be accounted for in the future dealings of the parties, then plaintiff was entitled to interest until he received payment of this loan from proceeds of sale of tobacco. The proceeds of sale, when received from time to time by plaintiff, should have been applied in his accounts current, first in payment of his necessary expenses and commissions, and then to the interest and principal of the cash advancements; and, if insufficient for full payment, he would be entitled to interest on any balance that might remain until the loan was fully discharged.

The plaintiff is not entitled to recover the amount of interest which he claims unless you find that the contract of loan expressly stipulated that the borrowed money was to be repaid in Australia at 10 per cent.,—the rate of interest allowable by the laws of that country. When there is no express contract for the payment of interest, the legal obligation of a contract of loan is repayment of the money at the place where borrowed, at the rate of interest which the local law allows, as an incident to the debt; and if the money is not repaid the creditor is entitled, in an action at law, to recover his debt, with such interest assessed as damages for the detention of the money. Interest is not strictly a part of a contract of loan, unless expressly stipulated for in the terms of the contract. In every forum a contract is governed by the law with a view to which it was made. Contracts made in one place, to be performed in another, are to be governed by the laws of the place of performance; and, if such laws allow a higher rate of interest than those of the place of the execution of the contract, the parties may expressly stipulate for such higher rate of interest, and the contract will be valid and obligatory.

The plaintiff claims that under his contract with defendants he was to be their sole agent for the sale of manufactured tobacco in the Australian provinces and New Zealand, and that he is entitled to recover 5 per cent. commissions on the proceeds of tobacco which the defendants admit that they sold and consigned to a party in New Zealand. The evidence tends to show that such tobacco was stem-

med and put up in packages of 12 or 15 pounds weight, and was not prepared for sale in the market to consumers as manufactured tobacco, but was intended to be manufactured by the purchasers into cigars and cigarettes. Under our strict internal revenue laws, the defendants might be regarded as manufacturers of such tobacco, and held liable to pay special taxes; but I think that, under a fair construction of their contract, they are not liable to plaintiff for commissions if the tobacco put up by them, and sent to New Zealand, was prepared and intended for sale to manufacturers of cigars and cigarettes, and not to immediate consumers. The parties to this action made a contract about tobacco of a particular quality, to be manufactured in a manner and style suitable to the Australian market, and in conformity with certain furnished samples. The reasonable object of their contract, in reference to other commission merchants, was to prevent defendants from selling similar manufactured tobacco to consumers, or making consignments to other commission merchants who would be competitors of plaintiff in the markets of Australia and New Zealand.

Gentlemen of the jury, if a preponderance of the evidence satisfies you that the contract and dealings of the parties were as alleged by the plaintiff in his pleadings, and supported by his personal testimony and the voluminous correspondence with the defendants, then, in your adjustment of the matter, he is entitled to 5 per cent. commissions on the proceeds of sale of tobacco,  $2\frac{1}{2}$  per cent. commissions on del credere sales,  $2\frac{1}{2}$  per cent. on money advanced by him for necessary expenditures as factor, and also to the payment of any balance that may be due him on the £2,000 advanced as a loan to defendants, with 10 per cent. interest on same, after deducting, at the time when received, the proceeds of sales of tobacco consigned to him by defendant. If a preponderance of the evidence satisfies you that the contract and dealings of the parties were as alleged by defendants in their answer and counterclaim, supported by their personal testimony, the testimony of many other witnesses, and the written correspondence with plaintiff, then, in your adjustment of the controversy, they are entitled to recover on their counterclaim the balance of the guaranteed cost price of the tobacco consigned to plaintiff, and the expenses of shipment, after deducting the £2,000 advanced them, without interest, as the money was a partial payment of the guaranteed cost price. The defendants are not liable for commissions on sales, as the evidence shows that the guaranteed cost price and expenses of shipment have not been realized by them.

Gentlemen of the jury, I have now performed my part in this trial as fairly and justly as I could, and I feel confident that you will patiently and honestly endeavor to render a verdict in accordance with the weight of the evidence, and in compliance with the legal instructions given by the court.

INTERSTATE COMMERCE COMMISSION v. DELAWARE, L. & W. R.  
CO. et al.

(Circuit Court, N. D. New York. December 3, 1894.)

INTERSTATE COMMERCE COMMISSION—POWER OF COURT OVER ORDERS OF COM-  
MISSION—REHEARING.

Complainant moved for a rehearing, in proceedings to enforce an order of the interstate commerce commission, upon a certificate of the commission stating, in substance, that, in making the order which the court was asked to enforce, the commission did not design to make one so broad as its terms import. *Held*, that the court could not substitute, for an order actually made, one such as the commission might or should have made, or such as the commission intended to, but failed to, make.

Motion for a rehearing upon petition to enforce an order of the interstate commerce commission.

John D. Kernan, for interstate commerce commission.

Frank Loomis, for Delaware, L. & W. R. Co.

WALLACE, Circuit Judge. Upon a certificate of the interstate commerce commission, stating, in substance, that, in making the order which the court is asked in this cause to enforce, the commission did not design to make one so broad as its terms import, the complainant has moved for a rehearing of the cause. The court cannot substitute, for an order actually made, one such as the commission might or should have made, or such as the commission intended to, but failed to, make. This court has no revisory power over the orders of the commission. Its function in a proceeding like this is merely to inquire whether the respondents, the common carriers, have refused or neglected to perform any lawful order or requirement of the commission. It cannot undertake to decide whether the respondents have violated one which the commission might have lawfully made. It is not a violent presumption that if the order had been, in terms, one such as the commission intended to make, the respondents would have contested its propriety, and refused to obey it. But such an issue is not here. As framed, the respondents, in my judgment, were justified in refusing to obey it. It is much to be regretted that the real controversy between the Minnetto Shade-Cloth Company and the respondents is not presented by the application to enforce the order made by the commission, and that the parties have been subjected to the delay and expense of trying an extraneous issue; but the misfortune is not remediable by a rehearing, and a rehearing is therefore denied.

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INTERSTATE COMMERCE COMMISSION v. DELAWARE, L. & W. R.  
CO. et al.

(Circuit Court, N. D. New York. December 3, 1894.)

INTERSTATE COMMERCE COMMISSION—ENFORCEMENT OF ORDER.

An order of the interstate commerce commission prohibited railway carriers from charging any greater compensation for the transportation of window shades of any description—whether the cheap article, worth \$3

per dozen, or the hand-decorated article, worth \$10 per pair—than the third-class rate, the rate charged for the transportation of the materials used in making window shades. *Held*, upon petition to enforce compliance with the order, that the court would refuse to enforce such order, ignoring as it did the element of the value of the service in fixing the reasonable compensation of the carrier, and denying him any remuneration for additional risk.

This was a proceeding, under section 16 of the act to regulate interstate commerce, by petition to enforce compliance with an order of the interstate commerce commission which directs that the railway carriers, the respondents, "wholly cease and desist and thenceforth abstain from charging, demanding, collecting, or receiving any greater compensation for the interstate transportation of window shades, plain or decorated, mounted or unmounted, when packed in boxes, than they or either of them contemporaneously charge or receive for like service rendered in the transportation of commodities enumerated as third-class articles in the classification of freight articles established and put in force by them upon their several lines of railroad." The cause was heard upon the record of the proceedings before the interstate commerce commission at the complaint of Alanson S. Page and others, doing business at Minetto, N. Y., under the copartnership name of the Minetto Shade-Cloth Company, and upon depositions taken in the cause.

John D. Kernan, for complainant.

Frank Loomis, for respondents.

**WALLACE**, Circuit Judge. The order of the interstate commerce commission which the court is now asked to enforce prohibits the railway carriers, the parties respondent, from charging any greater compensation for the transportation of window shades of any description—whether the cheap article, worth \$3 per dozen, or the hand-decorated article, worth \$10 per pair—than the third-class rate, the rate charged for the transportation of the materials used in making window shades. Such an order, in my judgment, ignores the element of the value of the service in fixing the reasonable compensation of the carrier, and denies him any remuneration for additional risk. I cannot regard it as justifiable upon principle, and must refuse to enforce it. The petition is dismissed.

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UNITED STATES v. DEBS et al.

UNION TRUST CO. v. ATCHISON. T. & S. F. R. CO.

(Circuit Court, N. D. Illinois. December 14, 1894.)

1. CONTEMPT—PROCEEDING IN EQUITY—CONCLUSIVENESS OF ANSWER.

In proceedings for contempt in equity, a sworn answer, however full and unequivocal, is not conclusive, even in the case of a stranger to the bill for the injunction which has been violated.

2. SAME—JUSTIFICATION—IRREGULARITIES.

Where a court had jurisdiction of an injunction suit, and did not exceed its powers therein, no irregularity or error in the procedure or in the order can justify disobedience of the writ.

## 8. SAME.

In a proceeding for contempt in disobeying an injunction, the sufficiency of the petition for the injunction, in respect to matters of form and averment merely, cannot be questioned.

## 4. EQUITY JURISDICTION—RESTRAINING PUBLIC NUISANCE.

Equity has jurisdiction to restrain public nuisances on bill or information filed by the proper officer, on behalf of the people.

## 5. CONTEMPT—TRIAL BY COURT.

Though the same act constitute a contempt and a crime, the contempt may be tried and punished by the court.

## 6. COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE — SCOPE OF THE STATUTE—CONSPIRACY.

Act July 2, 1890 (26 Stat. 209), § 1, declaring illegal "every contract, combination in the form of trust, or otherwise, or conspiracy" in restraint of trade or commerce among the states, or with foreign nations, is not aimed at capital merely and combinations of a contractual nature, which by force of the title, "An act to protect trade and commerce against unlawful restraints and monopolies," are limited to such as the courts have declared unlawful, the words "in restraint of trade" having, in connection with the words "contract," and "combination," their common-law significance, but the term "conspiracy" is used in its well-settled legal meaning, so that any restraint of trade or commerce, if to be accomplished by conspiracy, is unlawful.

## 7. SAME—CONSTRUCTION.

The construction of the statute is not affected by the use of the phrase "in restraint of trade," rather than one of the phrases "to injure trade" or "to restrain trade."

## 8. SAME—COMMERCE.

The word "commerce," in the statute, is not synonymous with "trade," as used in the common-law phrase "restraint of trade," but has the meaning of the word in that clause of the constitution which grants to congress power to regulate interstate and foreign commerce.

## 9. SAME—FORFEITURE OF PROPERTY.

The provision of Act July 2, 1890, § 6, for forfeiture of "any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in this act, and being in the course of transportation from one state to another, or to a foreign country," does not imply that only cases in which property shall be found subject to forfeiture shall be deemed within the scope of the act.

## 10. EQUITY JURISDICTION—RIGHT TO JURY.

The power given by Act July 2, 1890, to circuit courts "to prevent and restrain violations" of the act, is not an invasion of the right of trial by jury, as the jurisdiction so given to equity will be deemed to be limited to such cases only as are of equitable cognizance.

## 11. CONTEMPT—VIOLATION OF INJUNCTION—CONSPIRACY.

Where defendants, directors, and general officers of the American Railway Union, in combination with members of the union, engaged in a conspiracy to boycott Pullman cars, in use on railroads, and for that purpose entered into a conspiracy to restrain and hinder interstate commerce in general, and, in furtherance of their design, those actively engaged in the strike used threats, violence, and other unlawful means of interference with the operations of the roads, and, instead of respecting an injunction commanding them to desist, persisted in their purpose, without essential change of conduct, they were guilty of contempt.

## 12. SAME—INTERFERENCE WITH RECEIVER.

Any improper interference with the management of a railroad in the hands of receivers is a contempt of the court's authority in making the order appointing the receivers, and enjoining interference with their control.

Proceedings for contempt against Eugene V. Debs and others for violation of injunctions issued, one on complaint of the United

States, and the other on petition of the receivers of the Atchison, Topeka & Santa Fé Railroad Company, appointed in a suit against that road by the Union Trust Company.

These informations were filed July 17, 1894. The substance of the first is: That on the 2d day of July, 1894, the United States of America filed with the clerk of this court an information or complaint charging, among other things, that the defendants, Eugene V. Debs, George W. Howard, L. W. Rogers, Sylvester Kellher, the American Railway Union, and others, were engaged in a conspiracy unlawfully to interfere with and to prevent the transportation of the mails and interstate commerce over and upon the several railroads named in the complaint, and praying an injunction. That on that day, by order of the court, a writ of injunction was duly issued, whereby the defendants, and all persons combining and conspiring with them, and all persons whosoever, were commanded and enjoined "to desist and refrain"—

(1) From in any way or manner interfering with, hindering, obstructing, or stopping any of the business of any of the following named railroads: Atchison, Topeka & Santa Fé Railroad; Baltimore & Ohio Railroad; Chicago & Alton Railroad; Chicago & Eastern Illinois Railroad; Chicago & Erie Railroad; Chicago & Grand Trunk Railway; Chicago & Northwestern Railway; Chicago & Western Indiana Railroad; Chicago, Burlington & Quincy Railroad; Chicago Great Western Railway; Chicago, Milwaukee & St. Paul Railway; Chicago, Rock Island & Pacific Railway; Cleveland, Cincinnati, Chicago & St. Louis Railway; Illinois Central Railroad; Lake Shore & Michigan Southern Railway; Louisville, New Albany & Chicago Railway; Michigan Central Railroad; New York, Chicago & St. Louis Railroad; Pennsylvania Company; Wisconsin Central lines; Wabash Railroad; Union Stock-Yard & Transit Company,—as common carriers of passengers and freight between or among any states of the United States;

(2) "From in any way interfering with, hindering, obstructing, or stopping any mail trains, express trains, or other trains, whether freight or passenger, engaged in interstate commerce, or carrying passengers or freight between or among the states;

(3) From in any manner interfering with, hindering, or stopping any trains carrying the mail, and from in any manner interfering with, hindering, obstructing, or stopping any engines, cars, or rolling stock of any of said companies engaged in interstate commerce, or in connection with the carriage of passengers or freight between or among the states;

(4) From in any manner interfering with, injuring, or destroying any of the property of any of said railroads engaged in or for the purpose of, or in connection with, interstate commerce, or the carriage of the mails of the United States, or the transportation of passengers or freight between or among the states;

(5) From entering upon the grounds or premises of any of said railroads for the purpose of interfering with, hindering, obstructing, or stopping any of said mail trains, passenger or freight trains engaged in interstate commerce, or in the transportation of passengers or freight between or among the states, or for the purpose of interfering with, injuring, or destroying any of said property so engaged in or used in connection with interstate commerce, or the transportation of passengers or property between or among the states;

(6) From injuring or destroying any part of the tracks, roadbed, or road, or permanent structures of said railroads, and from injuring, destroying, or in any way interfering with any of the signals or switches of any of said railroads, and from displacing or extinguishing any of the signals of any of said railroads, and from spiking, locking, or in any manner fastening any of the switches of any of said railroads, and from uncoupling or in any way hampering or obstructing the control by any of said railroads of any of the cars, engines, or parts of trains of any of said railroads engaged in interstate commerce, or in the transportation of passengers or freight between or among the states, or engaged in carrying any of the mails of the United States;



(7) From compelling or inducing, or attempting to compel or induce, by threats, intimidation, persuasion, force, or violence, any of the employes of any of said railroads to refuse or fail to perform any of their duties as employes of any of said railroads in connection with the interstate business or commerce of said railroads, or the carriage of the United States mail by such railroads, or the transportation of passengers or property between or among the states;

(8) From compelling or inducing, or attempting to compel or induce, by threats, intimidation, force, or violence, any of the employes of any of said railroads who are employed by such railroad and engaged in its service in the conduct of interstate business, or in the operation of any of its trains carrying the mail of the United States, or doing interstate business, or the transportation of passengers and freight between and among the states, to leave the service of such railroads;

(9) From preventing any persons whatever, by threats, intimidation, force, or violence, from entering the service of any of said railroads, and doing the work thereof, in the carrying of the mails of the United States, or the transportation of passengers and freight between or among the states;

(10) From doing any act whatever in furtherance of any conspiracy or combination to restrain either of said railroad companies or receivers in the free and unhindered control and handling of interstate commerce over the lines of said railroads, and of transportation of persons and freight between and among the states; and

(11) From ordering, directing, aiding, assisting, or abetting, in any manner whatever, any person or persons to commit any or either of the acts aforesaid."

That the American Railway Union is a voluntary association, of which many thousand railway employes were at the time of the filing of the bill, and still are, members. That the defendant Eugene V. Debs is the president of the association; George W. Howard, its vice president; Sylvester Kelher, secretary and treasurer; L. W. Rogers, one of the directors; and all of the defendants were and are directors. That the avowed purpose of said union and its officers has been, and still is, to procure all of the employes of the railways within the United States to become members, and to concentrate the power and jurisdiction of the union and its members under one official control, with authority to order strikes, or a discontinuance of the service of such employes with any of the railway companies of the United States, at any time when the union, its board of directors or other officers, should elect so to do, with or without sufficient cause. That on the 26th or 27th day of June, last past, prior to the filing of the bill and the issuing of the writ of injunction, the union, or its board of directors or other officers, including the defendants, had directed and ordered all its members engaged in the service of the Illinois Central Railroad Company in the transportation of the mails, and of interstate commerce, and all other trains controlled and operated by that company, to strike or quit service. That thereafter, and before the writ of injunction was issued, similar orders were issued to the employes of other railway companies, named in the bill of complaint; and that, in pursuance to those orders, all employes who were members of the American Railway Union did in a body leave the service of said railway companies, for the avowed purpose of hindering, preventing, and delaying the operation of trains engaged in the transportation of the mails and interstate commerce. That the order of injunction was published in the daily papers of Chicago on the morning of July 3, 1894. That each of the defendants had knowledge that the order had been duly entered in said cause. That a copy was served upon the defendant Rogers on the 3d day of July, and upon the defendant Eugene V. Debs early on the morning of July 4th, and upon the defendants George W. Howard and Sylvester Kelher on the 4th day of July, 1894. That the American Railway Union, prior to the 2d day of July, had organized many local unions upon substantially all the railroads in the northwest, from Chicago to California, including substantially all the railroads to the Pacific coast, and at the same time was engaged in organizing local unions upon the main lines of road extending from Chicago to the Atlantic coast; and that the work of organization and extension was

continued without change or interruption, after the service of the injunction, for the avowed purpose of conferring upon the union authority to order strikes upon all of the roads as rapidly as the local unions could be organized.

That the orders for strikes and for the railway employes to leave in a body the service of the railroads named in the bill of complaint, as well as other railroads, were generally communicated by telegram from the defendant Debs to the officers or committees of local unions at the most important railway centers and cities. That copies of some of such telegrams and orders, so issued by the defendant Debs, both before and after the service of said writ of injunction, are herein inserted, for the purpose of showing that the service of the injunction did not affect or change the policy or conduct of the defendants relative to said strikes, but that, on the contrary, the defendants continued, notwithstanding the order of the court, and in direct and open violation thereof, to direct the employes of the railway companies named in the writ of injunction, as well as other railway companies, to leave the service of the companies in a body, and thereby hinder, delay, and prevent the discharge of their duty to the public, and especially the discharge of their duties as agents of the government in the transportation of the mails, as well as interstate commerce. That said telegrams, and hundreds of other telegrams, similar in form and character, were sent by the defendant Debs (with the knowledge, authority, and approval of each and all of the other defendants, as well as other directors of the American Railway Union), after the service upon them of the writ of injunction; and that, in pursuance of said orders and directions, many of the employes of the several railways named were induced to leave the service, and so-called "railway strikes" prevailed generally upon the lines of several of said railway companies, and the transportation of the mails and interstate commerce was thereby greatly hindered, delayed, and prevented, and upon some lines for several days.

That, as a direct result of the orders to strike upon some of the lines,—notably upon the Illinois Central Railroad, the Chicago, Rock Island & Pacific, the Chicago, Burlington & Quincy, the Chicago & Alton, the Chicago & Western Indiana, and upon the Pennsylvania Company's lines,—there was exercised upon the part of many of the strikers or ex-employes of the railway companies intimidation and open violence. That employes who refused to join in the strike, and others who had been employed by the railway companies to take the place of strikers, and were in the actual service of the companies, were assaulted and intimidated by the strikers, and driven from their post of duty, either by physical violence or threats of personal injury. That, during the 5th, 6th, and 7th days of July, the strikers, and others acting in sympathy with them, took forcible possession of some of the roads within and adjacent to the city of Chicago, and, by physical force, prevented the passage of trains carrying mails and interstate commerce. That engines and trains of cars were derailed, and passenger trains were assailed with stones and other missiles, as well as the employes in charge of such trains; and in some instances both the passenger cars and engines were fired upon, endangering the lives both of employes and passengers. That these mobs were in many instances led by the strikers or ex-employes of the railway companies, who had gone out of service upon the orders of the defendants as officers of the American Railway Union; and mobs composed of strikers and others were massed at different points, upon the different lines of road, within and adjacent to the city of Chicago, in such numbers as to be beyond the control of the government, state, and municipal authorities. That at least 1,000 freight cars belonging to the railway companies, some of which were loaded with interstate merchandise, were set on fire and destroyed. Signal towers and other appurtenances of the railways were burned. Employes of the railway companies who refused to obey the orders of the defendants and other officers of the American Railway Union, and remained faithful to the discharge of their duty, were violently assaulted, beaten, and bruised, and in some instances were forcibly arrested, and taken from their engines, and kept for hours in confinement. That many lives were also sacrificed,—all of which was a direct result of the numerous strikes ordered as aforesaid.

That the defendants had full knowledge that many of such violent acts upon the part of the strikers or ex-employés of the railroads had been perpetrated prior to the service of the injunction; and notwithstanding such knowledge, and the further knowledge that violence invariably follows all strikes of a similar character, they daily and continuously, and in willful violation after the service of the injunction, issued their orders and directions for the employés of the railways to quit service in a body, and also continued such orders while the mobs were in partial possession of the railroads, and engaged in forcible resistance of the orders of this court and its officers.

That the strikes were not ordered on account of any wrongful act of the railroad companies, or of their officers, towards the members of the American Railway Union or other employés of the railroad companies; but, on the contrary, the avowed purpose of the directors of the Railway Union, including the defendants, was wrongfully and unlawfully to establish a boycott against Pullman sleeping cars, which were used in great numbers by the railroad companies in trains carrying the mail and passengers traveling from state to state, and through the several states; and, to make boycott effectual, the directors of the American Railway Union, including the defendants, ordered that no trains or cars of any kind or character should pass over the tracks of any road within and adjacent to the city of Chicago until the use of Pullman cars had been abandoned by all of said railroad companies.

That the board of directors of the American Railway Union, including the defendants and its authorized agents, assume the authority and power, and, as complainant believes, have full authority and power, to order strikes and boycotts, and to discontinue the same, under the rules of the American Railway Union.

That such assumed power and authority is clearly shown by a communication signed by Debs, Howard, and Keliher, as officers of the union, and addressed to the railway managers, on the 12th of July, of which the following is a copy:

"Chicago, July 12, 1894.

"To the Railway Managers—Gentlemen: The existing troubles growing out of the Pullman strike having assumed continental proportions, and, there being no indication of relief from the wide-spread business demoralization and distress incident thereto, the railway employés, through the board of directors of the American Railway Union, respectfully make the following proposition as a basis of settlement:

"They agree to return to work in a body at once, provided they shall be restored to their former positions without prejudice, except in cases, if any there be, where they have been convicted of crime.

"This proposition, looking to an immediate settlement of the existing strike on all lines of railway, is inspired by a purpose to subserve the public good. The strike, small and comparatively unimportant in its inception, has extended in every direction, until now it involves or threatens not only every public interest, but the peace, security, and prosperity of our common country. The contest has waged fiercely. It has extended far beyond the limits of interests originally involved, and has laid hold of a vast number of industries and enterprises in no wise responsible for the differences and disagreements that led to the trouble. Factory, mill, mine, and shop have been silenced; widespread demoralization has sway. The interests of multiplied thousands of people are suffering. The common welfare is seriously menaced. The public peace and tranquillity are imperiled. Grave apprehensions for the future prevail.

"This being true,—and the statement will not be controverted,—we conceive it to be our duty as citizens, and as men, to make extraordinary efforts to end the existing strife and approaching calamities whose shadows are even now upon us. If ended now, the contest, however serious in some of its consequences, will not have been in vain. Sacrifices have been made, but they will have their compensations. Indeed, if lessons shall be taught by experience, the troubles now so widely deplored will prove a blessing of inestimable value in the years to come. The differences that led up to

the present complications need not now be discussed. At this supreme juncture, every consideration of duty and patriotism demands that a remedy for existing troubles be found and applied. The employes propose to do their part by meeting their employers halfway. Let it be stated that they do not impose any condition of settlement except that they be returned to their former positions. They do not ask the recognition of their organization or any organization.

"Believing this proposition be fair, reasonable, and just, it is respectfully submitted, with the belief that its acceptance will result in the prompt resumption of traffic, the revival of industry, and the restoration of peace and order."

"Respectfully,

E. V. Debs, President,

"G. W. Howard, Vice President,

"Sylvester Keliher, Sec'y,

"American Railway Union."

That the authority exercised over the members of the union by its board of directors, and by Debs, as its president, relative to the movement of trains, is shown by an order issued on the 2d day of July, 1894, of which the following is a copy:

"To the Panhandle Yard Man—Greeting: Please execute the orders of Mr. John Brenock in reference to the removal of dead stock from the stock yards to Globe station. This is issued by order of the board of directors, in the interest of public health. Eugene V. Debs, President."

That the following report of an interview with the defendant Debs was published in the Chicago Herald of July 15th:

"We are in condition to keep the strike on for months. Nothing but armed intervention to-day permits the moving of trains. Throughout that great stretch of country which lies west of the Mississippi river our men are steadfast and willing to wait until the bitter end. You will notice that it is impossible to buy a ticket to the Pacific coast in Chicago to-day, except by way of the Great Northern Road, over which no Pullman cars are run, and against which we have no possible grievance. This shows the line on which our future campaign is to be carried. We shall keep the men of the West, where the air is purer and wholly free from plutocratic combinations, in line with our ideas. We shall persist in our work of organization throughout the East. As a road throughout the country hitherto unorganized by us falls into line, we shall call it out. And we shall keep on doing this until the very end of all things. If our present struggle, based, as it is, on motives wholly disinterested, be successful, there is no wage earner in the land who will not feel its beneficent effects before the year closes. And if this is true, when the command of the so-called 'arteries of commerce' falls into our hands, and the trades' unions which have given us comfort require reciprocation from us, we, and we alone, are in a position to give them material assistance. This is an axiom, and I believe no one will disagree with me."

Answer of Debs, Howard, Rogers, and Keliher.

The defendants, being in custody under a writ of attachment issued by order of the court, Judge Seaman presiding, filed on the 23d of July a joint answer, admitting specified averments of the information, and in substance alleging:

That the purpose of the American Railway Union was the protection of all its members in their rights and interests as employes of the various railway systems of the United States, and to procure for them, by all lawful means, fair and adequate compensation for the service performed by them. That membership in the American Railway Union was open to every employe of good personal character and reputation, engaged upon the railway systems of the United States; and that to better secure and effectuate the objects of the union, as hereinbefore set forth, it was the desire and one of the purposes of the union to procure all such persons to become members. That, by the organization of the said American Railway Union, strikes could only be declared or discontinued by the vote of a majority of the members of such American Railway Union employed in the service affected by any

such strike; and that the only power, authority, or office of the officers or directors of the American Railway Union, or of these defendants, or either of them, in respect to said matter, was to notify the members of the union in the service concerned in such strike of the action taken by such majority. That, on or about the 26th or 27th day of June (contrary to the averments of the information), a majority of the members of the American Railway Union employed upon the Illinois Central Railroad and upon the other roads referred to in the information did for themselves, without any order, direction, or control of the American Railway Union, or of its officers or directors, or of these defendants, or any of them, voluntarily determine by vote that they would strike or leave the service of said railway companies; and that, in pursuance of that vote, the employes did, on or about the time stated, leave the service of the railway companies freely, and of their own accord, without any order, direction, or control on the part of said American Railway Union, its officers or directors, or of these defendants, or any of them. "Upon information and belief, the defendants deny that the employes so leaving the service of said railway companies, as aforesaid, did so for the purpose of hindering, preventing, and delaying said railway companies in the operation of trains engaged in the transportation of the United States mails and interstate commerce over the respective roads of said companies." They "deny that, after the service of said injunction, they or either of them carried on the work of organization other than by generally advising railroad employes to become members of such union, and receiving to membership persons so applying therefor as aforesaid. They expressly deny that the organization of said unions upon said roads, or any of them, was intended to confer or did confer upon said American Railway Union, its officers or directors, or upon these defendants, or either of them, the power and authority to order strikes upon said roads, as alleged in said information or otherwise, but, on the contrary, allege that strikes could be ordered upon said road by the employes of said road themselves, and that such employes were in no manner subject to the authority or control of said American Railway Union, its officers or directors, or of these defendants, or either of them, in that regard." "They deny that orders to strike were at any time or in any manner communicated by said American Railway Union, its officers or directors, or these defendants, or either of them, to said local unions, or any of them, as alleged in said information or otherwise."

"The defendants deny that any one of the telegrams set forth in said information was sent, or caused to be sent, by them, or any of them, or that they authorized or approved the same, or any one thereof, except a certain telegram dated July 6, 1894, in the words and figures following: 'We have assurance that within forty-eight hours every labor organization in this country will come to our rescue. \* \* \* Whatever happens, do not give credence to rumors and newspaper reports,'—which said telegram defendants admit was sent, or caused to be sent, by the defendant Debs, as in said information alleged; but save as hereinbefore admitted, defendants allege that they had no knowledge or notice whatever of the sending of said telegrams, or of the contents thereof, until the filing of said information." "They deny that any other telegrams similar in form and character to those in said information set out were sent by the defendant Debs, or any of the defendants, with the knowledge, authority, or approval of any of said other defendants, at any time after the service of said writ of injunction upon said defendants, and deny that any employes of any of the railway companies named in said information were induced by reason of any telegram sent, or caused to be sent, by the defendants, or any of them, by threats, intimidation, force, or violence, to leave the service of said railway companies, or that the transportation of the United States mails and interstate commerce was thereby in any way hindered, delayed, or prevented." "The defendants admit that upon some of said lines of railway there was exercised, upon the part of some persons to the defendants unknown, violence against persons and property. They deny that they, or any of them, have any knowledge or information sufficient to form a belief as to the commission of the specific acts of violence in said information set forth, or any thereof; and, upon information and belief, they deny that any member of said American Rail-

vay Union in any manner participated in said acts of violence or any of them." "They deny that, in violation of the order of the court, they daily and continuously or at all issued any orders or directions for the employes of said railway companies, or any of them, to leave such service in a body, as alleged in said information or otherwise. They deny that at said time, or at any time, they knew that violence and unlawful conduct necessarily followed from strikes of the kind mentioned in said information, and deny that such is the fact, but, on the contrary, allege that, so far as said American Railway Union, or the members thereof, are concerned, said strike, and all strikes of a similar character, contemplate nothing more than the quiet, peaceable, and lawful cessation of work by such members when and for such periods as they shall for themselves determine. Defendants expressly deny that they, or any one of them, did at the time mentioned in said information, or at any other time, order, direct, counsel, advise, recommend, or approve the acts of violence in said information set forth, or any of them, or any violence or unlawful acts of any kind or character, but, on the contrary, allege that they did at all said times counsel and advise all members of the said American Railway Union with whom they were in communication to at all times abstain from violence, threats, intimidation, and to at all times respect the law and the officers thereof." "They deny that the board of directors of said American Railway Union, or its officers, or these defendants, or either of them, at any time assumed the authority and power, or have now or ever have had any authority or power whatsoever, to order strikes and boycotts, or to discontinue the same." "They admit that on the 12th day of July, 1894, the communication set out in said information was addressed to the railway managers, and signed by the defendants, whose names are affixed thereto, but allege that so much of said communication as implies or assumes any right, power, or authority in said defendants, or either of them, to discontinue said strike, was unauthorized, and that said defendants had no other power or authority in said matter than to recommend to the members of the said American Railway Union the adoption of the proposals therein stated." "Defendants admit the sending of the communication to the Panhandle yard men set forth in said information, but deny that in and by said communication they exercised, or assumed to exercise, any power or authority over said men, or any thereof, but that said communication was merely a request to said men to perform the acts therein stated." "They deny that they have any knowledge or information sufficient to form a belief as to whether the interview set forth in said information was in fact published in the Chicago Herald on July 15th, or at any other time. They deny that the defendant Debs, or any other defendants, caused said interview to be published, or uttered the statements therein contained, or any of them, but allege that said interview is wholly false, forged, and fictitious." "The defendants deny that they, or either of them, have in any way or manner interfered with, hindered, obstructed, or stopped any of the business of the railroads mentioned in said injunction, or either of them, as common carriers of passengers and freight between or among the states of the United States; or that they, or either of them, have in any manner interfered with, hindered, obstructed, or stopped any mail trains, express trains, or other trains, whether freight or passenger, engaged in interstate commerce, or carrying passengers or freight between or among the states; or that they, or either of them, have in any manner interfered with, hindered, or stopped any train carrying the mail; or that they, or either of them, have in any manner interfered with, hindered, obstructed, or stopped any engine, car, or rolling stock of any of said companies engaged in interstate commerce, or in connection with the carriage of passengers or freight between or among the states; or that they, or either of them, have in any manner interfered with, hindered, or destroyed any of the property of any of said railroads engaged in or for the purpose of or in connection with interstate commerce, or the carriage of the mails of the United States, or the transportation of passengers or freight between or among the states; or that they, or either of them, have entered upon the grounds or premises of any of said railroads for the purpose of interfering with, hindering, obstructing, or stopping any of said mail trains, passenger, or freight trains,

engaged in interstate commerce, or in the transportation of passengers or freight between or among the states, or for the purpose of interfering with, injuring, or destroying any of said property so engaged in or used in connection with interstate commerce, or the transportation of passengers or property between or among the states; or that they, or either of them, have injured or destroyed any part of the tracks, roadbed, or road, or permanent structures of said railroads; or that they, or either of them, have injured, destroyed, or in any way interfered with any of the signals or switches of any of said railroads; or that they, or either of them, have displaced or extinguished any of the signals of any of the said railroads; or that they, or either of them, have spiked, locked, or in any manner fastened any of the switches of said railroads; or that they, or either of them, have uncoupled or in any way hampered or obstructed the control of any of said railroads or any of the cars, engines, or parts of trains of any of said railroads engaged in interstate commerce, or in the transportation of passengers or freight between or among the states, or engaged in carrying any of the mails of the United States; or that they, or either of them, have compelled or induced, or attempted to compel or induce, by threats, intimidation, persuasion, force, or violence, any of the employes of any of said railroads to refuse or fail to perform any of their duties as employes of any of said railroads in connection with the interstate business or commerce of such railroads, or the carriage of the United States mail by such railroads, or the transportation of passengers or property between or among the states; or that they, or either of them, have compelled or induced, or attempted to compel or induce, by threats, intimidation, force, or violence, any of the employes of said railroads who are employed by such railroads and engaged in its service in the conduct of interstate business, or in the operation of any of its trains carrying the mail of the United States or doing interstate business, or in the transportation of passengers and freight between or among the states, to leave the service of such railroads; or that they, or either of them, have prevented any person whatever, by threats, intimidation, force, or violence, from entering the service of any of said railroads, and doing the work thereof in the carrying of the mails of the United States, or the transportation of passengers and freight between or among the states; or that they, or either of them, have done any act whatever in furtherance of any conspiracy or combination to restrain either of the said railroad companies or receivers in the free and unhindered control and handling of interstate commerce over the lines of said railroad, and of transportation of persons and freight between and among the states; or that they, or either of them, ordered, directed, aided, assisted, or abetted in any manner whatever any person or persons to commit any or either of the acts aforesaid." "And the said defendants each for himself does plead to the said information that he is not guilty of any or either or all of the acts therein charged, or of any contempt of the orders of this court in the premises." "Defendants further allege that, after the service of said injunction upon them, they forthwith consulted competent counsel, learned in the law, and duly authorized and licensed to practice as attorney and counselor at law in the courts of the United States, and fully and fairly stated to him all the facts in the premises, and exhibited to him the order of the court made herein, and were advised by him as to what they might rightfully and lawfully do in the premises without violation of the order of the court or contempt of its authority; and that they have since that time in all things proceeded, in their acts and conduct in regard to said strike and the persons engaged therein, in strict accordance with the advice of the said attorney so by them consulted. And the said defendants each for himself denies that he intended in any way to violate the injunction of this court, or to act in defiance or contempt of its authority in any respect. And the defendants further allege that by the organization of said American Railway Union, and by custom and usage uniformly and universally prevailing therein, at all the times in said information mentioned, which said custom and usage had the force and effect of, and stood in lieu of, by-laws of said American Railway Union, and by the general and unanimous will, consent, delegation, and acquiescence of all the members thereof, the officers and directors of said American Railway

Union, including these defendants, were at all the times in said information mentioned fully authorized, empowered, and directed to act as the agents of the members of said American Railway Union, and all of them, and all the separate unions thereof, whenever a strike or cessation of labor had been determined upon by said members of said union, or either of them, to inform and advise them concerning the condition and prospects thereof, and the condition and attitude of the several local unions engaged therein, and to advise and counsel them as to peaceful and lawful methods pursued by them to secure the redress of grievances complained of by them, and to treat and negotiate for them, subject to their ultimate ratification, with their employers for a settlement or adjustment of the causes leading to said strike, but had no right, power, or authority to in any way order or command any of said members in respect to any of said matters; and they allege that each and every act and thing done by them in reference to the strike in said information mentioned, or any of the persons engaged therein, was done in pursuance of such power and authority, and not otherwise. Wherefore, defendants pray that they may be adjudged not guilty of contempt; that the complainant's information be as to them dismissed, and they go hence without delay."

On July 25th the defendants filed a supplemental answer, denying "each and every allegation in said information contained, and each and every part thereof, save as the same are in their former answer expressly admitted or denied."

#### Second Information.

On the 1st day of August, 1894, a second information was presented in the cause, directed against James Hogan, William E. Burns, R. M. Goodwin, J. F. McVean, and M. J. Elliott. This information recites the filing of the original information, and the arrest of the defendants therein named upon the writ of attachment issued, and, alleging that the persons named were directors of the American Railway Union, reiterates the original averments and charges further: That on or about June 27, 1894, the officers and directors of the American Railway Union entered into a combination and conspiracy to bring about, by their orders, their advice, their counsel and persuasion, the strike and boycott more particularly described in said original bill of complaint; and that the better to conduct the business of said combination and conspiracy, and to more effectually manage the vast number of persons being members of said American Railway Union and others engaged in such combination and conspiracy, said officers and board of directors divided up the work of such management and direction among committees. That, under said arrangement and action of the board of directors, Debs and Howard would have, and thereafter they did have, charge of the work of publication and publicity; Rogers, Burns, and Goodwin had charge of all meetings and speakers, and the organization of lodges; and Hogan, either alone or with others of the directors, had charge of correspondence, and of the sending and receiving of letters and telegrams, or a considerable portion thereof. That each of the directors is responsible for every act done or omitted to be done by all or any of the other directors or officers or servants or agents in connection with the business of said strike or boycott. That, by arrangement or agreement of the board of directors, Rogers was to have charge of editing and the publishing of a certain newspaper called the "Railway Times," which was to be the official organ of the American Railway Union. That the paper was published in the city of Chicago by Rogers; and that in and through said newspaper the directors counseled, encouraged, and directed the members of the American Railway Union and all other railway employes, including the employes of the railway companies named in the bill of complaint, to disregard said order and writ of injunction, and the orders and directions of the officers operating said railroads, respectively. That said officers and directors, in pursuance of said conspiracy, did, on different dates in the months of June and July, 1894, cause to be sent each and all of the telegrams set out in the original information, to which the name of said Debs is attached, and also the several following telegrams, which are set out by copy; also many hundred other telegrams of like purport, and with similar intent and purport, copies of which, sent to different



places in the different states, over the signature of E. V. Debs, between the dates of June 27 and July 29, 1894, are set out. That said defendants continued to send out, by telegraph, orders, directions, and advice to the meeting of the various unions along the lines of railroads, directing and counseling them to continue the strike and the various acts of interference with the operation of said roads; and that all of the directors have persisted in violation of the injunction, and in their defiance of the order of this court.

Answer of Hogan and Others.

The defendants so brought into the case filed a joint answer, not essentially different from the answer of the original defendants, except that it contains the following averments:

They deny that on the 26th day of June, A. D. 1894, or at any other time, the American Railway Union, through its officers and directors, or otherwise, ordered or directed all or any of the employes of the railroad companies named in the bill, or either of them, to enter upon any strike for the purpose in the information alleged, or otherwise. They admit that at divers times during the month of June, and before the issuing of the injunction, they did counsel and advise certain of the employes of the railway companies named in the bill, all of the employes so counseled and advised being members of the American Railway Union, to quietly, peaceably, and lawfully quit the service of their employers, and allege that, in giving such advice and counsel, they acted for the employes, and by their authority conferred upon them or each of them, as hereinafter set forth. And they deny that their purpose in giving such advice and counsel was to cause any strike with the sole purpose, or with the purpose at all, of compelling the railway companies, or either of them, to unite with the American Railway Union, or with any person or persons, in any illegal boycott, or in any boycott whatsoever, and deny that the American Railway Union, its officers, directors, and members, or these defendants, or either of them, did on the day mentioned, or at any time, for any purpose or in fact, enter into any unlawful conspiracy or combination whatever to tie up or paralyze any of the business of any of said railroads or the carrying of the mails or interstate commerce until such company should consent to enter into any conspiracy or refuse to haul the cars of said Pullman Sleeping-Car Company, whether as alleged or otherwise, or that said combination was to be persisted in as alleged or otherwise. On the contrary thereof, the defendants allege that they were at all said times informed, and in good faith verily believed, that the railroad companies named in the bill, and all of them, had formed or organized and were members of a certain unlawful conspiracy and combination among and between themselves to reduce the wages and compensation of their employes upon said roads, and each of them, including the members of the American Railway Union thereon, and all of them; and that, pursuant to that conspiracy and combination, the railroad companies proposed and intended to make reduction in the wages of employes, including the members of the American Railway Union, upon each of the lines of railroad, separately and successively, they, the railroad companies, uniting their powers, property, and influence to prevent the employes, including the members of the American Railway Union, upon each of the lines whereon the wages were to be successively reduced, from obtaining redress against the action of the railroad companies in pursuance of such unlawful conspiracy, and proposed and intended, by their combined and united action, to overcome successively and in detail any lawful and peaceable resistance that the employes, or any of them, might make to the reduction of their compensation. And, upon information and belief, the defendants allege that such conspiracy was in fact formed at said time with the intents and for the purposes hereinbefore set forth.

"It is further alleged that at all times they were informed and did in good faith verily believe that the Pullman Palace-Car Company, a corporation organized under the laws of the state of Illinois, and engaged in the business of constructing passenger and other cars upon the lines of said railroads (which said Pullman Palace-Car Company had various contract relations with said railroad companies, and each of them, for the use of its

said cars), was a member of and party to said conspiracy, and all the intents and purposes thereof; and, upon information and belief, defendants allege that such was the fact in regard thereto." They allege that very many of the employes of the Pullman Palace-Car Company were members of the said American Railway Union at the time in the information mentioned, and for some months prior thereto had been such members. They deny that they, or either of them, knew, or could have known, that any such acts were certain or almost certain or probable or reasonably to be expected to follow from such strike or cessation of labor, or that the same were in any manner due to or occasioned by or resulted naturally or otherwise from the orders, directions, counsel, or advice or acts, or either thereof, of the officers and directors of said American Railway Union, or either of them, or these defendants.

They allege that obstructions of the business of the railroad companies, or either of them, by the so-called "strike," was occasioned solely by the free, voluntary, and peaceable action of the employes of said railway companies in quitting the service thereof, for the purpose of protecting themselves and their rights and interests, and for their own purposes, and to secure their own ends, without any orders, directions, control, counsel, or assistance from these defendants, or either of them. And they allege, on information and belief, that the railway companies, and each of them, in pursuance of said conspiracy, and for the purpose of maintaining the said Pullman Palace-Car Company in its dispute with its said employes, and for the purpose of overcoming the resistance of their employes to the acts threatened and contemplated by them, as aforesaid, and to bring down upon said employes the penalties of law, and endeavor to invoke against the employes the action of the courts of the United States, did, by their efforts, contribute largely to the hindering and impeding of said transportation of mails and interstate commerce; and that said railway companies could, had they been so disposed, have fully performed their duties, under the laws of the United States, in that regard. They allege that they and each of them have uniformly and consistently and at all times in said petition mentioned, by speech and writing, advised a great number of said American Railway Union members, and all persons acting with them, to use only peaceable and lawful methods, and to refrain from any force or violence or unlawful conduct whatever, and from any violation of the laws of the United States or any of the states thereof, or any order of the courts to them directed.

Defendants admit the proceedings in the nature of contempt had in this court against Eugene V. Debs, George W. Howard, Sylvester Keliher, and L. W. Rogers, and admit that in said information against such persons it was charged that they had caused to be sent certain telegrams, and that, in their answers, they deny the sending of all said telegrams except a certain one dated July 6, 1894. They deny that any or all of the telegrams set out in said information were sent, or caused to be sent, by the officers and directors of said American Railway Union except as hereinafter admitted, or that any other telegrams in relation to said strike were sent except as hereinafter admitted, and deny that any telegrams were sent by said officers and directors, or either of them, in pursuance of any combination or conspiracy, or to accomplish the purposes thereof. They deny that there was any specific division among the officers and directors of the American Railway Union of the business and duties of the organization or the labors occasioned by their relation to the cessation of labor or strike hereinbefore mentioned, but allege that, in respect to said work, each of said officers and directors performed generally the work and things coming under his notice, and seeming to him fit and proper to be done. They deny that said work was divided in the manner alleged in said information or otherwise, or any of said officers or directors had charge of the alleged divisions of work stated in said information, or any such divisions or departments of work. They allege that, in the actual practice of work, some tacit and occasional division actually occurred, but that the same was in no wise formally or generally observed; and that each and every one of said officers and directors acted for himself, upon his own judgment and respon-

sibility, except where, by conference upon a given subject, a course was determined upon; and that each one of said officers and directors was responsible solely for the specific acts by him done, and not otherwise. They allege that each and all the acts done by said officers and directors and by these defendants, and each of them, were so done in pursuance of the authority conferred upon them by the members of said American Railway Union as the same is hereinbefore alleged, and not otherwise. Defendants deny that, in pursuance of any arrangement or agreement or otherwise, the defendant Rogers was to have charge of the editing or publishing of the so-called "Railway Times"; or that said Rogers caused said paper to be published in the said city of Chicago, as alleged, or otherwise; or that, by said newspaper or otherwise, said directors, or either of them, have counseled, encouraged, directed, or advised the members of said American Railway Union, or any other person or persons, or class of persons, to disregard the order and writ of injunction of this court, or any order or writ of any court, or to disregard the orders and directions of the persons operating any railway at any time. They admit and allege that the telegrams set forth in said information were sent by the defendant James Hogan; and allege that the same were sent by him for the purpose and with the intent of peacefully and lawfully counseling and advising men who had, by reason of the grievances done or threatened to them, and by reason of the unlawful conspiracy of said railway companies and said Pullman Palace-Car Company, hereinbefore set forth, peaceably, lawfully, and voluntarily quit the service of said railway companies; and allege that said telegrams, and all of them, had no other relation to or effect upon said strike, or any of the matters incident to or growing out of the same, than might well result from the lawful and peaceful counsel to the members of the said American Railway Union as to such of their own personal rights and interests as were involved in said controversy. The said defendants each for himself denies that he intended in any way, in any act or thing by him done, to violate the injunction of this court, or to act in defiance or contempt of its authority. And the said defendants each for himself does plead to said information that he is not guilty of any of either or all of the acts therein charged, or of any contempt of the authority of this court in the premises.

The petition of the receivers shows their appointment in December, 1893; that, by the order appointing them, all persons were forbidden to interfere with their possession and management; that the road extends through a number of states, and is an important line of commerce, using Pullman sleepers under contract; that on the 22d of June, 1894, the defendants, being officers of the American Railway Union, entered into a conspiracy to boycott Pullman cars, and, upon the refusal of the receivers to submit to their dictation, proceeded to employ substantially the same modes of interference as are charged in the information presented in the other case in the name of the United States.

In addition to the order made when the receivers were appointed, it is also shown that on June 29, 1894, this court issued an additional order, for the protection of the receivers in the management of the property, whereby "all persons were enjoined and restrained from interfering in any manner with trains, cars, switches, or other property, and from interfering, by intimidation, threats, violence, or in any other manner, with the employés of said receivers in the performance of their duties"; that this order was published in the evening papers of Chicago on June 29th, and in morning papers of the 30th; and that on July 2d an injunction was issued, upon the petition of the United States, enjoining the defendants, and others in conspiracy with them, from interfering with the railroads named, including the Atchison, Topeka & Santa Fé; that, notwithstanding these orders and injunctions, the defendants persisted in "their illegal acts and doings, without change or abatement," etc.

The defendants Debs, Howard, Keliher, and Rogers, who only, in the first instance, were named in this information, filed an answer, differing in no respect which need be pointed out from their answer in the other case. The names of Hogan, Burns, Goodwin, McVean, and Elliott were afterwards

inserted in the information, by leave of court; and it was agreed that they should have the benefit of the answer already filed by Debs and others as if it were their own. The two cases were heard at the same time, upon an agreement that they should be considered to be separate hearings, but that any evidence introduced in either case might be considered in the other, if relevant.

Edwin Walker and T. E. Milchrist, U. S. Dist. Atty., for the United States.

E. A. Bancroft and John S. Miller, for receivers.

W. W. Erwin, Clarence S. Darrow, and S. S. Gregory, for defendants.

The attorneys for the receivers presented the following propositions and citations of authorities:

Any interference with property in the custody of the court is a contempt. *Richards v. People*, 81 Ill. 551; *Noe v. Gibson*, 7 Paige, 513; *In re Sowles*, 41 Fed. 752. Such, also, is any act of interference by force or threats with employés in charge of such property. *Secor v. Toledo, P. & W. R. Co.*, 7 Biss. 513, Fed. Cas. No. 12,605; *King v. Ohio & M. R. Co.*, 7 Biss. 529, Fed. Cas. No. 7,800; *In re Wabash R. Co.*, 24 Fed. 217; *In re Higgins*, 27 Fed. 443; *In re Doolittle*, 23 Fed. 544; *U. S. v. Kane*, Id. 748. See, also, *In re Ohles*, 22 Wall. 157; *McCaulay v. Sewing Mach. Co.*, 9 Fed. 698; *Sherry v. Perkins*, 147 Mass. 219, 17 N. E. 307. Where the court has jurisdiction of the person, a disobedience of the court's order is contempt, though committed in another district. *McCaulay v. Sewing Mach. Co.*, supra; *Williams v. Hintermeister*, 26 Fed. 889, 890. Aiding, advising, or persuading another to do a forbidden act, or even permitting another whose action can be controlled to do the forbidden act, is contempt. *Societe Anonyme de la Distillerie de la Liqueur Benedictine de l'Abbaye de Fecamp v. Western Distilling Co.*, 42 Fed. 96; *Blood v. Martin*, 21 Ga. 127; *Neale v. Osborne*, 14 How. Pr. 81; *Wheeler v. Gilsey*, 35 How. Pr. 139; *Stimpson v. Putnam*, 41 Vt. 238; *Poertner v. Russell*, 33 Wis. 193.

WOODS, Circuit Judge, after making the foregoing statement: If the case presented were itself of less moment, the very great importance of some of the questions involved could not be overlooked. To the study of them I have devoted more time than could well be spared from other duties. It is due to counsel to say that the labor of the court, protracted and painstaking as it has been, has been greatly relieved by the contributions of learning and research which they brought to the discussion. While the principles considered are not new, in the question of the validity of the injunction which the defendants are charged with violating there are involved inquiries which in some respects go beyond the lines of established or unquestioned precedent.

A preliminary question in the case was whether or not, upon the filing of their answers, the defendants were entitled to be discharged without an inquiry into the facts. The authorities seem to be agreed, and accordingly the court ruled, District Judge Grosscup participating in the decision, that, in a proceeding for contempt in equity, a sworn answer, however full and unequivocal, is not conclusive. *King v. The Vaughan*, 2 Doug. 516; *Underwood's Case*, 2 Humph. 48, 49; *Rutherford v. Metcalf*, 5 Hayw. (Tenn.) 58, 61, 62; *Magennis v. Parkhurst*, 4 N. J. Eq. 433, 434; *State v. Harper's Ferry Boat Co.*, 16 W. Va. 864, 873; *Crook v. People*, 16 Ill. 534, 537; *Buck*

v. Buck, 60 Ill. 105, 106; Welch v. People, 30 Ill. App. 399, 409; Yates' Case (Kent, Ch. J.) 4 Johns. 317, 373; McCredie v. Senior, 4 Paige, 378, 381, 382; Bank v. Schermerhorn, 9 Paige, 372, 375; U. S. v. Anon., 21 Fed. 761, 768.

The objection raised by demurrer that the injunction was illegal and void was overruled at the time of presentation, but with leave for further argument at the final hearing upon the evidence. A great body of evidence, consisting of the testimony of witnesses, telegrams, and other documents, has been adduced to show the guilt of the accused. The defendants, claiming the constitutional privilege against self-incrimination, refused to testify at the instance of the prosecution, and have offered no evidence in their own behalf, excepting parts of certain documents which were allowed to be read in connection with other parts offered by the prosecution. Besides denying that any violation of the injunction has been proved against them, the defendants now reassert and insist that the injunction is invalid, on the two grounds that the court had no jurisdiction to hear and determine the case in which the injunction was ordered, and that, though possessed of such jurisdiction, the court lacked organic power to make the particular order in question. Reference is made to *Ex parte Fisk*, 113 U. S. 713, 718, 719, 5 Sup. Ct. 724; *In re Sawyer*, 124 U. S. 200, 220-222, 8 Sup. Ct. 482; *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77; *Windsor v. McVeigh*, 93 U. S. 274, 282, 283; *Kerfoot v. People*, 51 Ill. App. 409. If the injunction was, for any reason, totally invalid, no violation or disregard of it could constitute a punishable contempt; but if the court acquired jurisdiction, and did not exceed its powers in the particular case, no irregularity or error in the procedure or in the order itself could justify disobedience of the writ. *Elliott v. Peirsol*, 1 Pet. 340; *Ex parte Watkins*, 3 Pet. 193; *In re Coy*, 127 U. S. 731, 8 Sup. Ct. 1263. The considerations of public policy on which this rule rests are too plain and well understood to need restatement.

Was the case one of which the court had jurisdiction? No question is made, or could be made in a proceeding for contempt, of the sufficiency of the petition for the injunction in respect to matters of form and averment merely. In *Coy's Case*, *supra*, the court said:

"In all such cases, when the question of jurisdiction is raised, the point to be decided is whether the court has jurisdiction of that class of offenses. If the statute has invested the court which tried the prisoner with jurisdiction to punish a well-defined class of offenses,—as forgery of its bonds, or perjury in its courts,—its judgment as to what acts were necessary under these statutes to constitute the crime is not reviewable on a writ of habeas corpus."

The question here, therefore, is whether the case presented by the petition was of a class which in a federal court admits of the remedy by injunction.

Without going into the details of averment, the charge made against the defendants was that they were engaged in a conspiracy to hinder and interrupt interstate commerce and the carriage of the mails upon the railroads centering in Chicago, by means and in a manner to constitute, within the recognized definitions, a public nuisance. A nuisance is "anything that unlawfully work-

eth hurt, inconvenience, or damage." 3 Bl. Comm. 216. "A public nuisance is such an inconvenience or troublesome offense as annoys the whole community in general, and not merely some particular person." Id. 166. As defined in Wood on Nuisances (page 38), "a public nuisance is a violation of a public right, either by a direct encroachment upon public rights or property, or by doing some act which tends to a common injury, or by omitting to do some act which the common good requires, and which it is the duty of a person to do, and the omission to do which results injuriously to the public." A form of public nuisance of which cognizance has been taken by the courts of equity in England and in this country is called "purpresture," which is defined to be "an encroachment upon lands, or rights and easements incident thereto, belonging to the public, and to which the public have a right of access or of enjoyment, and encroachment upon navigable streams." "The remedy for a purpresture, simply, is by information in equity at the suit of the attorney general or other proper officer." Wood, Nuis. pp. 107, 117; *People v. Vanderbilt*, 28 N. Y. 396; *New Orleans v. U. S.*, 10 Pet. 662; *Attorney General v. Forbes*, 2 Mylne & C. 123.

In *Kerr on Injunctions* (page 395) it is said:

"There is a wide difference between a purpresture and a nuisance. Although they may coexist, either may exist without the other. If the act complained of be a purpresture, it may be restrained at the suit of the attorney general, whether it be a nuisance or not. Being an encroachment on the soil of the sovereign, like trespass on the soil of an individual, it will support an action irrespective of any damage which may accrue. But, to constitute a public nuisance, damage to the public right of navigation or other public right must be shown to exist. If the act complained of be a mere purpresture, without being at the same time a nuisance, the court will usually direct an inquiry to be made whether it will be more beneficial to the crown to abate the purpresture or to suffer the erection to remain and be arrested; but, if the purpresture be also a public nuisance, this cannot be done, for the crown cannot sanction a public nuisance."

Accordingly, it is contended, and numerous decisions and texts are cited to show, that "equity had jurisdiction to restrain public nuisances upon bill or information filed by the attorney general on behalf of the people." High, *Inj.* §§ 745, 759, 764, 1570; *Pom. Eq. Jur.* § 1349; *Wood, Nuis.* p. 124; *Story, Eq. Jur.* §§ 921-924; 1 *Daniell, Ch. Pr.* 7, 8; *Mitt. Eq. Pl.* 104, 117, 196; *Attorney General v. Johnson*, 2 *Wils. Ch.* 87; *Attorney General v. Forbes*, 2 *Mylne & C.* 123; *Attorney General v. Terry*, 9 *Ch. App.* 423; *Attorney General v. Birmingham*, 4 *Kay & J.* 528; *People v. Miner*, 2 *Lans.* 396; *People v. Ferry Co.*, 68 *N. Y.* 71; *Davis v. Mayor, etc.*, 14 *N. Y.* 526; *People v. Vanderbilt*, 28 *N. Y.* 396; *Id.*, 26 *N. Y.* 287; *Attorney General v. Hunter*, 1 *Dev. Eq.* 12. I quote passages, some of which, besides bearing upon the principal question of jurisdiction, will be found to be determinative of other questions which have come under discussion.

Story says:

Section 921: "In regard to public nuisances, the jurisdiction of courts of equity seems to be of a very ancient date. \* \* \* The jurisdiction is applicable, not only to 'public nuisances,' strictly so called, but also to purprestures upon public rights and property. \* \* \* In its common acceptation it [purpresture] is now understood to mean an encroachment upon the

king, either upon part of his demesne lands, or upon rights and easements held by the crown of the public, such as open highways, public rivers, forts, streets, etc., and other public accommodations." *City of New Orleans v. U. S.*, 10 Pet. 662; *Mohawk Bridge Co. v. Utica & S. R. Co.*, 6 Paige, 554; *Attorney General v. Cohoes Bridge Co.*, 6 Paige, 133.

Section 923: "In cases of 'public nuisances,' properly so called, an indictment lies to abate them, and to punish the offenders; but an information also lies in equity to redress the grievance by way of injunction. The instances of the interposition of the court, however, are, it is said, rare, and principally confined to informations seeking preventive relief. Thus, informations in equity have been maintained against a public nuisance by stopping a highway."

Section 924: "The ground of this jurisdiction of courts of equity in cases of purpresture, as well as of public nuisances, undoubtedly is their ability to give a more complete and perfect remedy than is attainable at law, in order to prevent irreparable mischief, and also to suppress oppressive and vexatious litigations. In the first place, they can interpose, where the courts of law cannot, to restrain and prevent such nuisances which are threatened or are in progress, as well as to abate those already existing. In the next place, by a perpetual injunction, the remedy is made complete through all future time."

So Pomeroy, in section 1349, says:

"A court of equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of the attorney general, in England, and at the suit of the state, or the people, or municipality, or some proper officer representing the commonwealth, in this country." *Attorney General v. Eau Claire*, 37 Wis. 400; *State v. Eau Claire*, 40 Wis. 533; *Rochester v. Erickson*, 46 Barb. 92; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518.

Wood (volume 1, p. 124) says:

"While, at the close of the Revolution, the people of each state, in their sovereign capacity, acquired the absolute right to all navigable waters and the soil under them, yet where the state has permitted a use of navigable waters connecting the two states that interferes with navigation, the general government, under the power given it by the constitution to regulate commerce between the states, may exercise jurisdiction over the waters, and procure an abatement of such obstructions." *Insurance Co. v. Cullenius*, 6 McLean, 209, Fed. Cas. No. 3,045.

High says:

Section 1554: "When the right involved is purely of a public nature, and the grievance which it is sought to enjoin is one which affects the public at large, the proceeding is usually instituted, both in England and in this country, by the attorney general in behalf of the people, sometimes proceeding in his own name or that of the people absolutely, and sometimes upon the relation of a citizen; and in actions to enjoin the erection or continuance of public nuisances this course is generally pursued." *State v. Dayton & S. E. R. Co.*, 36 Ohio St. 434; *People v. Vanderbilt*, 28 N. Y. 396.

Section 764: "When proceedings are had to enjoin a public nuisance, such as the pollution of a river by a board of municipal officers in violation of an act of parliament under which they are acting, a distinction is drawn, as to the necessity of proving an actual injury, between the case of an information filed by the attorney general in behalf of the public and a bill filed by private citizens in their own behalf; and in the former case it is held to be unnecessary for the attorney general to establish any actual injury, the statute having prohibited the act complained of."

Section 745: "It is, however, to be observed that the fact that the commission of the threatened act, which it is sought to enjoin as a nuisance, may be punished criminally as such, will not prevent the exercise of the restraining power of equity." *People v. St. Louis*, 5 Gilman, 351; *Attorney General v. Hunter*, 1 Dev. Eq. 12; *Gilbert v. Canal, etc., Co.*, 8 N. J. Eq. 495.

To the same effect, in 2 Daniell, Ch. Pl. & Pr. (4th Ed.) p. 1636, it is said: "In cases of 'public nuisance,' properly so called, an indictment lies to abate them, and to prosecute the offender; but an information will also lie in equity to stop the mischief, and to restrain the continuance of it"; and among the cases cited in support of the text are Attorney General v. Nichol, 16 Ves. 338; Attorney General v. Forbes, 2 Mylne & C. 123; Attorney General v. Cambridge Consumers' Gas Co., L. R. 6 Eq. 282; Bunnell's Appeal, 69 Pa. St. 59. See, also, Craig v. People, 47 Ill. 487; Attorney General v. Railroad Companies, 35 Wis. 527; Attorney General v. City of Eau Claire, 37 Wis. 400.

The supreme court of the United States has spoken on the subject. In the case of Mayor of Georgetown v. Alexandria Canal Co., 12 Pet. 91, 98, where an injunction was sought against obstructing the navigation of the Potomac river, the court said:

"Besides this remedy at law, it is now settled that a court of equity may take jurisdiction, in cases of public nuisance, by an information filed by the attorney general. This jurisdiction seems to have been acted on with caution and hesitancy. Thus, it is said by the chancellor, in 18 Ves. 217, that the instances of the interposition of the court were confined and rare. He referred, as to the principal authority on the subject, to what had been done in the court of exchequer upon the discussion of the right of the attorney general, by some species of information, to seek, on the equitable side of the court, relief as to nuisance, and preventive relief. Chancellor Kent, in Attorney General v. Utica Ins. Co., 2 Johns. Ch. 382, remarks that the equity jurisdiction in cases of public nuisance, in the only cases in which it had been exercised (that is, in cases of encroachment on the king's soil), had lain dormant for a century and a half (that is, from Charles I. down to the year 1795). Yet the jurisdiction has been finally sustained upon the principle that equity can give more adequate and complete relief than can be obtained at law. While, therefore, it is admitted by all that it is confessedly one of delicacy, and accordingly the instances where it is exercised are rare, yet it may be exercised in those cases in which there is eminent danger of irreparable mischief before the tardiness of the law can reach it."

See, also, the opinion in Pennsylvania v. Wheeling, etc., Bridge Co., 13 How. 518, where a bridge across the Ohio river was held to be a public nuisance, and ordered abated, at the suit of the state of Pennsylvania.

But while this jurisdiction of the English courts of chancery and of the equity courts of the several states of the Union is not understood to be disputed by counsel for the defendants, they do insist that, in the absence of legislation by congress conferring the authority, the federal courts can do nothing for the protection of the highways of interstate commerce, whether upon land or water. They cite the following language from the opinion in Parkersburg & O. R. Transp. Co. v. City of Parkersburg, 107 U. S. 691, 2 Sup. Ct. 792, in which Pennsylvania v. Wheeling, etc., Bridge Co., it may be observed, is declared to be "a peculiar case":

"Now, wharves, levees, and landing places are essential to commerce by water, no less than a navigable channel and a clear river. But they are attached to the land; they are private property,—real estate; and they are, primarily at least, subject to the local state laws. Congress has never yet interfered to supervise their administration; it has hitherto left this exclusively to the states. There is little doubt, however, that congress, if it



saw fit, in cases of prevailing abuses in the management of wharf property,—abuses materially interfering with the prosecution of commerce,—might interpose and make regulations to prevent such abuses. When it shall have done so it will be time enough for the courts to carry its regulations into effect by judicial proceedings properly instituted; but, until congress has acted, the courts of the United States cannot assume control over the subject as a matter of federal cognizance. It is congress, and not the judicial department, to which the constitution has given the power to regulate commerce with foreign nations and among the several states. The courts can never take the initiative on this subject."

And from *Bridge Co. v. Hatch*, 125 U. S. 1, 8 Sup. Ct. 811, the following:

"The power of congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, is not questioned; but, until it does pass some such law, there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers, unless it be the maritime law, administered by the courts of admiralty and maritime jurisdiction. No precedent, however, exists for the enforcement of any such law; and, if such law could be enforced (a point which we do not undertake to decide), it would not avail to sustain the bill in equity filed in the original case. There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the states. Such obstructions and nuisances are offenses against the laws of the states within which the navigable waters lie, and may be indicted or prohibited as such; but they are not offenses against United States laws which do not exist, and none such exist except what are to be found on the statute book."

Accordingly, notwithstanding the provision, in the "Act for the admission of Oregon into the Union" that "all the navigable waters of said state shall be common highways and forever free," it was held in that case that the bridge which it was sought to remove was not an offense against the United States, in the absence of direct legislation bringing obstructions and nuisances in navigable streams within the scope of national law.

In reply to this position of the defense, reference is made to the "Act to regulate commerce," as amended by the act of March 2, 1889 (25 Stat. 855); and it is contended that by force of the provisions of that statute, passed in exercise of the power conferred on congress by the constitution "to regulate commerce among the several states," the national control has been extended over the channels and agencies of interstate commerce, including railways as well as navigable waters, and that out of this legislation, whatever had been the rule before, has arisen by necessary implication the jurisdiction of the federal courts, in accordance with the principles of equity, to protect that commerce against interference or obstruction. The right of the federal government to obtain the injunction is also asserted upon the ground of property right in the mails.

That the nation owns the mail bags is of course beyond dispute, and that it pays large sums annually for the carrying of the mails upon the railroads is well understood. In *Searight v. Stokes*, 3 How. 151, where the question was whether vehicles carrying the mails were "laden with the property of the United States," and therefore exempt from toll on the Cumberland road, in Pennsylvania, the supreme court said:

"The United States have unquestionably a property in the mails. They are not mere common carriers, but a government, performing a high official duty in holding and guarding its own property as well as that of its citizens committed to its care; for a very large portion of the letters and packages conveyed on this road, especially during the sessions of congress, consists of communications to or from the officers of the executive department, or members of the legislature, on public service or in relation to matters of public concern."

It is said, on the contrary, to be easy "to show that, at common law, jurisdiction of the chancery on information of the attorney general to restrain a purpresture or nuisance rests on the idea that the king owns the land whereon it exists." It is doubtless true that, in the cases where the jurisdiction was invoked, the king was the owner of the land, because the land under navigable waters in England has always belonged to the crown; but the object of the suits has always been, not to vindicate the title to the land, which could have been done by the action of ejectment, but to prevent or remove obstructions to navigation, which required the prompt and efficient methods of equity; and it is not to be believed that if in England, as along the fresh-water rivers of this country, the title of lands under the water had belonged to the riparian owners, the same jurisdiction would not have been exercised for the protection of the public right of navigation. The public interest is concerned in the unobstructed use of the water, and it is sticking in the mud to say that the right to protect that use is dependent upon the ownership of the underlying soil. If, however, the jurisdiction in such cases must be held to rest upon some legal title or property right, which by fiction shall be deemed to be worthy of equitable protection, or to afford a basis of jurisdiction for protecting incidental rights, it would seem that the property which the government has been declared to have in the mails and its unquestioned ownership of mail bags might well be deemed sufficient for the purpose. Justice Brewer said in *U. S. v. W. U. Tel. Co.*, 50 Fed. 28, 42: "The dollar is not always the test of real interest. It may properly be sacrificed if anything of higher value be thereby attained."

"But," say counsel, "this whole subject is utterly foreign to the question in this case. \* \* \* Waterways are not railways. They are free to all comers, and are not the subject of private ownership nor control, but only of municipal regulation by public authority. *Lake Front Case*, 146 U. S. 387, 13 Sup. Ct. 110. The control of the railway is primarily with the company that owns and operates it. These great interests are entirely able to cope with any interference with their property. If they be held, in a high sense, as trustees for the public, why should equity entertain a suit by the beneficiaries of this trust until the trustees have proved recreant? These companies own the land over which their lines run, or a right of way in perpetuity, and, though charged with public duties, are still private pecuniary corporations operated for gain. As to all local matters, viz. the speed of trains, stopping at crossings, elevation of tracks, and things of that character, they are subject to local or state regulation. This could not be were the power of congress exclusive as in the matter of interstate rates. *Wabash, etc., Ry.*

Co. v. People of Illinois, 118 U. S. 557, 7 Sup. Ct. 4." It is, of course, true that waterways are not railways; that the latter and the title to the land under them are owned and controlled, under legal limitations, by companies which operate them for gain; but so are the boats which ply the rivers and lakes of the country; and I see no reason in any of the suggestions advanced for saying that the courts may give to commerce on the rivers a protection which they may not extend to commerce on the railways. The railroad companies are clothed with the power of eminent domain, to enable them to acquire lands necessary for their purposes, because the proposed use is for the public benefit. To the extent of the share which the companies have in interstate commerce they hold their lands and rights of way for the benefit of the general public and subject to the national control. "For this purpose," to use the expression of the supreme court in *Gilman v. Philadelphia*, 3 Wall. 713, in respect of navigable waters, "they are the public property of the nation, and subject to all the requisite legislation of congress."

But while the reasons to justify, on the grounds considered, the issuing of the injunction for the purpose of protecting, against obstruction or interruption, either the mails alone or interstate commerce, of which the carrying of the mails is a part, are strong, and perhaps ought to be accepted as convincing, there seems to be no precedent for so holding, and the responsibility of making a precedent need not now be assumed.

While, however, the point is not decided, the authorities on the subject have been brought forward so fully because, in part, of their bearing upon the question now to be considered,—whether or not the injunction was authorized by the act of July 2, 1890. It was under that act that the order was asked and was granted; but it has been seriously questioned in this proceeding, as well as by an eminent judge and by lawyers elsewhere, whether the statute is by its terms applicable, or consistently with constitutional guaranties can be applied, to cases like this. It is admitted in one of the briefs for the defendants, and the authorities already quoted clearly demonstrate, "that were congress to declare that the United States might maintain a bill to enjoin the obstruction of interstate commerce on railroads engaged therein, where such obstructions amounted to what, on a public highway, would be a public nuisance, such legislation would be admissible." Such an act, not going beyond the scope of equity jurisdiction in England at the time when the federal constitution was adopted, it is plain would not be obnoxious to the objection that it was an invasion of the field of criminal law which involved interference with the right of trial by jury. The jurisdiction of the courts of equity, and by implication their right to punish for contempt, are established by the constitution, equally with the right of trial by jury; and so long as there is no attempt to extend jurisdiction over subjects not properly cognizable in equity, there can be no ground for the assertion that the right of jury trial has been taken away or impaired. The same act may constitute a contempt and a crime. But the contempt is one thing, the crime another; and the punishment for one is not a dupli-

cation of the punishment of the other. The contempt can be tried and punished only by the court, while the charge of crime can be tried only by a jury.

The first and fourth sections of the act of July 2, 1890 (26 Stat. 209), read as follows:

Section 1: "Every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 4: "The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the cause and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

It is not contended that other sections bear materially upon the construction or interpretation of these, except the sixth, to which reference will be made further along. The position of the defendants in respect to this statute, as stated in one of the briefs, is that it "is directed at capital," "at dangers very generally supposed to result from vast aggregations of capital," that "the evil aimed at is one of a contractual character, and not of force and violence." In another brief it is said more definitely:

"That, sections 1 and 6 being construed together, it is apparent that the statute is aimed at monopoly of trade or commerce by which trade should be engrossed, and in and by which property should be employed and secured, but that, even should this contention be denied, still the statute does not confer a right on the government to proceed under the direction of the attorney general to abate a public nuisance existing in a highway of interstate commerce, but generally, by section 4, to prevent and restrain, by injunction, violations of a penal statute. It is thought, therefore, that, as held by Judge Putnam in *U. S. v. Patterson*, 55 Fed. 605, this act is inapplicable; but, if it is, then it is unconstitutional as an attempt to enforce a penal statute in equity, and not a justifiable authority for a proceeding familiar to equity, and, under congressional authority, admissible in the federal courts in the name of the government."

The very elaborate arguments presented in support of these propositions are the same, in the main, as were made and reported at length in the case referred to (*U. S. v. Patterson*), and therefore need not be restated. Reference was made in that case, and has been made in this, to the debates in congress while the measure was under consideration in that body; and, though it is conceded that we cannot take the views or purposes expressed in debate as supplying the construction of statutes, it is said we may gather from the debates in congress, as from any other source, "the history of the evil which the legislation was intended to remedy." Doubtless, that is often

true; and in this instance it is perhaps apparent that the original measure, as proposed in the senate, "was directed wholly against trusts, and not at organizations of labor in any form." But it also appears that before the bill left the senate its title had been changed, and material additions made to the text; and it is worthy of note that a proviso to the effect that the act should not be construed to apply "to any arrangements, agreements or combinations made between laborers with a view of lessening hours of labor or of increasing their wages, nor to any arrangements, agreements or combinations among persons engaged in horticulture or agriculture made with the view of enhancing the price of agricultural or horticultural products," was not adopted. Such an amendment, doubtless, was not necessary in order to exclude agreements and arrangements of the kind mentioned; but the offering of the proposition shows that the possible application of the statute to cases not in the nature of trusts or monopolies, and in which workmen or farmers should be concerned, was not overlooked. But it is more significant that, upon the introduction of the bill into the house, the chairman of the judiciary committee, as reported in the Congressional Record (volume 21, pt. 5, p. 4089), made the following statement:

"Now, just what contracts, what combinations in the form of trusts, or what conspiracies will be in restraint of trade or commerce, mentioned in the bill, will not be known until the courts have construed and interpreted this provision."

It is therefore the privilege and duty of the court, uncontrolled by considerations drawn from other sources, to find the meaning of the statute in the terms of its provisions, interpreted by the settled rules of construction. That the original design to suppress trusts and monopolies created by contract or combination in the form of trust, which of course would be of a "contractual character," was adhered to, is clear; but it is equally clear that a further and more comprehensive purpose came to be entertained, and was embodied in the final form of the enactment. Combinations are condemned, not only when they take the form of trusts, but in whatever form found, if they be in restraint of trade. That is the effect of the words "or otherwise." It may be that those words should be deemed to include only forms of like character,—that is to say, some form of contract as distinguished from tort; but, if that be so, it only emphasizes and makes imperative the inference, which otherwise it seems to me would be sufficiently clear, that the word "conspiracy" should be interpreted independently of the preceding words. It is hardly to be believed that the words "or otherwise" were used simply for the purpose of giving fuller scope to the antecedent words "contract" and "combination," and then "conspiracy" added merely for the same purpose. Construed literally, the terms used in the body of this act forbid all contracts or combinations in restraint of trade or commerce; but that construction is controlled by the title, which shows that only unlawful restraints were intended. But what constitutes an unlawful restraint is not defined; and, under the familiar rule that such federal enactments will be interpreted by the light of the common law, I have no doubt but that this

statute, in so far as it is directed against contracts or combinations in the form of trusts, or in any form of a "contractual character," should be limited to contracts and combinations such, in their general characteristics, as the courts have declared unlawful. But to put any such limitation upon the word "conspiracy" is neither necessary, nor, as I think, permissible. To do so would deprive the word, as here used, of all significance. It is a word whose meaning is quite as well established in the law as the meaning of the phrase "in restraint of trade," when used—as commonly, if not universally, that phrase has been used—in reference to contracts. A conspiracy, to be sure, consists in an agreement to do something; but in the sense of the law, and therefore in the sense of this statute, it must be an agreement between two or more to do, by concerted action, something criminal or unlawful, or, it may be, to do something lawful by criminal or unlawful means. A conspiracy, therefore, is in itself unlawful, and, in so far as this statute is directed against conspiracies in restraint of trade among the several states, it is not necessary to look for the illegality of the offense in the kind of restraint proposed; and, since it would be unnecessary, it would be illogical, to conclude that only conspiracies which are founded upon, or are intended to be accomplished by means of, contracts or combinations in restraint of trade, are within the purview of the act. It would be to make tautologous words which have distinctly different meanings, and to deprive the statute, in a large measure, of its just and needful scope. Any proposed restraint of trade, though it be in itself innocent, if it is to be accomplished by conspiracy, is unlawful. A distinction has been suggested between the phrase "in restraint of trade" and the phrases "to injure trade" and "to restrain trade." Though perceptible, the distinction does not seem to me so significant that the use of one expression rather than the other should vary the interpretation of this statute. Any contract, combination, or conspiracy, to be "in restraint of trade," must involve the use of means of which the effect is "to injure" or "to restrain" trade. A contract, combination, or conspiracy in restraint of trade is therefore a contract, combination, or conspiracy to restrain or to injure trade. It would not, I suppose, be enough, in an indictment, to charge conspiracy in restraint of trade in the language of the statute, but it would be necessary, unless the proposed restraint be shown to be in itself unlawful, to allege the illegal means intended to be used in order to effect the restraint; and whether the means should be averred to have been used "in restraint of" or "to restrain" trade could hardly be important. There are many cases, doubtless, in which the rule that every word of a statute should be given effect is inapplicable, because, when synonymous words are used, the court is powerless to give them different meanings; but, when words of different significance are employed, the rule forbids that the scope of the statute be compressed within the limits of the narrower word. "Drinking house" and "tippling house" are necessarily one, and it was well held in *Reg. v. McCulley*, 2 Moody, Cr. Cas. 34, that "ram, ewe, sheep, and lamb" were all covered by the word "sheep"; but, if the words had been "ram, ewe, or sheep," it would have been a plain violation of the rule to reject

the comprehensive word "sheep," and say that lambs or wethers were not included. *Rice v. Railroad Co.*, 1 Black, 379; *Gelpcke v. City of Dubuque*, 1 Wall. 220; *Fau v. Marsteller*, 2 Cranch, 10; *Adams v. Woods*, Id. 337; *U. S. v. Coombs*, 12 Pet. 72; *Maillard v. Lawrence*, 16 How. 251; *Market Co. v. Hoffman*, 101 U. S. 115; *Thornley v. U. S.*, 113 U. S. 313, 5 Sup. Ct. 491. And it is no more legitimate here to reject the word "conspiracy," or, what is practically the same thing, strip it of its well-settled criminal significance by confining it within forms of contract or of combinations in the form of trusts. For like reasons I am unable to regard the word "commerce," in this statute, as synonymous with "trade," as used in the common-law phrase "restraint of trade." In its general sense, trade comprehends every species of exchange or dealing, but its chief use is "to denote the barter or purchase and sale of goods, wares, and merchandise, either by wholesale or retail," and so it is used in the phrase mentioned. But "commerce" is a broader term. It is the word in that clause of the constitution by which power is conferred on congress "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Const. U. S. art. 1, § 8. In a broader and more distinct exercise of that power than ever before asserted, congress passed the enactments of 1887 and 1888 known as the "Interstate Commerce Law." The present statute is another exercise of that constitutional power, and the word "commerce," as used in this statute, as it seems to me, need not and should not be given a meaning more restricted than it has in the constitution. That meaning has often been defined by the supreme court. *Gibbons v. Ogden*, 9 Wheat. 195, 197; *Gilman v. Philadelphia*, 3 Wall. 713; *The Daniel Ball*, 10 Wall. 557; *The Case of the State Freight Tax*, 15 Wall. 232, 275; *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1; *Ex parte Siebold*, 100 U. S. 371, 395; *County of Mobile v. Kimball*, 102 U. S. 691; *Wabash, etc., Ry. Co. v. Illinois*, 118 U. S. 569, 7 Sup. Ct. 4; *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S. 641, 657, 10 Sup. Ct. 965. I quote passages which will serve incidentally to dispose of a number of points raised in the course of the argument, without referring to them more directly:

"The power of congress," said Chief Justice Marshall, in *Gibbons v. Ogden*, in 1824, when railroads were unknown, "comprehends navigation within the limits of every state in the Union, so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several states, or with the Indian tribes.'"

In *Gilman v. Philadelphia* it is said:

"The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation of congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, imposed by the states or otherwise. \* \* \* It is for congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided."

In the case of *The Daniel Ball*, a steamer employed on Grand river between Grand Rapids and Grand Haven, Mich., Justice Field, speaking for the court, said:

"So far as the steamer was employed in transporting goods destined for other states, or goods brought from without the limits of Michigan and destined to places within that state, she was engaged in commerce between the states; and, however limited that commerce may have been, she was, so far as it went, subject to the legislation of congress. She was employed as an instrument of that commerce; for, whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of congress."

In the State Freight Tax Case, Justice Strong said:

"Beyond all question, the transportation of freight or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one state to another was the prominent idea in the minds of the framers of the constitution when to congress was committed the power to regulate commerce among the several states. A power to prevent embarrassing restrictions by a state was the thing desired. The power was given by the same words, and in the same clause, by which was conferred power to regulate commerce with foreign nations. It would be absurd to suppose that the transmission of the subjects of trade from the state to the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade either with foreign nations or among the states. In his work on the constitution (section 1057), Judge Story asserts that the sense in which the word 'commerce' is used in that instrument includes not only traffic, but intercourse and navigation; and in the Passenger Cases, 7 How. 416, it was said: 'Commerce consists in selling the superfluity; in purchasing articles of necessity, as well productions as manufactures; in buying from one nation and selling to another; or in transporting the merchandise from the seller to the buyer to gain the freight.' Nor does it make any difference whether this interchange of commodities is by land or by water. In either case, the bringing of the goods from the seller to the buyer is commerce."

In Pensacola Tel. Co. v. W. U. Tel. Co., Mr. Chief Justice Waite, speaking for the court, after reciting the provisions of the constitution, says:

"The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stagecoach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of congress to see to it that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily hindered by state legislation."

In County of Mobile v. Kimball, in reference to the power of congress over the subject, it is said:

"That power is indeed without limitation. It authorizes congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries, and between the citizens of the several states, and to adopt measures to promote its growth and insure its safety."



In *Wabash, etc., Ry. Co. v. Illinois*, Justice Miller, in the course of an exhaustive discussion, says:

"It cannot be too strongly insisted upon that the right of continued transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the state might choose to impose upon it, that the commerce clause was intended to secure. This clause, giving to congress the power to regulate commerce among the states and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the constitution (*Cook v. Pennsylvania*, 97 U. S. 566, 574; *Brown v. Maryland*, 12 Wheat. 419, 446); and it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the states which was deemed essential to a more perfect union by the framers of the constitution, if, at every stage of the transportation of goods and chattels through the country, the state within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce."

Speaking by the same judge, in *Ex parte Siebold*, the court had said:

"We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. This power to enforce its laws and to exercise its functions in all places does not derogate from the power of the state to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the constitution itself show which is to yield: 'This constitution and all laws which shall be made in pursuance thereof \* \* \* shall be the supreme law of the land.' \* \* \* The government must execute its powers, or it is no government. It must execute them on the land as well as on the sea; on things as well as on persons."

In *Cherokee Nation v. Southern Kan. Ry. Co.*, the court, speaking by Mr. Justice Harlan, says:

"Congress has power to regulate commerce, not only with foreign nations and among the several states, but with the Indian tribes. It is not necessary that an act of congress should express in words the purpose for which it was passed. The court will determine for itself whether the means employed by congress have any relation to the powers granted by the constitution. \* \* \* The question is no longer an open one, whether a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, and therefore subject to governmental control and regulation."

These definitions and expositions of the scope and law of interstate commerce, except the last, preceded the enactments by congress on the subject. It was therefore of commerce so defined, embracing all instrumentalities and subjects of transportation among the states, that congress, by that legislation, assumed the control; and I see no reason for thinking that as employed in the act of 1890, which is essentially supplemental of the other acts, the word was intended to be less comprehensive. It has been decided in a number of cases in the circuit courts, and in one instance by a circuit court of appeals, that this act cannot be applied to trusts or monopolies in the manufacture or production of articles of commerce. For instance, in *Greene's Case*, 52 Fed.

104, Justice Jackson held that congress had not the constitutional power, and by this act had not attempted, to limit the right of a corporation, created by a state, in the acquisition, control, and disposition of property in the several states, even if carried to the extent necessary for the control of traffic in a species of property among the several states. To the same effect was the ruling in *U. S. v. Knight*, which was affirmed by the United States circuit court of appeals for the Third circuit. 60 Fed. 306; *Id.*, 60 Fed. 934, 9 C. C. A. 297. This case is pending on appeal in the supreme court.<sup>1</sup> See, also, *Dueber Watch-Case Manuf'g Co. v. E. Howard Watch & Clock Co.*, 55 Fed. 851. If these decisions are right (a point upon which I express no opinion), it follows that the act in question has relation only to commodities, and possibly to persons, in the course of movement among the states, and to the agencies or means of transportation; and if, as is contended, and as seems to have been decided in *U. S. v. Patterson*, *supra*, it covers only contracts, combinations, or conspiracies "intended to engross or monopolize the market," it is an act of very narrow scope. Why should it not be construed to embrace all conspiracies which shall be contrived with intent, or of which the necessary or probable effect shall be, to restrain, hinder, interrupt, or destroy interstate commerce?

The argument to the contrary, drawn from the sixth section of the act, is not controlling, nor, as it seems to me, even strongly persuasive. That section provides for the forfeiture of "any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in this act, and being in the course of transportation from one state to another, or to a foreign country"; but it does not say nor imply that only cases, whether of contract or combination or conspiracy, in which property shall be found subject to forfeiture, shall be deemed to come within the scope of the act. The force of the section is the same, I think, as if it read: "If in any case there shall be found any property owned," etc., "it shall be forfeited," etc.; and so read it neither expresses nor implies any limitation of the provisions of other sections.

At this point is interposed the constitutional objection which, it is urged, forbids a construction that goes beyond trusts and monopolies to include conspiracies to employ force or violence in restraint of trade or commerce. The argument was employed and amplified in the *Patterson Case*, 55 Fed. 605, 629-632. It was contended there "that if two or more persons commit an act of murder, robbery, forgery, shop-breaking, store-burning, champerty, or maintenance, which in fact has a natural, though unintended, result of interference with interstate commerce, they are liable criminally for a conspiracy to interfere with interstate commerce, if the statute broadly covers conspiracy merely to interfere with it." This proposition is built on the assumption—which I believe is supported neither by authority nor reason—that co-conspirators are responsible as conspirators for the natural, though unintended, results of the commission or attempt by one of them to commit the particular offense

<sup>1</sup> Affirmed, 15 Sup. Ct. 249.

originally agreed upon or intended. It is a fundamental and essential principle of law, and of social order, that all engaged in the commission of a particular crime, whether as counselors, aiders, abettors, or otherwise, are individually responsible criminally for other offenses which result naturally from the commission or attempt to commit the crime intended; but, as agreement and intent are of the essence of a conspiracy, a conspiracy to commit a particular offense can hardly be deemed to include another conspiracy to commit another offense, unless the latter was the necessary result of the commission or attempt to commit the crime intended, or to such a degree the probable result that it could itself be charged in the indictment to have been intended. But if it were possible, by a course of technical reasoning and refinement, to extend the law of conspiracy to all crimes known to the law where two or more persons are implicated, it would, as Judge Putnam held, not involve the constitutionality of this act, which is limited to the field of interstate commerce, where the power of congress is unrestricted and supreme.

The question here, however, is of the validity of the fourth, rather than of the first, section of the act. It is urged that the power given by that section "to prevent and restrain violations" of the act is an unwarranted invasion of the right of trial by jury, and in support of the proposition are cited *Puterbaugh v. Smith*, 131 Ill. 199, 23 N. E. 428; *Carleton v. Rugg*, 149 Mass. 550-557, 22 N. E. 55; *Littleton v. Fritz*, 65 Iowa, 488, 22 N. W. 641; *Eilenbecker v. Plymouth Co.*, 134 U. S. 31, 10 Sup. Ct. 424; *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712; *Pearson v. Yewdall*, 95 U. S. 294; *Boyd v. U. S.*, 116 U. S. 616-634, 6 Sup. Ct. 524; *Counselman v. Hitchcock*, 142 U. S. 547-582, 12 Sup. Ct. 195.

Little need be added to what has already been said upon that subject. The same act may be a crime and a contempt of court. If an assault or murder be committed in the presence of a court, the offender will be punishable both for the crime and for the contempt, and so with any other act committed in violation both of a criminal statute and of an injunction or order of court. Within the proper subjects of equitable cognizance, as established when the constitution was adopted, it was competent for congress to vest the courts with the jurisdiction granted by this section, and to impose upon them the duty of its exercise in proper cases. Just as, in construing the first section of the act, its general words are limited by force of the title to unlawful restraint, and the words "in restraint of trade," in their connection with the words "contract" and "combination," are to be given their common-law significance, so the jurisdiction in equity, though given in broad and general terms, will be deemed to be limited so as not to extend to a case which is not of equitable cognizance. Indeed, if the sixth section of the act may legitimately be used in aid of the construction of the first section, the fourth section warrants, if it does not require, that the first section be restricted to cases in which, in accordance with established precedent, an injunction could issue,—a limitation which would not be essentially uncertain or of difficult application,

and which, if necessary to the upholding of the statute, might well be adopted.

That this case is one of equitable character is clear, and, as I understand, has not been questioned by counsel; their contention being that neither by this statute, nor upon general principles, is the case within the jurisdiction of a federal court. Excepting the case of *U. S. v. Patterson*, I know of no ruling inconsistent with the jurisdiction here exercised. The case of *U. S. v. Trans-Missouri Freight Ass'n*, 53 Fed. 440; *Id.*, 7 C. C. A. 15, 58 Fed. 58, had reference to a contract between railroads, which was alleged to have been made in violation of the act, but was held to be not unlawful. In the case of *U. S. v. Workingmen's Amalgamated Council of New Orleans*, 54 Fed. 994, the late Judge Billings, under this statute, granted an injunction upon facts which made the question of jurisdiction the same as it is here, and in respect to that question his ruling and opinion were distinctly approved by the circuit court of appeals for the Fifth circuit (6 C. C. A. 258, 57 Fed. 85). The court said:

"The appellants assign as error the overruling by the circuit court of each of the grounds of objection urged in that court against the granting of said injunction. These are well summarized, discussed, and disposed of in the very able opinions of the judge of the circuit court who passed the decree now sought to be reversed. The matters of law presented to and considered by him were not well taken by the appellants (respondents below) and the circuit court's ruling to that effect was correct. The bill exhibited is clearly within the statute, and the pleadings of the respondents were not such as to require the refusal of the prayer for a temporary injunction."

See, also, the opinion of Judge Speer in *Waterhouse v. Comer*, 55 Fed. 149.

In the Case of *Phelan*, 62 Fed. 803, who was charged with contempt of the United States circuit court at Cincinnati, growing out of the strike of last summer, and involving facts essentially identical with the facts of this case, Judge Taft declared the combination to be "in the teeth of the act of July 2, 1890," and after quoting from the act, and referring to the rulings of other judges in accord with his own view, said:

"A different view has been taken by Judge Putnam in the case of *U. S. v. Patterson*, 55 Fed. 605; but, after consideration, Judge Lurton and I cannot concur with the reasoning of that learned judge. The fact that it was the purpose of Debs, Phelan, and their associates to paralyze the interstate commerce of this country is shown conclusively in this case, and is known of all men. Therefore, their combination was for an unlawful purpose, and is a conspiracy, within the statute cited."

In the recent case of *U. S. v. Elliott*, 64 Fed. 27, Judge Phillips declares similar views.

The facts of this case suggest illustrations of the impropriety as well as inconsistency of putting upon the statute the restrictive construction proposed. If, for example, the manufacturers of other sleeping cars, in their own interest, should enlist the brakemen and switchmen or other employes of the railroads, either individually or in associated bodies, in a conspiracy to prevent or restrain the use of Pullman sleepers, by refusing to move them, by secretly uncoupling, or by other elusive means, the monopolistic character of

the conspiracy would be so evident that, even on the theory that the statute is aimed at contracts or combinations intended to engross or monopolize the market, it would be agreed that the offense ought to be punishable. But in such a case if the officers or agents of the car companies, who might or might not be capitalists, would be individually responsible for violating the statute, upon what principle could the brakeman or switchman be exempt? Can workingmen, or, if you will, poor men, acting by themselves, upon their own motion and for their own purposes, whether avowed or secret, do things forbidden by the statute, without criminal responsibility, and yet be criminally responsible for the same things done at the instance and to promote the purposes of others? Or will it be said that under this statute one who is not a capitalist may, without criminality, assist capitalists in the doing of things which on their part are criminal? If that be so, then, if a capitalist and one who is not a capitalist join in doing things forbidden by this statute, neither can be punished, because one alone cannot be guilty of conspiracy. The persistent effort of the defendants, as the proof shows, was to force the railroad companies—the largest capitalists of the country—to co-operate, or at least to acquiesce, in a scheme to stop the use of Pullman sleepers; and for a time they had the agreement of a manager and other officers of one road to quit the use of the obnoxious cars, and perhaps a qualified submission of the officers of another road or two to the same dictation: Does the guilt or innocence of the defendants of the charge of conspiracy, under this statute, depend on the proof there may be of their success in drawing to the support of their design those who may be called capitalists, or does it depend upon the character of the design itself, and upon what has been done towards its accomplishment by themselves and by those in voluntary co-operation with them, from whatever employment or walk in life?

I have not failed, I think, to appreciate the just force of the argument to the contrary of my opinion,—it has sometimes entangled me in doubt,—but my conclusion is clear that, under the act of 1890, the court had jurisdiction of the case presented in the application, and that the injunction granted was not without authority of law, nor for any reason invalid.

This brings me to the question of fact: Did the defendants violate the injunction? The evidence upon the question is voluminous, but need not be reviewed in detail. The injunction issued July 2d, and on the 3d and 4th was served upon the defendants Debs, Howard, Rogers, and Keliher. It was not served upon the other defendants, and in one of the briefs it is contended that only parties to a bill can be charged with violating an injunction; that while strangers to a suit in chancery may be liable for willful interference, their cases stand upon the same footing as ordinary criminal contempts, and their answers are conclusive. Authorities cited: *Watson v. Fuller*, 9 How. Pr. 425; *Kip v. Deniston*, 4 Johns. 24; *Boyd v. State*, 19 Neb. 128, 26 N. W. 925; *Lord Elden's Opinion*, 7 Ves. 257-259; *State v. Anderson*, 5 Kan. 90, 114; *Elliot v. Osborne*, 1 Cal. 396; *Jewett v. Bowman*, 27 N. J. Eq. 171;

*Coddington v. Webb*, 4 Sandf. 639. In another brief the weight of authority is conceded to be that one who has actual notice of an injunction is bound by it. *Rapalje*, Contempt, 46; *Ewing v. Johnson*, 34 How. Pr. 202; *Waffle v. Vanderheyden*, 8 Paige, 45. I know of no authority and perceive no reason for treating the answer of a stranger to the bill as conclusive, while the answer of a party to the bill is not conclusive.

The testimony of newspaper reporters shows that on July 4th Debs said to one of them:

"I have done nothing unlawful. I have kept myself strictly within the provisions of Judge Caldwell's decision, \* \* \* and I shan't change my course of conduct in any way by reason of the service of this injunction."

Again, on the 7th, that:

"There had been another injunction served upon him, and it should not make the slightest difference in the manner in which the American Railway Union was doing its business; it had kept within the bounds of the law."

To another, on July 2d, he had said, in substance—

"That he was not afraid of any court or grand jury, or of any injunction as he had done nothing to be enjoined against, and that the American Railway Union would continue the fight on the same lines they had commenced."

July 3d the defendant Burns, who, it should be observed, in responding jointly with his codefendants Hogan and others to interrogatories, had asserted that they were not informed of the injunction until near the end of the strike, in answer to the inquiry of the reporter what they should do about it, said:

"Why, they would simply laugh at the injunction; that the Railway Union knew its rights; that they had not done anything wrong,—had not interfered with interstate commerce or mails or passengers; that they had simply called off their men; that they had not done anything contrary to the injunction; that they had a right to strike peaceably."

These declarations are not brought forward for the purpose of showing that the defendants held or expressed sentiments of contempt for the order of the court. Whether they did or not is immaterial here. Their conduct only is in question, and these expressions are quoted because they confirm the inference deducible from other evidence, that no essential and voluntary modification of their course of action either followed or was caused by the injunction. Their original intention, it is true, was only to prevent the use of Pullman cars, but finding, as they did, immediately, that that aim would be thwarted by the discharge from service of men who refused to handle those cars, they began as early as June 27th, the day after the boycott was proclaimed, to issue orders to strike; and from that time to the end, to the extent of their ability, they conducted and controlled the strike with persistent consistency of purpose, and with unchanged methods of action. What they did the first day they did, in substance, each succeeding day, so that it is not necessary to discriminate very closely between what was done before and what after service of the injunction.

As officers of the American Railway Union, it is beyond question that the defendants had practical control of the strike, guiding as they chose the movements of the men actively engaged. Is it

true, as they assert, that they did nothing, and advised or instigated nothing, unlawful, and nothing contrary to the injunction? Leaving out of view for the moment the rule that co-conspirators are responsible for the deeds of each other, done in furtherance of the common design, is it true that the defendants, in the exercise of their acknowledged leadership, did no more than advise a peaceable strike or withdrawal of their followers from railroad service, or did they counsel and encourage such violence and intimidation as they knew to be necessary to prevent the equipment and moving of trains? To the charge of the information that they knew "that violence invariably follows all strikes of a similar character," they answered by denying that "they knew that violence and unlawful conduct necessarily follows from strikes of the kind mentioned." When, at an early stage of the case, the court suggested that in the use of the word "necessarily" the answer was not responsive to the information, where the word "invariably" was employed, the variance was stated by counsel to have been inadvertent, and leave was taken to amend; but, instead of an amendment curing the defect, a supplemental answer was filed, which merely denies such averments and parts of the information as they had not "in their former answer expressly admitted or denied." On this point, Hogan and the other defendants to the second information speak more explicitly, denying "that they or either of them knew or could have known that any such acts were certain or almost certain, or probable or reasonably to be expected, to follow from such strikes or cessation of labor." While this is not perceived to be equivocal or evasive, it is difficult to understand how intelligent men familiar with the subject, as these men may be presumed to have been, could honestly affirm it. Strikes by railroad employes have not been infrequent of late years in this country, and the testimony of the one witness who spoke on the subject, and whose experience and intelligence made him apparently quite competent to speak, accord with what I suppose to be common knowledge,—that they have been attended generally, if not in every instance, with some form of intimidation or force. The witness said he knew of no exception. Under the conditions of last summer, when there were many idle men seeking employment, it was impossible that a strike which aimed at a general cessation of business upon the railroads of the country should succeed without violence; and it is not to be believed that the defendants entered upon the execution of their scheme without appreciating the fact, and without having determined how to deal with it. The inference therefore is a fair one, aside from direct evidence to the point, that they expected and intended that this strike should differ from others only in magnitude of design and boldness of execution, and that the accustomed accessories of intimidation and violence, so far at least as found essential to success, would not be omitted. For that much the striking workmen, acting on the promptings of self-interest, without instigation or direct suggestion, and even in spite of admonitions to the contrary, may ordinarily be counted on. Such admonitions against violence were

sent out occasionally by the defendants, but it does not appear that they were ever heeded; and I am not able to believe on the evidence that, in the fullest sense, it was expected or intended that they should be. I am able and quite ready to believe that the defendants not only did not favor, but deprecated, extreme violence, which might lead to the destruction of property or of human life. But they were not unwilling that coupling pins should be drawn; that Pullman cars should be "cut out" and side tracked; that switches should be turned and trains derailed; that cars should be overturned and tracks obstructed; that false or contradictory signals should be given to moving trains; that the strikers and lawless rioters should wear a common badge, and should assemble together upon the tracks and yards of the companies to obstruct business; that engineers and firemen should be pulled from their cabs, if by persuasion or threats they could not be induced to leave them; that the unemployed should be deterred by threats or abuse from taking the places of strikers; and that engines should be "plugged," or otherwise "killed." These things, and the like of them, were done daily in Chicago and elsewhere by members, and sometimes by officers, of the local unions, without protest or condemnation, and some of them at the instigation of the defendants, who, it can hardly be doubted, were well aware of what was going on. When, therefore, in his address of June 29th, "To the Railway Employees of America," Debs said: "I appeal to the strikers everywhere to refrain from any act of violence. Let there be no interference with the affairs of the companies involved, and, above all, let there be no act of depredation. A man who will destroy property or violate law is an enemy, and not a friend, to the cause of labor. The great public is with us," etc.,—the chief aim, I am convinced, was to secure the good will of the public. To that end the warnings against acts of depredation or visible destruction of property, it may well be believed, were sincere; but their followers did not understand, and the court cannot believe, that it was intended to forbid intimidation and the milder forms of violence, which did not directly involve the destruction of property or severe injury to person, and which for that reason, it seems, were assumed to be not unlawful, when employed in the interests of organized labor in a contest with "an alliance of rich and powerful corporations." By just what theories of law and duty they were governed might be better understood, perhaps, if in that part of the answer which alleges "that upon the service of the injunction the defendants consulted competent counsel, learned in the law, and, upon a full and fair statement of the facts in the premises, they were advised what they might rightfully and lawfully do without violating the order of the court, and that since that time they have in all things proceeded in accordance with that advice," they had disclosed, as they ought to have done, just what statement of the facts they made to counsel, and what advice they received. Without such disclosure, either in the answer or the proof, the alleged advice neither justifies nor mitigates a wrong or error committed in pursuance of the advice, but raises, rather, a presumption that a full



statement would not be advantageous. Proof was made of portions of the testimony of Mr. Debs on the 20th of August before the commission appointed by the president, wherein, among other things, he said:

"It is understood that a strike is war; not necessarily a war of blood and bullets, but a war in the sense that it is a conflict between two contending interests or classes of interests. There is more or less strategy, too, in war, and this was necessary in our operation. Orders were issued from here, questions were answered, and our men were kept in line from here. \* \* \* As soon as the employes found that we were arrested, and taken from the scene of action, they became demoralized, and that ended the strike. It was not the soldiers that ended the strike. It was not the old brotherhoods that ended the strike. It was simply the United States courts that ended the strike. Our men were in a position that never would have been shaken, under any circumstances, if we had been permitted to remain upon the field, among them. Once we were taken from the scene of action, and restrained from sending telegrams or issuing orders or answering questions, then the minions of the corporations would be put to work. \* \* \* Our headquarters were temporarily demoralized and abandoned, and we could not answer any messages. The men went back to work, and the ranks were broken, and the strike was broken up, \* \* \* not by the army, and not by any other power, but simply and solely by the action of the United States court in restraining us from discharging our duties as officers and representatives of our employes.

In answer to an inquiry what, if anything, he did to ascertain whether his men were concerned in violence, he said:

"We did that [by] our committee, which called at headquarters every evening and advised us. They were instructed to guard the company's property, if they were near it at all, and to apprehend anyone that might be caught destroying property. This instruction was given again and again to the central committee that went out from headquarters. We said we knew that if there was trouble, if there was disorder and riot, we would lose, because we knew enough by experience in the past that we had everything to lose by riot, and nothing to gain. We said that man who incites riot or disorder is our enemy, and we have got to be the first to apprehend and bring him to justice. So we called upon our men, and advised them, urged them, to do everything in their power to maintain order, because we felt and knew that if there was perfect order there was no pretext upon which they could call out the soldiers, or appeal for the intervention of the court, and we would win without a question of a doubt."

One or two reflections upon these statements will be enough: First, with all that is said about guarding property, keeping the peace, and being the first to arrest offenders, not one was arrested, and no effort was made by strikers or members of the Railway Union to preserve the peace or to protect property. On the contrary, many of them were leaders in scenes of violence and disorder. Second, if this strike, like others, was understood to be war, not necessarily of blood and bullets, but a conflict between contending interests or classes of interests, in which strategy had to be employed to keep the men in line, it was more than a peaceable strike, or mere cessation from work. Had it been only that, the injunction, instead of being a hindrance, would have been in their hands the very weapon they needed to enable them to suppress the violence and disorder in which alone, they say, they saw possible danger to the success of their cause.

"When the trouble began," said Mr. Debs again, in his testimony before the commission, "there were thousands of telegrams and communi-

cations pouring in, and it was impossible for me to see them all personally, because I was out among the men, meeting with committees, meeting at different cities, and addressing meetings, and all that kind of work; so it was really impossible for all those telegrams that were coming in to come under my personal notice. So then the work was apportioned by the board to its members. This young man named Benedict (who had been employed as an assistant secretary) answered, by instruction of the board, some telegrams, and in other cases, where the board was all absent, he answered telegrams himself. Telegrams, when he had answered others of a kindred character, he would answer without instructions." The inconsistency of these statements with the averments of the answer of the defendants to the original information, denying responsibility for the telegrams sent and received, is too evident to need comment, but they are quoted here not so much to point out the discrepancy as to show the activity of Mr. Debs, his intimate connection with the conduct of the strike, and consequently his direct responsibility for what was done. By his admission, he was out among the men, meeting committees, and addressing meetings. It is shown also by the testimony of two or more witnesses that on the night of June 29th he and Howard and Keliher attended a meeting of the local union at Blue Island, a suburb of Chicago, on the line of the Rock Island & Pacific Railroad; that he and Howard each addressed the men, urging them to join the strike; that, among other things, one or both of them said the men "ought to stand together and go out in a body"; that if others came to take their places "they ought to make them walk the plank." In the language of the witnesses, "They told the workmen there that the only way to resist the orders of the general managers in cutting down the wages of the men in detail on the different roads was by unanimously organizing and standing by, —all standing together. Debs told them not to molest the mail trains, but," as the witness puts it, "not to let the Pullman cars out, at no hazards." Howard "advised the men not to do any violence, or anything like that, but to go out, and stay out, man to man, and they would win the victory." "Howard said not to commit any violence, but not to allow any Pullman cars to run, at no hazard." "He said all those that didn't go out and stay out, and help the laboring class of people out of trouble, will have to walk the plank in the future." These speeches did not mean, and were not understood by the men to whom they were addressed to mean, that no resistance should be made by them to the running of Pullman cars, or that they should submit unresistingly to the employment of other men to take their places. They voted that night to join the strike, and on the next day inaugurated "a condition of turbulence" which a witness declared he "did not believe could exist." "A body of men, principally ex-employees of the Rock Island road, blockaded traffic, threatened violence, and tied up the road." "The same condition, only worse, July 1st," and notwithstanding the efforts of the United States marshal, by reading the injunction and otherwise, to quell the disturbance, nothing was ac-

complished until the 5th of July, when federal soldiers arrived. With that assistance, through trains began to be moved, and the transportation of the mails was resumed on the 7th or 8th, but it was not until the 14th that traffic on that line was fully restored. These things directly followed, and in large measure, I think it not unwarranted to say, were the natural and probable result of, the speeches made and counsel given to the men by Debs and Howard at the meeting on the night of the 29th at Blue Island. Similar suggestions, calculated to incite to acts of violence or intimidation, were contained in many of the telegrams which were sent out over the name of Debs, and for which, notwithstanding the averment of their sworn answers to the contrary, it is no longer possible for any of the defendants to evade some measure of responsibility. I quote from a few of them, commencing June 27th:

"A boycott has been declared against the Pullman Company, and no Pullman cars are to be handled." "If men are discharged for refusing to handle Pullman cars, every employé should at once leave the service of the company."

#### June 28th:

"No forcible interference with mail trains, but any man who handles trains or cars will be a scab." "No loyal man will handle any train at all on your system." "Tie up every line possible, to enforce boycott. Do not cut any cars from mail trains, but no loyal man will move a train of any kind under existing conditions." "Passenger train came south this morning, and will be held here." (To Debs from Las Vegas.) "If your company refuses to boycott Pullman, tie it up."

#### June 29th:

In substance: Leave denied for train at Livingston, Montana, to proceed with sick passengers. "All taking part in this struggle will receive protection of A. R. U., whether members or not." "Pay no attention to injunction orders. Men will not be slaves."

#### June 30th:

"This is a fight against combined capital and oppression, and we are assured winners. Do no violence, but every man stand pat and firm." "No fear about reinstatement. All lines in Chicago are paralyzed. Impossible to get scabs to fill places in time." "Do not interfere with mail trains in any manner."

#### July 1st:

"Knock it to them as hard as possible." "Have men stand firm. They show a better front in Ohio than you. \* \* \* I do not suspect Grand Junction of housing scabs or sucklings of autocrats."

#### July 2d:

"The train will haul your car to its destination on presentation of this telegram." (To Mrs. Leland Stanford.) "All who work during present strike will be branded as scabs."

#### July 3d:

"This is authority to call out roads named." "Tie up Big Four." "Get your men out immediately." "It will take more than injunctions to move trains. Get everybody out." "Wear a white ribbon, instead of red. We have requested our friends to wear white in Chicago." "Let everybody wear white ribbon who are in favor, and all opposed wear red." "Do not let court order scare you. I have had orders served on me. We are breaking no laws. You and all strikers have quit your places peaceably, as is your right. \* \* \* Don't be silly."

July 4th:

"Have your men stand pat. They will have to make many arrests before this strike is over. We all stand firm. Arresting men will not operate the road." "To call out troops was an old method of intimidation. Commit no violence. Have every man stand pat. Troops cannot move trains. Not scabs in the world to fill places, and more occurring hourly." "This is authority to call out P. D. & E."

July 5th:

"The lines are now sharply drawn. Capital has declared war. Any man who works is assisting capital to defeat labor." (Richards of St. Paul to Debs): "Send all good news possible. \* \* \* Look after locals on all roads, and play the strongest card left."

July 8th:

"You cannot paralyze the world in a minute. Do not let strong men become childish. \* \* \* You appear to be paying more attention to newspapers than to messages."

July 10th:

"Debs, Howard, Keliher, Rogers, in jail. Rest expect to go. This is the last act of the corporations. Our cause is just. Victory certain. Stand pat. [Signed] Hogan."

July 14th:

"All negotiations off. Stand to a finish now."

The condition as it was on the 12th of July is aptly described in the letter of that date signed by Debs, Howard, and Keliher, as officers of the American Railway Union, and addressed, "To the Railway Managers." It is set out in full as a part of the information,<sup>1</sup> and if more convincing evidence of the nature of the strike, and of the direct personal and official responsibility of the defendants for what was done, and for the results, were needed, it is found in that document.

But the defendants are not entitled to be judged solely by the rules which determine the responsibility of one who has acted without combination or agreement with another. The bill upon which the injunction was ordered charged them with conspiracy, as, under the statute, it must have done, in order to bring them within the cognizance of the court. Conforming to the allegations of the bill, the injunction, in substance, commanded them, and all combining or conspiring with them, "to desist and refrain" from interfering with the business, rolling stock, and other property of the roads named; from using force, threats, or persuasion to induce employes of the roads to neglect duty; from using force or threats to induce employes to quit, or other persons not to enter, the service of the roads; from doing any act in furtherance of a conspiracy to interfere with interstate commerce on the roads; and from ordering, aiding, or abetting any person to do the forbidden things. It is not necessary to consider whether this injunction, when properly construed, forbids, or whether it might lawfully have been made to forbid, the employes of the railroad companies to quit work in furtherance of the alleged conspiracy, or to forbid others, in aid of the conspiracy, to persuade or advise them to quit. The order was not intended when issued,

<sup>1</sup> Ante, p. 729.

and will not now be construed, to go so far. In the recent case of *Arthur v. Oakes* (C. C. A., 7th Circuit), 63 Fed. 310, it was decided, with my full concurrence in the opinion, that a court of equity will not, "under any circumstances, by injunction, prevent one individual from quitting the personal service of another"; and in respect to the right of employes, singly or in concert, to quit work, and of others to advise them on the subject, there is no present necessity for adding to what was said in that case, further than to observe that neither expressly nor by implication does the opinion there delivered lend the remotest sanction to the proposition asserted by one of the counsel for the defendants, that in free America every man has a right to abandon his position, for a good or a bad reason, and that another, for good or bad reason, may advise or persuade him to do so. Manifestly that is not true. If it were, a servant might quit his place, and another might advise him to quit, in order to make way for the entry of thieves or burglars into the employer's house,—a suggestion at which simple minds revolt, and for which the acutest can invent neither justification nor apology. The rule is familiar in criminal jurisprudence that any act, however innocent in itself, becomes wrongful or criminal when done in furtherance of an unlawful design. But whether or not, in a particular case, an injunction will be appropriate, and to what extent it shall go if granted, will depend on other considerations than the mere wrongfulness or illegality of the act or conduct proposed to be enjoined. The right of men to strike peaceably, and the right to advise a peaceable strike, which the law does not presume to be impossible, is not questioned. But if men enter into a conspiracy to do an unlawful thing, and, in order to accomplish their purpose, advise workmen to go upon a strike, knowing that violence and wrong will be the probable outcome, neither in law nor in morals can they escape responsibility.

The evidence establishes, and it has not been denied, that on the 21st day of June, 1894, the American Railway Union, in convention at Chicago, declared a boycott against the Pullman palace cars, to take effect after five days if meanwhile the Pullman Company should not accede to a proposed arbitration with striking workmen; that the convention, after conferring upon the directors of the union jurisdiction over all matters connected with the boycott, adjourned on the 25th of June; that on the next day the following notice or order was issued, over the signature of the president of the union: "June 26, 1894, 1:30 p. m. Boycott against Pullman cars in effect at noon to-day. By order of convention. E. V. Debs,"—and that on the same day the following telegram was sent to the general officers of labor organizations throughout the country:

"A boycott against the Pullman Company, to take effect at noon to-day, has been declared by the American Railway Union. We earnestly request your aid and co-operation in the fight of organized labor against a powerful and oppressive monopoly. Please advise if you can meet with us in conference, and, if not, if you will authorize some one to represent you in this matter. Address 421 Ashland Block. Eugene V. Debs, President."

Pullman cars in use upon the roads are instrumentalities of commerce, and it follows that from the time of this announcement, if not

from the adoption of the resolution by the convention, the American Railway Union was committed to a conspiracy in restraint of interstate commerce, in violation of the act of July 2, 1890, and that the members of that association, and all others who joined in the movement, became criminally responsible each for the acts of others done in furtherance of the common purpose, whether intended by him or not. The officers became responsible for the men, and the men for the officers. While I do not accede to the proposition which was advanced in Patterson's Case, for the purpose of invalidating or of putting a narrow construction upon the statute, that a conspiracy to commit a specified offense includes a conspiracy to commit any other offense which may result and does result from an attempt to commit the offense intended, the rule is well settled, and I suppose well understood, that all who engage, either as principals or as advisers, aiders, or abettors, in the commission of an unlawful or criminal act, are individually responsible for the criminal or injurious results which follow the commission or an attempt by any of their number to commit the intended crime or wrong. It is by the same rule that co-conspirators are responsible for the acts and declarations of each other in the furtherance of their unlawful purpose. *Brennan v. People*, 15 Ill. 511; *Hanna v. People*, 86 Ill. 243; *Lamb v. People*, 96 Ill. 74; *Whart. Cr. Law*, § 1405; *1 Bish. Cr. Law*, 636; *Hawk. P. C. c. 29, § 8*. I quote:

"Upon this ground [says Hawkins, *supra*], it has been adjudged that where persons combine together to stand by one another in the breach of the peace, with a general resolution to resist all opposers, and in the execution of their design a murder is committed, all the company are equally principals, though at the time of the fact some of them were at such a distance as to be out of view."

"A man may be guilty of a wrong which he did not specifically intend [says Bishop], if it came naturally, or even accidentally, through some other specific, or a general, evil purpose. When, therefore, persons combine to do an unlawful thing, if the act of one, proceeding and growing out of the common plan, terminates in a criminal result, though not the particular result meant, all are liable."

In *State v. McCahill* (Iowa) 30 N. W. 553, the court said:

"Where there is a conspiracy to accomplish an unlawful purpose, and the means are not specifically agreed upon or understood, each conspirator becomes responsible for the means used by any co-conspirator in the accomplishment of the purpose in which they are all at the time engaged."

These defendants were the directors and general officers of the American Railway Union, and had practical control of the organization. They procured the adoption of the resolutions by which the boycott of the Pullman cars was declared, and authority given themselves to begin and control the movement. They put themselves at once in telegraphic communication with the officers of local unions, advising them of the action of the convention, and that no Pullman cars were to be handled; but, it appearing very soon that men who refused to handle Pullman cars were being discharged, they determined to prevent the running of all trains upon all the roads until the companies should accede to their demands, including the reinstatement of men who had been discharged. Later the Pullman strikers were abandoned, and only the re-employment of

railroad men insisted on. As early as the 27th of June they sent out telegrams directing men to quit work if the running of Pullman cars was insisted upon, and unless discharged men were restored to their places, and by the 28th it had become the distinct policy "to get the men out"; "to tie up" or paralyze the roads; to promise full protection to all who joined in the strike; to denounce as scabs, or as traitors to the cause of labor, all who refused to go out, and all who should consent to take places which others had abandoned,—and later the form or substance of expression became: "All employés of all roads will stand together"; "None will return until all return." By this course the original conspiracy against the use of Pullman cars became a conspiracy against transportation and travel by railroad. Upon their own authority, without consulting the local unions, the defendants converted the boycott into a strike; and with the aid of followers, some of whom stopped at no means between the drawing of a coupling pin and the undermining of a bridge, whereby men should be hurled to death, they pushed the strike to the conditions which prevailed when the intervention of the court was asked, and which, in the end, compelled the employment of military force to re-establish peace and start again the activities of commerce. The evidence leaves no feature of the case in doubt. The substance of it, briefly stated, is that the defendants, in combination with the members of the American Railway Union and others, who were prevailed upon to co-operate, were engaged in a conspiracy in restraint or hindrance of interstate commerce over the railroads entering Chicago, and, in furtherance of their design, those actively engaged in the strike were using threats, violence, and other unlawful means of interference with the operations of the roads; that by the injunction they were commanded to desist, but, instead of respecting the order, they persisted in their purpose, without essential change of conduct, until compelled to yield to superior force.

Much has been said, but without proof, of the wrongs of the workmen at Pullman, of an alliance between the Pullman Company and the railway managers to depress wages, and generally of corporate oppression and arrogance. But it is evident that these things, whatever the facts might have been proved or imagined to be, could furnish neither justification nor palliation for giving up a city to disorder, and for paralyzing the industries and commerce of the country.

My conclusion in the case on the information of the United States implies a like conclusion in the other case, tried at the same time and upon the same evidence, wherein, by an information presented by the receivers of the Santa Fé Railroad, the defendants were charged with wrongful and violent interference with the operation of that road pending the strike. That they did interfere as alleged, is established by the evidence already considered. Though violation of the injunction of July 2d is alleged in the bill, the questions of jurisdiction and of the construction and application of the act of 1890 are not essentially involved, because, the property being in the custody of the court, any improper interference with its manage-

ment, it is well settled, constituted a contempt of the court's authority, as exercised in making the order appointing the receivers and enjoining interference with their control. The decision, or rather letter, of Judge Caldwell has been referred to, but, while that recognized the right of employes to quit the service of the receivers, it contained no warrant for intimidating or abusing those who were willing to take employment, or for otherwise interfering directly, as the defendants and their followers did, with the management and operation of the road. The court therefore finds the defendants (except McVean, whose case is held under advisement) guilty of contempt as charged in each of the cases. The same sentences will be ordered in both cases, but it is not intended that they shall be cumulative.

**WILLIAMES et al. v. McNEELY et al.**

(Circuit Court, E. D. Pennsylvania. December 4, 1894.)

No. 44.

**1. PATENTS—STEAM-HEATING APPARATUS—ANTICIPATION.**

The Williames patent, No. 256,089, for an improvement in steam-heating apparatus for buildings, providing for an unobstructed exhaust pipe, and heating coils opening from it, in combination with a bleeder pipe connecting with said coils, and opening at the bottom into a hot well, in which a partial vacuum is maintained for the purpose of drawing the steam through the coils, is not anticipated by an apparatus for condensing engines, constructed to produce as instantaneous a condensation of the steam as possible, or by the Corey invention of an improvement in water tanks for hotels to utilize all the escape steam from the engines, etc., to contribute to the supply of hot water, neither of which inventions had any reference to heating buildings.

**2. SAME—DISCLAIMER—REV. ST. §§ 4917, 4922—UNREASONABLE DELAY.**

The reasonableness of the delay to enter a disclaimer of the parts of a patent to which the patentee is not entitled (Rev. St. §§ 4917, 4922) must be determined with reference to the time when the party acquired knowledge that he was not the true inventor of such parts; and the decree of a court of first instance holding his claim invalid is not to be taken as decisive of the acquisition of such knowledge as of the date of its promulgation, where it is still subject to appeal, and the patentee, in good faith, protests that it is incorrect.

**3. SAME—DELAY TO APPEAL.**

Complainants are not concluded in such case on the ground that they unduly delayed to take an appeal, where the time allowed by law therefor has not expired.

This was a bill by Napoleon W. Williames and Warren Webster against Charles W. McNeely & Co. to restrain infringement of a patent.

Ernest Howard Hunter, for complainants.

Mayer Sulzberger and Joseph C. Fraley, for defendants.

**DALLAS, Circuit Judge.** This is a suit in equity for alleged infringement of letters patent No. 256,089, granted to Napoleon W. Williames under date of April 4, 1882. The claims alleged to be infringed are as follows:



"(1) In apparatus for heating buildings, the unobstructed exhaust pipe, and heating coils opening from it, in combination with a bleeder pipe connecting with said coil, and opening at the bottom into a hot well, in which a partial vacuum is maintained, substantially as and for the purposes specified." "(3) In apparatus for heating buildings, the unobstructed exhaust pipe, A, heating coils, B, bleeder main, D, hot well, E, suction or exhaust fan F, and feed-water pipe, N, substantially as and for the purpose specified."

The allegation of infringement has been maintained. The larger and extended pipe, which in the defendants' arrangement is placed between the vacuum pump and the anterior portion of their apparatus, is substantially identical with the "hot well" of the patent; and in no other particular has it been attempted to distinguish the defendants' construction from that of the plaintiffs. The claims in suit were sustained by the circuit court for the Southern district of New York in the case of *Williames v. Barnard*, 41 Fed. 358. In the same case the broader claims, viz. the second, the fifth, and the seventh, were disallowed, and it is here contended that "the difference between the claims adjudicated to be void and those now in controversy is not patentable,"—that the latter are "void for lack of patentable novelty"; and, to uphold this contention, certain evidence has been adduced in the present case which was not presented in the former one. This additional evidence consists of publications in the *Circle of Sciences* (volume 2, p. 871), and in *Practical Notes on the Steam Engine, Propellers, etc.* (page 145), and United States patent No. 144,834, issued to James H. Corey on November 25, 1872. The two publications first mentioned relate to low-pressure or condensing engines. They do not refer to heating, nor suggest any means to that end. They deal with condensers for steam engines, and, as was admitted by defendants' expert, the forms of condensing apparatus of which they treat are designedly constructed to produce as instantaneous a condensation of the steam as possible, whereas in the complainants' heating system the steam does—and, to accomplish the desired result, must—remain almost wholly uncondensed in its passage through the pipes (generally of considerable length) which feed the radiators from which the heat supplied is immediately derived. The Corey patent is not anticipatory of the patent in suit. Corey had no thought of heating. He described his invention as "an improvement in water tanks for hotels," consisting "in so constructing the water tanks of hotels and other buildings as to utilize, as far as possible, all the escape steam from the engines, and all the drip from the heaters, kitchens, wash house, laundry, etc." He proposed, primarily, to use the escape from the engine, and to add to this the drip from other sources, including that from the heaters, but with the sole object of making it "available and useful" for obtaining an "ample supply of hot water." The return pipes from the kitchen, laundry, or any steam-heating apparatus, and from the steam coils for heating the building, were represented, but only to show the manner in which this single specified object was to be effected. They were all to contribute to the supply of hot water, but the inventor had no more idea of affecting the heating system than he had of interfering with the operations of the kitchen or of the laundry. Nor

did he even incidentally indicate the Williames contrivance for producing the Williames result. He suggested that "an exhaust pump may be attached to the discharge pipe of steam tank, C, D, at M, and to the steam coil, L, of water tank, E, F, at A, to remove the atmospheric pressure, thus making the engines, pumps, etc., connected thereto act at low pressure"; but he made no claim based upon this suggestion and could not have done so with success. It amounts to nothing more than a recognition of the possibility of applying devices whereby exhaust steam can be led to an exhaust pump, which, in a perfectly well known manner, acts to produce the effect belonging to the low-pressure system of steam engines, but which, as has already been shown, differs essentially from that which was designed and attained by the invention of this patentee.

The only remaining defense which has been pressed is that "the patent is void in toto because," as is alleged, "the patentee has unreasonably neglected and delayed to disclaim the parts of which he is not the original and first inventor." The privilege of disclaimer is conferred by section 4917 of the Revised Statutes; and section 4922 provides that a suit may be maintained by the owner of a patent for the infringement of any part thereof which is bona fide his own, notwithstanding the specifications may embrace more than he has invented, but unless the proper disclaimer shall have been entered he shall not recover costs, and no patentee "shall be entitled to the benefit of this section if he has unreasonably neglected or delayed to enter disclaimer." I think that the ruling of Judge Coxe that the Reid and Billington apparatus anticipates the broad claims of the Williames patent should be followed, and therefore, no disclaimer having been entered as to them, that no costs can be recovered by the complainants, notwithstanding the fact that this suit has been brought for a part thereof which is bona fide their own. But I do not think that the right to protection from infringement of the two narrower claims which were sustained in *Williames v. Barnard* has been lost through unreasonable neglect or delay to enter a disclaimer. It has not been conclusively settled that Williames claimed anything of which he was not the original and first inventor. It is true that a circuit court has held that he did, and it appears that when the opinion of that court was written it was supposed that a disclaimer should precede the entry of its decree in the complainants' favor upon the claims which it held to be valid. That decree, however, was in fact entered without disclaimer being made, and doubtless for the reason that the learned judge had observed, after his opinion had been delivered, that, while the statute deprives plaintiffs of costs in such cases, it does not authorize the requirement of the disclaimer of unfounded claims as a condition of granting relief upon those which are supported. There is, then, no decree for disclaimer, and there should be none; and there is no legislation which prescribes that, upon a patent being judicially held to be invalid in part, a disclaimer must then, or in a reasonable time thereafter, be entered. The reasonableness of the delay occurring in any case must be determined with reference to the time when the party acquired

knowledge that he was not the true inventor of any material or substantial part of the thing patented. Must the decision of a court of first instance be taken to be decisive of the acquisition of such knowledge at the date of its promulgation? In my opinion this question should be answered negatively, and if I am right in this the defense under consideration fails, for it is based wholly upon the opposite assumption. If the opinion of a single judge of a subordinate tribunal finally settled the matter, then, perhaps, it would be unreasonable to postpone the entry of a disclaimer for even a very brief period after such a decision, indicating its necessity, had been announced, and the right of appeal would be practically frustrated.

It is, however, further contended that these complainants have unduly delayed to take an appeal, and that, therefore, they are concluded by the decree of the circuit court; but the sufficient answer to this is that the time allowed by law for taking an appeal has not expired. In the meantime, the plaintiffs insist that the decree of Judge Coxe, in so far as it is adverse to them, is erroneous; and their counsel has submitted in the present case an argument in support of this insistence, which I may say, though I have no intention to intimate any opinion on the subject with which it deals, is certainly neither feigned nor frivolous. The disclaimer which it is contended should have been entered would, if made, have absolutely and irrevocably effaced material parts of the patent; and in my opinion the plaintiffs were not bound to relinquish their claims to those parts, merely because they had been adjudged to be invalid by a decree which is still subject to appeal, and which they, in good faith, protest is incorrect. Decree for complainants, without costs.

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CHASE v. CATLIN et al.

(Circuit Court, S. D. New York. December 6, 1894.)

1. PATENTS—ANTICIPATION—UNDERSHIRTS.

A knitted vest, designed to produce a close fit, and to be worn next the skin, is anticipated by a knitted vest, similar in form and function, though designed to be worn over a corset.

2. SAME.

Appleton's patent, No. 240,569, for an improvement in undershirts, the middle part of which is knitted in plain stitch, and the upper or lower part, or both, in tuck stitch, to produce a better fit, *held* to have been anticipated by the "spencer," which is similar in form and function, though designed to be worn over the corset.

**Final Hearing in Equity.** This was a suit by Richard F. M. Chase against Julius Catlin and others for infringement of a patent.

This action is based upon letters patent No. 240,569, granted April 26, 1881, to Robert M. Appleton for an improvement in undershirts. The specification says:

"The object of my invention is to furnish an improved undershirt or vest which will retain its original woven shape after washing and fit the form of the body in an easy and comfortable manner. The invention consists of an undershirt in which plain knitting and tuck-knitting are combined in

such a manner that especially the upper and lower parts are tuck-knitted, so as to become wider or more expanded, while the middle part is made of plain knitting so as to fit closer than the other parts. \* \* \* For gentlemen's undershirts it is preferable to make the waist and lower part of the body in plain stitch and the upper part only in tuck stitch or knitting, while for ladies' use a plain middle or waist part and tuck-stitched or knitted upper and lower parts are preferable, as the same fit thereby better over the breast and hips and closely at the middle part or waist. \* \* \* The tuck-knitting can be produced in any desired pattern, closer together or at some distance apart, as taste and fancy may direct. The goods are manufactured on the well-known circular-knitting machines or shirt-looms with a continuous thread or yarn, and may be woven either circular and seamless or sewed at the sides, as desired."

The claims involved are as follows:

"(1) In an undershirt or vest, the combination of the middle part, made in plain stitch or knitting, and the upper part, made in tuck stitch or knitting, substantially as described.

"(2) In an undershirt or vest, the combination of the middle part made in plain stitch or knitting, and the lower part, made in tuck stitch or knitting, substantially as described.

"(3) In an undershirt or vest, the combination of the middle part, made in plain stitch or knitting, and the upper and the lower parts made in tuck stitch or knitting, substantially as described."

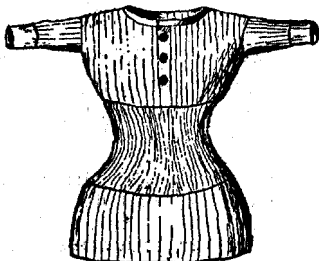
The defenses are lack of novelty and invention and noninfringement.

W. P. Preble, Jr., and John R. Bennett, for complainant.

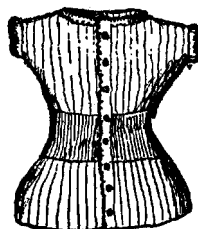
Knevals & Perry, Dudley Phelps, and Joseph C. Fraley, for defendants.

COXE, District Judge. The claims are designed to cover respectively an undershirt, the middle part of which is knitted in plain stitch and the upper or lower part, or both in tuck stitch. The object of the patentee was to obtain a better fit at the waist by using a close stitch for the middle part of the shirt and an expanded stitch for the upper and lower parts. He evidently thought that he was the first to combine the tuck and plain stitch in wearing apparel of this character. He was mistaken. The prior art is full of instances where the combination was used when it was desirable that the garment should fit tighter at one part than another. It was an obvious and common expedient. It is unnecessary to examine the prior art in detail for the reason that the defendants' exhibit "spencer," is an almost exact reproduction of the vest of the patent. This will be made plain by placing diagrams of the two side by side.

PATENT.



PRIOR ART



It is apparent that the close fit at the waist which the patentee says "forms the essential feature of my invention" is found in the spencer in form and function precisely like the patented vest. The spencer is, in fact, a vest, intended to be worn over the corset; it has the middle part made in plain stitch and the upper and lower parts in tuck stitch. In short, it infringes every one of the three claims involved and, of course, anticipates them.

It is argued that the spencer is not an anticipation for the reason that the patented vest is to be worn next the skin and the spencer is to be worn over the corset. The answers are manifest. First, there is nothing in the patent which so limits it; and, second, in no event can patentability be predicated of such a use. *Clothing Co. v. Glover*, 141 U. S. 560, 12 Sup. Ct. 79; *Cluett v. Clafin*, 140 U. S. 180, 11 Sup. Ct. 725; *Peters v. Manufacturing Co.*, 129 U. S. 530, 9 Sup. Ct. 389; *Holmes, etc., Protective Co. v. Metropolitan, etc., Alarm Co.*, 33 Fed. 254, and cases cited on page 256. To hold otherwise would lead to most astonishing results. A woman who happened, prior to 1880, to wear her spencer next her skin would be hailed as an inventor; should she do this after 1880, she could be pursued as an infringer. To-day she can wear the vest of the patent over another garment with perfect impunity, but if she wears it next her skin she is an infringer. The same garment will infringe or not according as it is worn as an under vest or a "sweater." This is *reductio ad absurdum*, but it follows as a logical result if the above construction is adopted. The only other difference is that the spencer is buttoned from top to bottom and not part of the way as in the patented vest, but this difference is too trivial to discuss. The bill is dismissed.

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TRAVERS v. AMERICAN CORDAGE CO.

(Circuit Court, S. D. New York. December 6, 1894.)

1. PATENTS—PROOF OF ANTICIPATION—EVIDENCE AS TO DATE OF PUBLICATION.

The date of a publication containing a description of an alleged anticipating process cannot be established (the book itself not being in evidence) by a certificate of the commissioner of patents to an extract therefrom, and further certifying that the volume is in the library of the patent office, and was received there on a date named.

2. SAME—INFRINGEMENT OF PROCESS PATENT.

One who appropriates the essentials of a patented process does not escape infringement by using that process in connection with improvements subsequently adopted by the inventor.

3. SAME—PROCESS FOR MAKING HAMMOCK BODIES.

The Rood patent No. 277,161, relating to a new process of making hammock bodies, shows utility, novelty, and invention, and is entitled to a liberal construction.

4. SAME—PROCESS FOR MAKING HAMMOCK ENDS.

The Rood patent No. 296,460, covering a new method of making the ends of hammocks,—attaching the converging strands to the completed hammock body,—discloses patentable invention, and was not anticipated.

This was a suit in equity by Vincent P. Travers against the American Cordage Company for infringement of certain patents for improvements in the art of making hammocks.

This suit is based upon two letters patent, granted to Albert O. Rood, as assignor to the complainant, for improvements in the art of making hammocks. The first of these, No. 277,161, relates to a new process of making hammock bodies. It is dated May 8, 1883. The application was filed July 15, 1882. The specification says: "This invention relates to hammocks and to the art or process of making the bodies of hammocks; and it consists in carrying the thread or cord used for the hammock body first through the loops of a selvage previously made, and then straight from one end of the frame to the other, and then looping it into the meshes already formed on its way back to the first end." The only claim involved is the first, which is as follows: "The method herein described of producing the body of a hammock, which consists in first joining the threads for the body with the selvage, next forming them into interlocking body strands near the selvage, and in then running the thread for the rest of the body in a straight line from one end of the body to the other, and in interlooping it with the straight strands thus formed on the way back, substantially as herein shown and described."

The second patent, No. 296,460, relates to a new method of making the ends of hammocks. It is dated April 8, 1884. The application was filed November 17, 1883. The specification says: "This invention has for its object to simplify the mode of constructing hammocks, and particularly the ends thereof, which are the parts of hammocks containing the converging threads and the suspension eyes or loops. The invention consists, principally, in forming the hammock body with loops in the ends thereof in any known manner; in then forming each end of the hammock by drawing a cord, from which the converging strands are to be made, through the loops at the end of the hammock body in a straight line, and in then drawing this thread from between said loops, forming of it the converging strands of the hammock end, and finally uniting these strands into a terminal eye." The claims are as follows: "(1) The art of making hammocks which consists in forming the hammock body with loops, b, b, in the ends thereof in any known manner, then forming each end of the hammock by drawing the cord, E, from which the hammock end is to be made, in a straight line through the end loops, b, b, of the hammock body, and in then drawing said cord from between said end loops, b, b, forming of it the converging strands of the hammock end, and in finally uniting these strands into a terminal eye, i, substantially as herein shown and described. (2) The art of making hammocks which consists in forming the hammock body with loops, b, b, in the ends thereof in any known manner, then forming each end of the hammock by drawing the cord, E, in a straight line through the loops, b, b, that are at the ends of the hammock body, D, in then drawing this cord out from between the end loops, b, b, and holding it temporarily, in then coiling or winding the outer part of this cord, and in then forming from this coiled or wound portion the eye, i, at the end of the hammock, substantially as herein shown and described."

Arthur v. Briesen, for complainant.

Frederic H. Betts and William B. Whitney, for defendant.

COXE, District Judge. The earlier patent, No. 277,161, relates to a new process of making the bodies of hammocks. Prior to the invention this had been done by weaving the thread in both directions between the supporting frames. The operator, provided with a shuttle on which the thread was wound, began at one end of the selvage and interlooped this thread with the thread attached to the selvage until she reached the opposite end of the frame when she repeated the same interlacing process back again, and so on from one end of the frame to the other, until the hammock body was completed. This operation took considerable time. It is estimated that an hour and twenty minutes was consumed in weaving one hammock body. The inventor reduced the

operator's manipulation about 50 per cent. by laying a strand straight across from frame to frame and weaving that strand into the hammock body. Instead of weaving each time she crosses from frame to frame, as in the old method, the operator now weaves every other time only. The work of the shuttle is thus reduced from two trips to one. That this saves time is manifest. Precisely how much time is saved is not established. The test made by the complainant's expert is not a demonstration. If he be right in his estimates, the invention increases the production threefold. The defenses are lack of utility, novelty and invention and noninfringement.

As to the first of these defenses it is only necessary to suggest that a process which is used by both parties in preference to any other—a process which saves time and money—can hardly be said to be useless. Regarding the other defenses, it is well to start with the undisputed proposition that Rood was the first to use this process in hammock making. Indeed, so far as this record shows to the contrary, he was the first to use the process for any purpose. The exhibits which are proved do not anticipate and the exhibit which comes nearest to an anticipation is not proved. The extract from the "Handbook of Point Lace" cannot be considered. The book from which it was taken is not in evidence, and it is said that it does not give the date of publication. The only evidence regarding it is a certificate from the commissioner of patents that the extract is a true copy from the bound volume in the library of the patent office and that "said publication was received in the library June 9, 1882." Assuming that the commissioner can certify the contents of the books in his library it is very clear that the date of publication cannot be established in this way. The extract describing the Touché process must, for this reason, be laid out of the case. The other exhibits do not touch the process claim. It is apparent, therefore, that there is nothing, so far as the prior art is concerned, which in any way affects the claim in question. Furthermore, there is no reason why the limitations of the product claim should be imported into the process claim.

Rood, being the first in this particular branch of industry, is entitled to a liberal construction,—a construction which will enable him to hold the fruits of his invention. So to construe the claim that an infringer is able to take the only valuable feature of the invention, is to do injustice to the inventor. There is no doubt that the claim—in the light of the severe criticism to which it has been subjected—might have employed more perspicuous language. It is, however, no easy task to describe the method of the patent in language which is perfectly clear. The subject-matter is intricate and complicated. It is figuratively as well as literally a mass of network. If anyone doubts the truth of these observations let him attempt, with nothing but the hammock body and the drawings before him, to describe and claim the patented method. It is possible that the court, should it set to work deliberately to destroy the patent, could arrive at a construction which would accomplish this result; but this should not be done in any case,—certainly not in the case at bar.

It is thought that no skilled hammock maker, reading the claim in connection with the description, can fail to understand the process described. He would see at a glance that the new departure—the root idea of the new method—consists in the introduction of the straight strand with its consequent saving of time and money. That the defendant adopts this feature is conceded; but it is argued that it does not use the process in the precise way described by the inventor. It has boldly and unhesitatingly appropriated Rood's method, but it is said that it was one adopted by him after the date of the patent and, therefore, not covered by it. It appears that almost from its inception the inventor was endeavoring to improve his process; that improvements were made in 1884, and again in 1889, when the improved method was adopted which is now practiced by both complainant and defendant. It is not necessary to describe this method. The changes do not go to the essence of the invention. It is a more convenient way of practicing it and produces a hammock body having a more symmetrical appearance, but the essence of the invention is in this method precisely as in the method described in the patent. The defendant, having appropriated this method, is not exculpated because it has used it in connection with improvements subsequently adopted by the inventor. *Sewing-Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299; *Proctor v. Bennis*, 36 Ch. Div. 740; *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. 970; *Machine Co. v. Murphy*, 97 U. S. 120, 125; *Winañs v. Denmead*, 15 How. 330; *Blanchard v. Reeves*, 1 Fish. Pat. Cas. 103, Fed. Cas. No. 1,515.

The patent No. 296,460 relates to a new method of making the ends of hammocks—attaching the converging strands to the completed hammock body. Previous to the inventions this had been done by winding the end cord around a shuttle and carrying the cord by means of the shuttle through a loop of the hammock body, thence around a pin fixed at the desired distance from the hammock body, back again through another loop and so on, back and forth through a loop and around the pin, until all the loops had thus been taken up. The patentee dispenses with this tiresome and expensive process. He draws the end of a cord, which he takes from a large reel, through all the end loops of the hammock body and from thence to a fixed pin to which the cord is tied. He then draws the cord from between the loops and lays it over two fixed pins and so on until the cord has been so drawn from between each of the loops; the reel permitting the cord to run easily through the loops. When all the loops have been thus connected the cord is cut, the other end is released from the pin, the two ends are united, and the strands between the pins are wound and formed into an end loop ready for use. There is evidence that this method is simpler and more rapid than the old one; that by it an inexperienced operator can make four or five times as many hammocks as an experienced operator can make by the old method. It saves time and money. Nothing like it was ever done before. The defenses are lack of invention and anticipation. Infringement is not denied.

The contention that the patent is anticipated is based upon the



alleged prior use of Louis Heinze. It is unnecessary to discuss this testimony. Suffice it to say that the only proposition which it establishes beyond a reasonable doubt is that it is absolutely untrustworthy. It is so full of contradictions, inaccuracies and tergiversations; so permeated with venality; so honeycombed with falsehood,—to use no harsher term,—that the court cannot for a moment think of basing any finding thereon injurious to the patent. This defense has been so often and so lately considered by this court that it is unnecessary to dwell upon the rules which require the court to disregard it now. *Simmons v. Oil Co.*, 62 Fed. 928; *Oval Wood Dish Co. v. Sandy Creek Wood Manuf'g Co.*, 60 Fed. 285; *Sessions v. Gould*, Id. 753; *Carter v. Wollschlaeger*, 53 Fed. 573; *Mack v. Manufacturing Co.*, 52 Fed. 819; *Electrical Accumulator Co. v. Julien Electric Co.*, 38 Fed. 117, 127; *Thayer v. Hart*, 20 Fed. 693.

Does the patent disclose invention? The process is a simple but ingenious one which would not have occurred to the skilled hammock maker even if he had before him all the nets, glove fasteners, ship's tackle, bed bottoms and lawyers' bags of the prior art. He would have continued to use the old shuttle in the old way. True, the patentee "struck" the process at once. But nothing unfavorable to him can be predicated of this fact. Indeed, the contrary is true. Many of the great inventions have come like a flash. The conception has been instantaneous, although the embodiment may have taken more or less time according to the character of the invention. Such ideas, involving an entire change of methods, whether they come quickly or slowly, always come to inventors. They never come to mere mechanics. The invention is not a great one, but it would be a step backward for the court to hold that the ingenious process which has done so much to advance the art of hammock making only involves mechanical skill.

It follows that the complainant is entitled to the usual decree.

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BRUSH ELECTRIC CO. et al. v. ELECTRIC STORAGE BATTERY  
CO. et al.

(Circuit Court, D. New Jersey. August 27, 1894.)

1. PRELIMINARY INJUNCTION — INFRINGEMENT OF PATENT — SUFFICIENCY OF PROOF.

A preliminary injunction will not be granted where the affidavits of eminent scientists are at complete variance on the question of infringement of complainant's patent.

2. SAME—LACHES.

A preliminary injunction will not be granted against an alleged infringement where it has been continuous for more than four years to complainant's knowledge, without any action being taken by complainant, and defendant has recently increased its capital invested in the business, and is financially responsible.

Suit by the Brush Electric Company and others against the Electric Storage Battery Company and others for infringement of patent. Complainants move for a preliminary injunction. Motion denied.

Witter & Kenyon, for complainants.

John R. Bennett, for defendants.

GREEN, District Judge. Two reasons conjointly compel a denial of the motion for a preliminary injunction made by the complainants. The validity of the letters patent in question is beyond dispute. They have been sustained by all the courts before which they have been the subject of litigation. The only question to be considered upon this motion, under the circumstances, is that of infringement. While it is well settled that a preliminary injunction will issue almost as a matter of course in any given case wherein the defendants are shown to be guilty of infringement, after an adjudication establishing the validity of the letters patent involved in the litigation, yet it is equally well settled that to warrant and justify the exercise of this extraordinary power the proof of the alleged infringement must be clear and decisive. Equity peremptorily insists that such action, so drastic in its effects, shall be taken only in those cases wherein a clear, unclouded, equitable right to the interference of the court is shown. In all other cases the demand is to be met by refusal, otherwise unfair prejudgment may result. In the case at bar the proof of infringement fails to attain to this standard. It is quite true that on the part of the complainants certain gentlemen, most eminent in their profession, and whose opinions as experts are entitled to great weight, have not hesitated, in their affidavits presented to the court upon this motion, to assert quite positively that not only the storage battery manufactured by the defendants, but as well the process used in the manufacture, do without doubt infringe some, if not almost all, of the claims of the letters patent under consideration; and they laboriously strove to justify the opinions so expressed, first by giving to the letters patent and the various claims an exceedingly broad construction, and, secondly, by basing such broad construction upon a yet broader construction of the legal conclusions of the learned judges who have in past litigations defined and characterized the inventions of Faure and Brush. Giving full weight to the opinions of these witnesses, elucidated and most eloquently enforced upon the attention of the court in the exceedingly able argument of counsel, it still remains to be said that the defendants have, in opposition thereto, presented opinions of other scientists, equally as learned, and of equal standing and repute in the scientific world, which are directly antagonistic thereto, and by which they most distinctly and positively declare that in their judgment neither the process pursued by the defendants nor the completely manufactured battery impinges in the slightest particular upon those secured to the complainants by their letters patent. And so upon the one side are found the concurring opinions of Prof. Morton and Prof. Chandler, Prof. Houston and Dr. Barker; upon the other, those of Prof. Brackett, Prof. Cross, Prof. Thomson, and Mr. Van Size. These are gentlemen of unquestioned veracity, thoroughly understanding the subject-matter under consideration, stating opinions with confidence which they believe to be well formed; and yet they arrive at conclusions which are irreconcilably and diametrically opposed. It must be apparent that affidavits of this character, ex parte as they are, can only be productive of doubt. When the statements so made and the opin-

ions so expressed come to be tested by a severe and thorough cross-examination, beyond question those which show themselves securely founded upon reason and fact will be immediately accepted and concurred in. But until then the existence of a doubt, well founded and reasonable, as to the right of the complainants to the remedy they ask, cannot be overlooked. The existence of such doubt must now, at least, control the action of the court. It is fatal to a motion for a preliminary injunction. To justify the interference of a court of equity pendente lite by way of an injunction, the actual or threatened infringement of a right must appear as clear as the noonday sun.

There is another reason why this motion must be denied. Equity demands of a complainant that he should display great diligence in the assertion and vindication of his rights. Inexcusable delay on his part, though it may not amount to conclusive proof of acquiescence, nevertheless may be, and often is, sufficient cause to disentitle him to the summary interference of the court on his behalf by way of interlocutory injunction. Whatever may be the original equities of the case as between the parties, if the complainant stands quietly by, without seeking to enforce his rights, while the defendant expends time and labor and money upon the enterprise sought to be enjoined, upon faith that no actual or effective objection thereto will be made, he will be shorn of any right to appeal to the court of equity for assistance. *Huffman v. Hummer*, 17 N. J. Eq. 263; *Whitney v. Union Ry. Co.*, 11 Gray, 359; *Carlisle v. Cooper*, 21 N. J. Eq. 599. In other words, the principle has been thus stated: No one can have relief if his own conduct has led to that state of affairs which occasions the application.

The proofs submitted to the court on this motion show these facts: The defendant corporation was organized under the laws of the state of New Jersey in 1888. Its sole purpose was to engage in the manufacture and sale of electric storage batteries of the type known as the "Chloride Accumulator." Its works were located at Gloucester, in this state; and from the time of its incorporation to the present it has carried on its business without interruption. Its existence, and the character and extent of its operations, were well known to the principal officers and managers of the complainant corporation. In the conduct of its business at various times, and especially in 1891, 1892, and 1893, the defendants openly installed storage battery plates of the alleged infringing type in various public buildings, and for various corporations. Thus, for example, they furnished plates or batteries to the Provident Insurance Company of Philadelphia, to the Metropolitan Railway Company of Washington, to the Union Square Theater in New York, and elsewhere. The fact that these plates were furnished by the defendants was well known to the complainants. Besides, early in 1893, the defendants issued a pamphlet, in which was printed an opinion of Prof. Chandler, of Columbia College, on storage batteries, and which contained a detailed and correct statement of the mode of construction and operation of the storage batteries of the defendants, and a full and succinct comparison between them and the bat-

teries of the complainants. This pamphlet was widely circulated, and admittedly the complainants knew of it. In July, 1893, the defendant, through its president, sent to the complainant corporation a letter, in which, among other things, is the following statement and appeal:

"Philadelphia, Pa., July 27, 1893.

"Mr. William Bracken, President Consolidated Electric Storage Co., New York, N. Y.—Dear Sir: I am favored with copies of your letters of 27th of February and the 24th of July, 1893, to Mr. George W. Pearson, president of the Metropolitan Railway Company of Washington, D. C., wherein you state that the battery manufactured by the Electric Storage Battery Company of Philadelphia is a clear infringement of the Brush patents, and of which 'there is no earthly doubt.' \* \* \* By what authority do you say our battery infringes the claims of your Brush patent? Surely on the authority of no court, for you well know that no court has declared our battery to be an infringement; and although we have been, to your knowledge, openly engaged in manufacturing our batteries for some years, you have not, down to this moment, proceeded against us, although threatening to do so for nearly eight months past. You apparently propose to dispose of our battery and business without even resorting to the courts wherein such questions are usually determined. \* \* \* Unlike you, we have sufficient confidence in our position to submit the question to the courts empowered to consider and determine such questions, and there we invite you to meet us at once; and unless you do so, or discontinue your libelous statements against our battery, we will take such steps as we are advised are open to us to protect our interests. We are advised by our counsel and experts that our battery does not infringe any of the claims of your patents, and, having confidence in their opinion, we propose to continue making and selling our battery, and shall protect and save harmless all users of them, not only as against any claim you may make, but against all claims from whatever source. Now, being advised of our intentions, we demand, in view of statements made in your letter to Mr. Pearson and other parties, that you proceed at once against us on a bill for infringement, accompanied with motion of injunction, so that the question of our infringement of your patents may be determined, and to that end we advise you, viz.: We are a New Jersey corporation, with a factory at Gloucester, in that state, where batteries are being manufactured daily; and we will at any time furnish you with one of our batteries, at the usual price, accompanying same with a sworn statement of precisely how they are made, with permission to use the same in any proceedings against us. We have, to avoid delay, authorized our counsel, Mr. John R. Bennett, Potter Building, New York City, to accept service papers in our name, and to aid you in every way possible to reach the courts at the earliest possible moment; and you can arrange with him, either direct or through your counsel, for one of our batteries, and a statement of its construction. If you have confidence in your position, you will, of course, accept our most reasonable proposition to proceed against us at once; and if you do not we hereby notify you that we shall proceed against you to protect our interests, holding you responsible for the damages resulting to our business by the making of statements and the sending out of such unfounded libelous letters as you have sent to Mr. Pearson."

To this letter the complainants returned no answer beyond a mere acknowledgment of receipt, and admittedly took no action towards the assertion of their claims until months after. In the meantime the defendants, assuming, as it cannot be denied they had reason to do, that no attack was to be made upon them, increased their capital stock \$250,000, and proceeded to erect, in addition to their existing factories, a very extensive plant, at a very large cost. It was not until 1894—months afterwards—that this bill of complaint was filed. Realizing the necessity of making

explanation of their delay, the complainants allege that it was caused first by their diligent searching for some purchaser of the defendants' storage battery within the jurisdiction limits of the circuit court of the United States for the district of Southern New York, in which forum much of the previous litigation concerning the Brush and Faure batteries had taken place, and so avoid, by the bringing of their suit in that jurisdiction, some of the trouble and labor which would necessarily follow the commencement of a suit in this jurisdiction; and further, that all the operations of the defendants were considered by the complainants to be simply tentative in the line of producing a practical commercial storage battery, and only an effort on the part of the defendants to persuade the complainants to spend thousands of dollars in substantially a moot litigation to stop the making and sale or use of only a few batteries, and because the complainants believed the venture of the defendants was destined to be a failure, and die a natural death. It is hardly necessary to say that such excuses do not justify the laches of which the complainants have been clearly guilty. If the rights of the complainants are now trespassed upon by the defendants, they were in like manner trespassed upon more than four years ago; and the trespass of which so loud complaint is made now, has been continuous. For reasons satisfactory to themselves the complainants, well aware of these continuous trespasses, chose to stand by without taking action looking to the vindication of their rights and the prompt punishment of the trespasser. The result of such inaction on the part of the complainants is found in the increased contribution of the capital stock of the defendant corporation, of hundreds of thousands of dollars, and the expenditure of an exceedingly large amount of money in the erection of a greatly extended plant. If, in fact, the rights of the complainants have been invaded by the alleged infringing acts of the defendants, it is scarcely an exaggeration to say that the dilatory conduct of the complainants in protecting their rights amounted to open encouragement of, or at least to silent acquiescence in, such invasion. Such conduct bars absolutely the remedy asked for at this time by the complainants. *Bridson v. Benecke*, 12 Beav. 1; *Smith v. Railway Co.*, Kay, 417.

It was admitted upon the argument that the defendants were financially responsible, and amply able to respond to any award of damages that might be made against them. Under all the circumstances, and for the reasons given, the motion for a preliminary injunction is denied.

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PRATT et al. v. SENCENBAUGH et al.

(Circuit Court, N. D. Illinois. December 29, 1893.)

**1. PATENTS—EVIDENCE OF PRIOR USE.**

Evidence of prior use, showing the identity of the thing used with the article covered by the patent, must be clear and explicit; and it is of little weight when given long after the thing used has been destroyed.

**2. SAME—LIMITATION—INFRINGEMENT—CAR-DOOR HANGINGS.**

The Pratt reissue patent, No. 7,795, for an improvement in car-door hangings, is limited by the prior art to the specific form shown in the patent, and is not infringed by a combination which lacks one of its elements.

Bill by Elias E. Pratt and E. C. Stearns & Co. against S. S. Sencenbaugh and Albert J. Ives for infringement of a patent.

Hay & Wilkinson and C. C. Linthicum, for complainants.

J. H. Raymond, for defendants.

JENKINS, Circuit Judge. The bill is filed to restrain the alleged infringement of claims 2 and 3 of reissued letters patent to Elias E. Pratt, numbered 7,795, dated July 17, 1877, the original of which letters patent were issued December 5, 1876, and numbered 184,983. Claim 3 of the reissue is claim 2 of the original patent. Claim 2 of the reissued patent first appears in the reissue. The patent is for an improvement in car-door hangings, the specifications stating that doors hung in the manner described may be used for barns and warehouses, and in a variety of places, without departure from the spirit of the invention. The invention described consists of a door-hanging for sliding doors, comprising in its organization an overhead track of two parallel rails separated by an intervening longitudinal slot, and secured to a support by which the rails are held in position; trucks of two wheels each, arranged side by side, and secured to an axle which extends transversely over the slot between the rails, on which latter the wheels of the trucks run; hanger irons elongated in the longitudinal direction of the rails, resting loosely upon the axle of the trucks, and extending downwardly through the slot; and a door attached to the hanger irons, and supported by them below the rails. The elongated hanger irons, resting upon the axles of the trucks, are said to permit a rolling motion of the hanger irons on the axle in the longitudinal direction of the rails, and afford to the door a limited lateral play, by which the door can adapt itself to the position of the ways, which may vary from imperfection in workmanship or settling of the supports. A further feature of the invention is a housing which contains the rails on its inner side, and extends over the rails and the trucks and hanger irons, inclosing and protecting them from interference, or as stated in the specifications, "preventing the working parts described from clogging with snow and ice, and also the entrance of sparks, dust, rain, etc., over the doors, into the body of the car." Claim 2 of the patent is as follows: "In a device for hanging the door of a car, the laterally elongated staple of lug, F, constructed and arranged to operate with the trucks, D, and door, G, substantially as set forth and specified." Claim 3 is as follows: "The door, G, lugs, F, trucks, D, and runlet, B, combined and arranged to operate substantially as set forth and specified." The defendants deny the novelty of the alleged invention, and deny that Pratt was the first and original inventor of the alleged improvement; deny that any door hangers for houses were ever made, sold, or used under said patent; and claim that the alleged invention, however valuable for freight cars, is impracticable for the use of hanging doors in houses. They assert that claim

2 of the reissue is an unwarranted enlargement of the original patent, and is invalid and void, and that the door hangers manufactured by them are so made under letters patent of the 22d of June, 1886, numbered 343,994, and of the 1st of March, 1887, numbered 358,613.

The patent in controversy has been the subject of considerable litigation. It was first before the United States circuit court for the Eastern district of Pennsylvania in the case of Pratt against Lloyd & Supplee in 1887, and was sustained by Judges McKennan and Butler. It was there held that the novelty of the combination or invention was fully sustained, and that claim 2 of the reissued patent was not an unwarranted enlargement of the claim of the original, but merely a fuller statement of the ideas originally expressed, and that, while it might seem to be narrower, a careful examination would show that it was substantially the same as the second claim of the original patent, which is the third claim of the reissued patent; the court observing: "While the runlet or covered track is not expressly named, it is plainly implied. The device described would be incomplete without it, or another substantially like it." If I correctly conceive the drift of the decision, it is to the effect that claims 2 and 3 of the reissued patent are identical. The patent next came under review in the case of Pratt v. Wright, in the United States circuit court for the Northern district of New York (65 Fed. 99), and was sustained by Judge Wallace in 1890. In his opinion that learned judge considers the question as to the validity of the second claim, "fairly doubtful," but under the rule of comity deems it his duty to follow the decision of the circuit court for the Eastern district of Pennsylvania. The patent is said to have been also sustained by Judge Colt in the case of Dunham Manuf'g Co. v. Coburn Trolley Track Manuf'g Co., 65 Fed. 98. I am furnished with no report of that decision. It is said here that this court should not follow these prior decisions through any reason of comity, because, while they are entitled to high respect as precedents, this case presents a different state of facts with respect to novelty of invention, and therefore it must be determined without regard to those decisions. It is true that the application of the rule of comity is limited to a case involving the same state of facts. This was held in *Starling v. Plow Co.*, 9 U. S. App. 318, 3 C. C. A. 471, 53 Fed. 119. Substantially the only new matter that is presented here, and was not considered by the various courts in the other cases, has reference to the paint-mill door, testified by the defendants to have been in use in the year 1870. It is only necessary to say, as to that, that that door, whatever it was, was destroyed long ago by fire, and no living witness testifies to its construction except the defendant Ives and his brother. It is well settled that evidence of prior use, when the thing used is not produced, is of little weight, after a long interval, as to its identity with the patent in evidence. The testimony with respect to such prior use must be explicit and convincing, and the evidence in this case with respect to the paint-mill door is not so satisfactory as to warrant me in declining to follow the decisions already had upon this patent.

Coming, now, to the question of infringement. As I have stated, the Pennsylvania court seems to have sustained claim 2 of the re-issue solely upon the ground that the runlet, B, is a necessary element of that claim. It logically follows, I think, that under such construction claims 2 and 3 are identical. Then we must consider the character of the invention or combination protected by the complainants' patent. Sliding doors were old. Wheels with axles between for supporting sliding doors were old. It was old to have two wheels running on tracks, and to support the sliding door upon the axle between the wheel. It was old to provide runlets in covered tracks for supporting wheels to run upon. In other words, all the elements, and their combinations, of the Pratt patent, were old, except in the specific form shown and described by Pratt, and he is entitled to protection for that specific combination. Without considering further whether the defendants' device for an adjusting hanger is an equivalent of the hanger of the Pratt device, I think the bill must fail upon the ground that the runlet, B, of the complainants' device is not found in the defendants' device, and that the defendants, do not, therefore, infringe. It follows that the bill must be dismissed.

CAMPBELL PRINTING-PRESS & MANUF'G CO. v. MARDEN et al.

(Circuit Court, D. Massachusetts. December 11, 1894.)

No. 285.

1. PATENTS—ANTICIPATION—DIFFERENT OPERATION OF SIMILAR DEVICES.

Where a change in the essential operation of a prior machine is necessary to produce the function of a later machine, the latter is not anticipated, though all of its devices, in substance, are used in the earlier machine.

2. SAME—EVIDENCE.

Anticipation will not be found, except in very extreme cases, on evidence of the inventor of the alleged infringing machine, and the model recently made by him.

3. SAME—CLAIM—MECHANICAL EQUIVALENTS.

Where a claim is not limited by the prior state of the art, it will not be limited by the fact of references by letters or figures to the specific mechanism shown in the patent.

4. SAME—"SUBSTANTIALLY AS AND FOR THE PURPOSE SET FORTH."

The words "substantially as" and for the purpose set forth" are to be construed as efficacious to import a limitation ascertainable from the specification, and necessary to make the claim coterminous with the invention, but are not to be used to import a limitation not inherent in the invention.

5. SAME—PRINTING MACHINE—ANTICIPATION.

The substance of the Kidder invention of a web-printing machine (patent No. 291,521), and the improvement of Stonemetz (patent No. 376,053), held to be the production of a device which shall print a web of paper stationary at the two ends thereof, by means of an impression cylinder moving in a moving fold of that web, and not to have been anticipated by any prior structure.

6. SAME—INFRINGEMENT.

The Kidder patent, No. 291,521, for a web-printing machine, held to be infringed as to claims 1, 2, and 7, by the machine constructed under the Cox patents, Nos. 441,646, 451,459, and 478,503.



## 7. SAME.

The Stonemetz patent, No. 376,053, for a web-printing machine, *held* to be void for want of novelty as to claim 8, and to have been infringed as to claim 12, but not as to claims 5, 7, 10, and 17, by the machine built under the Cox patents, Nos. 441,646, 451,459, and 478,503.

This was a suit in equity by the Campbell Printing-Press & Manufacturing Company against George A. Marden and others for infringement of certain patents for web-printing machines.

Louis W. Southgate, for complainant.

Frederic H. Betts, Samuel R. Betts, and T. H. Alexander, for defendants.

CARPENTER, District Judge. This is a bill in equity to restrain an alleged infringement of letters patent No. 291,521, issued January 8, 1884, to Wellington P. Kidder, for printing machine, and No. 376,053, issued January 3, 1888, to John H. Stonemetz, for web-printing machine. The claims of the Kidder patent which are alleged to be infringed are as follows:

(1) In combination with a stationary bed and an impression cylinder traveling over it, guides for the web, one at each side of the impression cylinder, and a feeding device which feeds the proper length of web while the impression is thrown off, all substantially as described.

(2) In combination, two stationary beds, two traveling impression cylinders, and a feeding mechanism, substantially as described, combined together and with suitable guides, substantially as described, and operating to print both sides of a web, as set forth.

(7) The web-perfecting press above described, consisting of the two stationary beds, the two traversing impression cylinders, the two sets of inking apparatus, the web-guiding mechanism, substantially as described, and the intermittently operating web-feeding mechanism, substantially as described, all operating together substantially as described.

The claims of the Stonemetz patent which are alleged to be infringed are as follows:

(5) In a printing machine, the combination of two stationary type beds located on the same horizontal plane, and a traveling carriage carrying an impression cylinder and inking rollers for each of said beds, operating on said beds in their forward and backward movements, with means, substantially as described, for moving said carriage back and forth over said beds, and rollers adapted to convey a web of paper through said machine, whereby one side of the web may be printed on forms placed on one of said beds and the other side of the web on forms placed on the other of said beds, substantially as and for the purpose set forth.

(7) The combination, in a printing machine, of stationary type beds secured to the frame of the machine, and a traveling carriage carrying impression cylinders and inking rollers and web carrying rollers thereon, a vertically moving roller for taking up the slack of the web as it is unwound from the web roll, and a vertically moving roller for drawing the web forward, substantially as and for the purpose set forth.

(8) The combination, in a printing machine, of stationary type beds, and a traveling carriage conveying impression cylinders and inking rollers back and forth over said beds, with web-carrying rollers on said traveling carriage, stationary and adjustable web-carrying rollers on the frame work of the machine, and means, substantially as described, for intermittently drawing the web forward, substantially as and for the purpose set forth.

(10) In a printing machine, the combination, with stationary type beds located on substantially the same horizontal plane on the frame of the machine, and traveling impression cylinders and inking rollers adapted to

travel back and forth over said type beds, and take impressions both ways, of web-carrying rollers on the frame of the machine, web-carrying rollers connected with the traveling impression cylinder carriage, and means, substantially as shown and described, for taking up the slack of the web as it runs off of the web roll while the impression cylinders are passing over the type beds, and means, substantially as shown and described, for drawing the web forward when the impression cylinders are off of the type forms, substantially as and for the purpose set forth.

(12) The combination, in a printing machine, of the side frames A, A', the stationary type beds, B, B', with the traveling cylinder carriage, I, carrying the impressor cylinders, E, E, which operate both forward and backward on said type beds, substantially as and for the purpose set forth.

(17) The combination, in a printing machine, of the web supporting rollers, M, M', and the vertically moving roller, W<sup>3</sup>, supported upon the arm, W', W<sup>2</sup>, with the cutting cylinders, S, S', substantially as and for the purpose set forth.

The machine used by the respondents is built under and in accordance with the description and drawings of three letters patent to Joseph L. Cox,—No. 441,646, issued December 2, 1890; No. 451,453, issued May 5, 1891; and No. 478,503, issued July 5, 1892. All the elements of the combinations set out and claimed in the patents in suit are to be found in printing machines older than these, and so also are a number of equivalents for these elements. I shall not undertake to specify these elements or recount the devices in which they appear. The substance of the Kidder invention, in the original patent and in the improvement of Stonemetz, seems to me to be the production of a device which shall print a web of paper, stationary at the two ends thereof, by means of an impression cylinder moving in a moving fold of that web. Such a device I do not find in any prior structure. The patent to R. Cummings, No. 83,471, issued October 27, 1868, shows a web of paper, and a fold, and an impression cylinder. If this mechanism were reversed in action, and the necessary resultant change made in the mode of operation so that the web of paper should be held stationary during the operation of printing, then, indeed, the function of the Kidder invention would appear. But this cannot be done without a change in the essential operation of that press. The devices, in substance, of the Kidder invention, are there; but the mode of operation is not there. On the other hand, the function of the invention appears on the press used by the respondents. It is claimed that the Kidder patent should be limited to a device containing vertical type beds. But there is nothing in the prior state of the art on which to found such a limitation, and the language of the patent does not suggest it. The form shown in the drawings contains vertical type beds, but the claims here alleged to be infringed do not imply vertical beds. Even if the words "substantially as described" should be held to import this form if the claims stood alone,—a position which, in the absence of any limitation in the prior art, I am not prepared to say is sound,—even then such a limitation cannot be read into these claims in view of the fact that the vertical form is claimed specifically in another part of the patent. The device of the respondents, therefore, infringes the above-recited claims of the Kidder patent. There is evidence in the case of a press made and used by Mr. Cox in 1878, which contains the devices of the Kidder patent. But the machine

is not shown to me. I have the evidence of Mr. Cox, and a model which he has since made, and which he testifies is a correct representation of the essential construction of that press. I cannot find an anticipation on evidence of this character, except in very extreme cases, which it is not necessary or indeed practicable now to describe. I will not say that there may not be a case in which evidence of this character may be persuasive. But the essential objection to finding an anticipation under circumstances like the present is as follows: The witnesses, assuming that they intend to speak the truth,—an assumption which I readily make in this case, as I perceive nothing in the evidence to the contrary,—are still, by the very necessity of the case, in a position where mistakes are easily made, and their evidence therefore should be received with great caution. The witness is familiar, in most cases, and notably so in this case, with the device which was patented subsequently to the construction of the machine which is alleged to be an anticipation. In recalling to his memory the construction of the earlier machine, he necessarily has in mind the instruction which he has received from the progress of the art in the meantime. It is therefore easy for him to transfer to his early device the characteristics which he now clearly sees are necessary to the accomplishment of the purpose which was then in mind, and difficult for him accurately to separate his recollection of the machine which was made from his present knowledge of the machine which ought to be made. The inventor who has perfected his invention and described it in his application is entitled to the benefit of the presumption that he is the first inventor; and it seems to me most dangerous to find that he is anticipated except on the most reliable evidence.

The Stonemetz patent is an improvement on the Kidder patent, and consists in devices for functions subsidiary to the underlying function of the Kidder device. The twelfth claim covers a device which, by the adoption of the horizontal posture for the type beds, and by other appropriate instrumentalities, is capable of printing at both movements of the cylinder forward and backward, and thus nearly, if not quite, doubles the capacity of the machine. The machine of the respondents performs this function. It is true that it performs it by means of type beds not situated in the same plane, as are the type beds, B, B<sup>1</sup>, of the claim; but, inasmuch as the claim is not limited by the prior state of the art, I do not think it should be limited by the fact of references by letters to the specific mechanism shown in the patent. It is an all-controlling principle, at least in all cases of merely implied limitations drawn from the language of the patent, that the structure described and claimed is but one form of the invention, and includes all equivalent forms. *Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.*, 10 C. C. A. 194, 61 Fed. 958. It is, perhaps, not out of place for me to say that the principle which underlies that decision promotes exact justice in such cases. It proceeds, if I read it correctly, on the proposition that a limitation is not to be inferred from any words in the patent in cases where, from a consideration of the whole patent, taken in connection with the state of the art, the actual invention ap-

pears to transcend such limitation. The case of an express disclaimer is not, of course, here under consideration.

It is objected that this claim is not confined to a web-perfecting device, and is therefore anticipated by the state of the art. I cannot so read the claim. The whole scheme of the patent implies a perfecting press, and this scheme, it seems to me, is well imported into the claim by the words "substantially as and for the purpose set forth." It seems to me to be the final result of all the decisions on this point that these general words are to be construed as efficacious to import a limitation ascertainable from the specification, and necessary to make the claim coterminous with the invention, but are not to be used to import a limitation not inherent in the invention.

The seventh claim of the Stonemetz patent relates to the vertically moving rollers for taking up the slack of the web, and for moving the web forward. They seem to me to be a device for combining a continuous motion of the web, as a whole, with an intermittent motion thereof within the machine. This function, thus broadly stated, is found in the patent to Joseph L. Cox, No. 332,138, issued December 8, 1885, and in the English patent to William Robert Lake, No. 2,461, issued May 16, 1883. The claim, therefore, must be limited to the specific mechanism with its functions so far as they appear to be new. The use of one of the feed rolls as an adjusting roll, so as to obtain a proper register of the impressions, is admitted to be old, being used in the Kidder patent and elsewhere. There remains nothing in the claim, so far as I can see, except the specific function of feeding by the method shown in the patent. The invention of this claim I therefore find to be the intermittent feeding by means of one adjustable positively acting roller and one roller acting by gravity. The rollers on the respondents' device both act positively, and thus it follows that, although the result is the same, it is reached by a different method. There is, as the patentee says, a "slack," or a tendency to a slack, in the web, which is taken up or counteracted by the gravity-controlled roller; but in the respondents' machine there is no such tendency, and, inasmuch as I cannot find that the invention covers the function of intermittent motion, I must find that this difference in operation relieves the respondents from the charge of infringement. I do not therefore pass on the validity of the seventh claim.

The eighth claim has for its distinguishing function the attachment of the adjustable feed roll to the framework of the machine, whereby an adjustment may be made while the actively operating parts are in motion. I should hesitate long before holding that such a device involves invention. I find, however, that it is not novel, in view of the French patent, No. 72,585, and the patent to Vienot, No. 274,534, and of the testimony regarding these which is given by the complainant's expert, Mr. Livermore.

The fifth and tenth claims are distinguished, so far as I can see, by the fact that they call for two type beds located in the same horizontal plane. In this way, only, is the mechanism here claimed different from that in the twelfth claim. The type beds of the respondents' machine are in different planes, and therefore do not infringe.

The seventeenth claim must be limited in the same manner as the seventh claim, and must be held to cover only feed rolls which operate in the specific manner here shown, and therefore is not infringed by the respondents.

The decree will therefore find infringement of the first, second, and seventh claims of the Kidder patent, and the twelfth claim of the Stonemetz patent; noninfringement of the fifth, seventh, tenth, and seventeenth claims of the Stonemetz patent; and that the eighth claim of the Stonemetz patent is void for want of novelty.

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GOLDMAN v. GOEBEL.

AMERICAN RY. SUPPLY CO. et al. v. SAME.

(Circuit Court of Appeals, Second Circuit. December 3, 1894.)

Nos. 112, 113.

1. PATENTS—INVENTION—CHANGE OF MATERIAL.

The use of wire cloth to form the entire crown of a hat being old, and the patentee having abandoned claims for the use of wire cloth, or of wire cloth cut diagonally to form the side crown of a cap having a flexible tip, and the use of diagonally cut hair cloth strips with an angular seam to form the side crown of such a cap being old, it is not patentable to use for the side crown of a cap having a flexible tip a wire-cloth strip with an angular seam.

2. SAME—CAPS AND HATS.

Goebel's patent, No. 345,965, for an improvement in caps and hats, *held* void for lack of invention.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Two suits in equity by John C. Goebel, one against Philipp Goldman, the other against the American Railway Supply Company and others, for infringement of a patent granted to complainant for an improvement in caps and hats. Decrees for plaintiff were granted in the court below, and defendants appealed. A motion for a preliminary injunction had been previously denied. 55 Fed. 828.

W. C. Hauff, for appellants.

Harry Cobb Kennedy, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The bills in equity in these two cases are based upon the infringement of letters patent No. 345,965, dated July 20, 1886, and granted to John C. Goebel for an improvement in caps and hats. The defendant Goldman manufactured and sold, and the American Railway Supply Company sold, the infringing caps. Upon final hearing, the circuit court for the Southern district of New York directed injunctions to issue against each defendant. From these interlocutory decrees the defendants appealed. The patented cap was particularly intended to be a uniform cap, and to be used by railway employés. The patentee, in

his specifications, describes the object and the essential features of his invention as follows:

"The object I have in view is to provide a very light and stiff body or skeleton for caps and hats, that will form a durable stay for the sides of the crown, and an elastic stretcher for the flexible tip; and for that purpose my invention consists in making such skeleton for the crown of wire cloth, cut in a manner that the woven wires are on diagonal lines relative to the band and tip, and that the connecting seam of the joint of the wire cloth is also on a diagonal line. \* \* \* The essential features of my device, therefore, are not only the use of wire cloth for the stay or skeleton of the side crown of a hat or cap, but also the peculiar cutting of the wire cloth to have its wires on a diagonal line to the edges of the cloth, as else the desired elastic expansion and contraction of the side crown for stretching the tip will not be obtained, and that otherwise the shape of such wire-cloth body cannot be made conical."

The claim of the patent is as follows: -

"In a cap or hat having a flexible tip, the body or skeleton of the side crown formed of wire cloth, the ends of which are connected by angular seams, as set forth."

The state of the art at and before the date of the alleged invention will sufficiently appear from the following facts: At that time the body or skeleton of caps having a flexible tip was frequently made of hair cloth, the strips of hair cloth being cut sometimes diagonally and sometimes upon a line parallel to the tip, and the ends of the strips being joined together either by a diagonal or by a straight seam. When the cloth was cut diagonally, a diagonal seam was naturally preferred. Wire cloth for the entire crown of a cap or hat had been used, as shown in letters patent No. 36,549, dated September 23, 1862, to James W. Bryant, but it does not appear that the side crown of caps having a flexible tip had been made of wire cloth. Letters patent No. 178,625, dated June 13, 1876, granted to Abraham Freshfield, described a hat body made of wire cloth bent into the form of the entire crown of a hat, and the drawings of the patent showed that the wires were at an angle of about 45 degrees to the brim of the hat. With these facts in mind, the history of the patent as it went through the patent office is important. The claims which were originally asked for were:

"(1) In a cap or hat having a flexible tip, the body or skeleton of the side crown formed of wire cloth, substantially as set forth.

"(2) In a cap or hat having a flexible tip, the body or skeleton of the side crown formed of wire cloth cut to have its wires on diagonal lines relative to such tip, substantially as set forth."

The patent office having rejected these claims by reference to the Freshfield patent, the patentee erased the first claim, and, changing the numeral of claim 2 to claim 1; added, as number 2, the claim which is contained in the patent, and has been quoted. The patent office again rejected claim 1 upon the authority of the Freshfield patent, in which decision the patentee acquiesced, and erased the claim, whereupon the patent was issued as it now appears. The question of patentability is the important one in the case, and is this: The use of wire cloth to form the entire crown of a hat being old, and the patentee having abandoned claims for the use of wire cloth, or of wire cloth cut diagonally to form the side crown of a

cap having a flexible tip, and the use of diagonally cut hair-cloth strips with an angular seam to form the side crown of such a cap being old, was it patentable to use, for such a crown, a diagonally cut wire-cloth strip with an angular seam? The complainant's expert is of opinion that a skeleton for the side crown formed of wire cloth having the diagonal arrangement of wires, and having its ends joined by a diagonal seam, is patentable. It is not important to consider whether the claim is for inclined wires and an angular seam, or could be construed to be for wires, however cut, and an angular seam; for nobody supposes that wires not inclined and an angular seam are a feature to be desired. The practical construction of the patent must be in accordance with the expert's theory, and the question is therefore reduced to the patentability of this mode of joining the ends of inclined wires. It being apparent that when the wires are cut diagonally an angular seam is the natural method of sewing the ends together, and it having been shown that an angular seam was the usual method of joining the diagonal ends of hair-cloth side crowns, there is nothing patentable in thus uniting the ends of a wire-cloth strip. After the patentee had abandoned the claim that he had made a patentable improvement in a cap having a flexible tip, by making the skeleton of the side crown from wire cloth, whether cut upon lines parallel or diagonal to the tip, there is no room for the contention that the manner in which the ends of the strip should be joined together required the help of invention. The patentee adopted the known mechanical practice of his predecessors.

The decrees of the circuit court are reversed, with costs, and the cases are remanded to that court, with instructions to dismiss the bills, with costs.

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EAGLE LOCK CO. v. CORBIN CABINET LOCK CO.

(Circuit Court of Appeals, Second Circuit. December 3, 1894.)

No. 11.

1. PATENTS—INVENTION.

There is no patentable invention where the peculiar structure necessarily resulted from the fact that the patentee wanted to combine old and familiar elements, and a person skilled in the art would naturally group the elements of the combination in the way the patentee adopted.

2. SAME—CLAIM.

An unclaimed peculiarity of construction is rarely read into a claim, the life of which consists in minor improvements upon an old article, and in which the patentee has undertaken to point out minutely the distinctive features which differentiate his combination from that of pre-existing devices.

3. SAME—TRUNK LOCKS.

Mix's patent, No. 337,187, for a trunk lock consisting of a hasp plate secured to the cover of the trunk, and a lock plate secured to the body of the trunk, and constructed with a cup or frame for the reception of the hasp lock, the hasp plate and lock plate constructed so as to extend to the meeting edges of the cover and body of the trunk, and the hasp plate provided with a dowel that engages in a socket in the lock plate, in combination with a hasp, hinged to the hasp plate at a considerable

distance above the lower edge, and provided on its free end with a lock, *held*, in view of the prior state of the art, to be void for want of patentable invention.

Appeal from the Circuit Court of the United States for the District of Connecticut.

This was a suit by the Corbin Cabinet Lock Company against the Eagle Lock Company for infringement of certain patents. The circuit court sustained the bill as to one of the claims (52 Fed. 980), and defendant appeals.

Wilmarth H. Thurston, for appellant.

Charles E. Mitchell and J. P. Bartlett, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The bill in equity in this case was founded upon the alleged infringement of the first and fifth claims of letters patent No. 285,916, dated October 2, 1883, and of each of the two claims of letters patent No. 337,187, dated March 2, 1886. Each patent was granted to Frank W. Mix for an improved trunk lock. The circuit court for the district of Connecticut, upon "final hearing" of the cause, dismissed the bill as to letters patent No. 285,916, and as to claim 1 of No. 337,187, and directed an injunction and an accounting as to the second claim of the later patent. 52 Fed. 980. From that part of the interlocutory decree which related to the second claim, this appeal was taken by the defendant. As infringement is practically admitted, the validity of this claim is the only question before this court. The correctness of the other conclusions of the circuit court has not been considered, as the decree was not a final one.

Common knowledge, as well as the evidence in the case, shows that a hasp plate, a hasp hinged thereto, a keeper plate and lock mechanism for locking the hasp bolt into engagement with the keeper, were well-known elements of a trunk lock prior to the date of the invention. It also appears from the proofs in the case that lock mechanism in a cup form had been mounted on the free end of the hasp, the hasp being fastened to the body of the trunk, the lock being received in a recess in the keeper plate upon the lid of the trunk. This form is shown in letters patent No. 235,130, dated December 7, 1880, and issued to George Crouch. It does not appear that lock mechanism of this form had ever been mounted upon the free end of the hasp, when the hasp was secured to the cover of the trunk. It was also old to provide a trunk lock with a spring arranged to press upon the hasp with a constant tendency to throw it out of engagement with the keeper plate when the hasp is opened, and to provide the structure in which the lock is formed with a dowel pin or pins upon the lid of the trunk, which are received in a socket or sockets at the meeting edges of the two plates, for the purpose of protecting the cover against lateral strain. These two peculiarities appear in the earlier Mix patent. The dowels and sockets also existed in the Star lock, which, at the time of the invention of the first Mix lock, was a well-known form of trunk



lock, having an old-fashioned hinged hasp entering the body of the lock on the body of the trunk, and secured by a lock bolt. In the lock of Mix's first patent, a hasp upon the body engaged with a keeper plate upon the lid of the trunk, and in different drawings of the patent the lock mechanism was mounted upon the hasp or was embodied in the keeper plate. In other pre-existing locks the hasp plate was secured to the lid, and the keeper plate was secured to the body of the trunk. In this state of the art the patentee constructed his lock, which is said, in his behalf, to have been a convenient and attractive device, possessing features in combination in one structure which neither the Crouch nor any other single lock possessed, and therefore to have been received with public favor.

The second claim of letters patent No. 337,187 is as follows:

"(2) A trunk lock consisting of a hasp plate adapted to be secured to the cover of the trunk, and a lock plate adapted to be secured to the body of the trunk, and constructed with a cup or frame for the reception of the hasp lock, the hasp plate and lock plate, constructed and arranged to extend to the meeting edges of the cover and body of the trunk, and the hasp plate provided with a dowel or extension that engages in a socket or recess in the lock plate, in combination with a hasp hinged to the hasp plate at a considerable distance above its lower edge, and provided on its free end with a lock, substantially as set forth."

It is manifest that no single structure, before the date of the second Mix invention, possessed all the elements of the combination of this claim, with the described peculiarities of construction. The lock, as a whole, has the requisites of novelty and of utility. The only question is whether it possessed patentable novelty. The patentee having constructed and made known to the public a lock which contained the minor elements of a dowel upon the part of the lock fastened to the lid, which met and entered a socket in the part attached to the body of the trunk, and a spring which threw the hasp out of engagement with the keeper, made another lock which, retaining these elements, had its advantages arising from the location of its lock mechanism. The defendant insists that the improvement consisted simply in the selection by the patentee of an old and familiar form of lock mechanism to be used in connection with his dowel and socket lock. This statement does not fully meet the facts of the case, because the construction of the new structure required more than a selection; it required an adaptation of old elements. The complainant insists that the new lock was a reorganization of the Crouch type, and that the details of the reconstruction demanded and evinced inventive skill. It was not claimed in the argument that there was invention in placing the Crouch lock, whether the location of the respective plates was changed or not, in combination with dowel, socket, and spring. These elements had been so often exhibited in locks that they had become a part of the common knowledge of the lock maker, and invention could not consist in adding them to or withdrawing them from a lock structure. Neither, in view of the state of the art which has been recited, would the simple change of position of the two Crouch plates with reference to each other be considered an invention, and, furthermore, a mere change would have made a clumsy and imperfect

article, of no pecuniary value. But it is said that the means by which a change could be satisfactorily accomplished, and the details of the reorganization, if a convenient and useful lock was to be the result, required more than a mechanical insight, and that the conception, as worked out and embodied, constituted invention. The question in the case turns upon the truth of this proposition.

It is true that, to make a convenient lock, it was necessary to do more than change the location of the lock-holding hasp. If dowels and sockets were to be used, the two plates must meet each other; and, to permit the use of a spring, the hasp must be hinged to the hasp plate "a considerable distance above the lower edge." It was also important to construct the keeper plate so that the hasp which carried the lock case should not project from the surface of the plate, and thus be exposed to breakage. This was done by making a flange on the front face of the keeper plate, whereby the lower end of the hasp was received in a recess. That portion of the changes in the organization of the Crouch type of lock which consisted in placing the hinge of the hasp at a distance above the lower edge of the hasp plate, and in locating the cup part of the keeper plate near the meeting edges of the two plates, was a mechanical expedient or necessity, which would naturally suggest itself to the lock maker of ordinary skill. The character of this modification is magnified on the part of the patentee beyond its proper proportions. The meeting of the edges of the two plates and the hinging of the hasp necessarily resulted from the fact that the patentee wanted to use a dowel and socket connection and a spring-pressed hasp, and the locksmith would naturally group the elements of the combination in the way that the patentee adopted. The second change, which consisted in having a flange upon the front face of the keeper, and thus forming a recess, is not mentioned in the claim, which was carefully drawn so as to include all the limitations and the peculiarities of construction upon which the patentee relied. An unclaimed peculiarity of construction is rarely read into a claim, the life of which consists in minor improvements upon an old article, and in which the patentee has undertaken to point out minutely the distinctive features which differentiate his combination from that of pre-existing devices. Moreover, if the counter-sunk recess is properly to be read into the claim, it does not apparently strengthen the patentable character of the improvement.

The interlocutory order of the circuit court, granting an injunction against an infringement of the second claim of No. 337,187, is reversed, with costs.

A suit was brought by complainant against the same defendant in the circuit court of Connecticut, for infringement of the first claim of reissued letters patent No. 10,361, granted to Henry L. Spiegel, July 31, 1883, and of original patent No. 316,411, granted to Spiegel, April 21, 1885, and assigned to plaintiff, for improvements in cabinet locks. The patents were held void for want of novelty, and a decree was entered dismissing the bill (37 Fed. 338), which was afterwards affirmed by the supreme court on appeal. 150 U. S. 38, 14 Sup. Ct. 28.

## ALLEN v. STEELE.

(Circuit Court, W. D. Pennsylvania. March 1, 1894.)

No. 37.

## 1. PATENTS—INVENTION—IMPROVEMENT.

Where the development of a certain industry has created a constant demand for new appliances, which the ordinary skill of those versed therein is generally adequate to devise, and which devising is the natural outgrowth of such development, the industry will not be burdened with a monopoly to each improver for every advance made, except where marked by invention somewhat above ordinary mechanical or engineering skill.

## 2. SAME—ANTICIPATION.

Allen's patent, No. 332,318, for a device for transmitting motion in oil-pumping apparatus, *held* to have been anticipated by Shippen's device.

This was a suit in equity by George Allen against R. W. Steele for infringement of a patent granted to complainant for a device for transmitting motion in oil-pumping apparatus.

J. H. Osmer and Jas. C. Boyce, for complainant.

W. C. Rheem and L. M. Plummer, for defendant.

BUFFINGTON, District Judge. George Allen brings this bill against R. W. Steele for alleged infringement of letters patent No. 332,318, to him granted December 15, 1885, for a device for transmitting motion in oil-pumping apparatus. The answer traverses the infringement charged, denies patentability, and sets up anticipation in a device of E. W. Shippen. The case necessitates a brief statement of the method of pumping oil wells. Originally, each had a boiler and engine of its own. The pumping was done by communicating power to sucker rods, which extended from the top to the bottom of the well. Later, a single boiler was used, and from it steam was carried to separate engines at each of several contiguous wells. In time this method was superseded by one engine and one boiler for the entire lot, by means which we now describe.

Such engine and boiler are placed at a central point, and connection made, by a belt, with a band wheel (as much as 20 feet in diameter), and distant about 50 feet. This space is required to prevent the belt from slipping, and to obtain the best mechanical results. On either end of the shaft of the band wheel were cranks, which connected by pitmen with an oscillating pull wheel. This wheel formed the center from which rigid rods, called "pull rods," radiated to the several wells, where they were connected with the sucker rods, or pumping mechanism. Over the engine, band wheel, and pull wheel, respectively, separate buildings were then erected. This method was expensive, the appliances cumbersome, and the mechanism scattered. It was in general use in 1883, and was used by E. W. Shippen at that time in pumping his wells at Sugar Creek, Venango county, Pa. In 1882 he conceived the idea of doing away with the band wheel, its substantial foundations, and its separate

building. To this end, and for local reasons, he substituted water power and a turbine wheel for his engine. As compared with the cumbersome band wheel, his method was strikingly simple, ingenious, and effective, and to our mind embodied all the advance that has since been made in the way of pumping. About half a mile from his pull wheel, he built, or rebuilt, a dam and race, and at the end of the latter constructed stone walls, within which he placed a substantial timber frame, formed of upright side pillars securely fastened to mudsills below, and framed at the top with cross timbers. The sides of the frame were planked. The whole served the double purpose of conducting the water to the turbine wheel placed therein, and also of a frame and foundation for the wheel shaft and mechanism used in transmitting the power. Just how closely the stone walls and the interior frame were allied, and the points and methods of connection between them are concerned, is differently stated, but for present purposes it is sufficient to say that there is no question that the evidence and models established the fact that the interior frame was in itself a solid, self-sustaining structure, so constructed as to contain, sustain, and support the entire mechanical appliances for utilizing the power, and also adapted to be used as a cover for the machinery contained within its walls, and at the same time allow the radiation of power by pump-actuating rods in every direction laterally from a point above the top of the frame. Diagonally across the interior of this frame, and midway from the top, a heavy timber was securely fastened to the corner posts, and a large parallel beam was bolted to, and on the top of, the frame. Each timber was fitted with two iron boxes, through which two perpendicular and parallel shafts extended. The one reached below the under beam, and formed the shaft of the water wheel, and above that beam was provided with a small cogwheel. The other shaft was furnished with a large cogwheel, at a point to attach with the small one above mentioned, and on the upper end of the shaft (which extended above the top of the frame) a crank was placed. This was in turn connected by a pitman with a pull wheel which was securely fastened and braced to and upon the end of the parallel timber on top of the frame. From this pull wheel, pull rods extended a half-mile to the pull wheel which formed the original center of radiation to the wells. This ingenious mechanism has been in use since June, 1883, and with it a large number of wells have been continuously and successfully pumped. Over this foundation, which is part above and part below ground, a frame building of one and a half additional stories was added for storage purposes. Incidentally, it has served to protect the crank, pitman, and pull wheel from the weather and from molestation. It will obviously occur to one versed in the oil business—and, indeed, to one who is not, but who uses the adaptive faculties with which mankind is ordinarily endowed—that the ideas and methods here, for local reasons, applied to water, and at a distance of half a mile from the radiating point, could be adapted to steam engines, and at a point as close as a connecting pitman would allow to the radiating pull wheel. And it is equally obvious that the building in

Shippen's device used for storage was no necessary part of, or performed no function in, the device.

In *Crompton v. Knowles*, 7 Fed. 203, it was said:

"It is a presumption of law that all mechanics interested in upholding or defeating a patent were fully acquainted with the state of this art when they took out their patent or built their machine. \* \* \* Each party may, then, be assumed to have borrowed from the other whatever was actually first invented and used by the other."

While Mr. Allen may not have known of this Shippen device, yet knowledge of it must be imputed to him, and, with this state of the art before him, he made application for the patent in controversy. In his specification he describes the existing method as follows:

"Hitherto it has been customary to locate the engine or other driving power in a house or on a foundation by itself, with the horizontal shaft and band wheel located fifty feet (more or less) therefrom, the pull wheel occupying a position, on still another support, some twenty feet from the band wheel. To protect the working parts of the machinery from the weather, it has been customary to build a house over the plants, and to cut holes through its sides to allow the pump-operating rods to pass through. Apart from the general inconvenience and extra expense incurred by scattering the several parts over so great an extent of ground and building a house sufficiently large to cover them, the freedom with which the pump-actuating rods might otherwise be laterally shifted has been materially interfered with. The object of my present invention is to provide a compact and economical arrangement of the engine, drive shaft, pull wheel, and pump-actuating rods whereby a single foundation and supporting frame shall serve at the same time as a house frame and a support for the engine shaft and pull wheel, and which will admit of the free lateral movement of the pump-actuating rods."

His improvement he thus describes:

"A represents a heavy framework, girded and braced by a sufficient number of beams and braces to make it steady and strong. The roof timbers of the framework preferably have but little slant, and the entire frame is covered by roofing and siding, and provided with suitable entrances. B represents an engine located in the house above described; C, the engine shaft, provided with the fly wheel, D, and bevel gear pinion, E; and F represents the upright shaft for driving the pump-actuating rods. The shaft, F, is preferably located at the center of the house, and extends upwardly through the apex of the roof. It is provided with the bevel gear wheel, G, meshing with the pinion, E, and at its upper end, above the roof with a crank, eccentric, or other equivalent device for actuating the rods, H. The pump-actuating rods, H, may either be loosely secured on the wrist pin of the crank, or they may be secured to a wheel, I, loosely mounted on the wrist pin of the crank; or they might be attached to an eccentric strap or ring loosely mounted on an eccentric wheel secured to the shaft; or they might be secured to one or more oscillating wheels, I, the latter being supported on the roof, and connected with the crank with short pitmen. From their points of attachment to the crank or shaft, the rods, H, head laterally in any desired directions to the oil wells, K, and may be freely shifted to the right or left, as circumstances may require. It is evident that the framework may be constructed in a great many different forms, and that the shaft, F, may be located in other positions than the center, and that the relative positions of the engine, engine shaft, and upright shaft may be changed, without departing from the spirit and scope of my invention; hence I do not wish to limit myself strictly to the construction herein set forth."

His claims are as follows:

"(1) A pump-driving shaft extending through the roof of a house, and having the pump-actuating rods attached thereto above the roof, substantially as set forth.

"(2) A supporting frame for the engine, engine shaft, and pump-driving shaft, adapted at the same time to form a house-frame, the end of the pump-driving shaft extending above the roof of the frame, for the purpose substantially as set forth.

"(3) The combination, with a supporting framework adapted to be covered by a roof and siding, and an engine located within the framework, of an upright shaft adapted to be driven by the engine, the said upright shaft extending outwardly through the roof, and a crank, or its equivalent, secured to the upper end of the shaft, adapted to actuate pump-operating rods, substantially as set forth.

"(4) The combination, with a supporting frame for the engine shaft and pump-driving shaft, adapted at the same time to form a house frame, the end of the pump-driving shaft extending above the roof of the frame, of pump-actuating rods connected with the shaft through the medium of an oscillatory wheel, substantially as set forth."

It will be noted no mention is made of the Shippen device,—of the fact that the band wheel had been already successfully dispensed with, and the necessity for large and disconnected buildings had ceased. Had that device been known to the patent office authorities, there could have been but one outcome to Mr. Allen's application, to wit, rejection. The adaptation of Shippen's mechanism to steam power, placing the engine near the center of power radiation, distributing the power from the top of the frame, and using the frame as a covering for the mechanism, were ideas which would at once suggest themselves to a mechanic skilled in that branch of work. Every element of Allen's combination was used by Shippen. From local conditions, they were spread over more ground, and did not have so compact a form; but the substance and body of the device were there, and substance rather than mere form should here avail. This adaptation was a mere carrying forward of the original design; a more extended application of the original thought. Indeed, we are satisfied that Shippen's device embodied the substantial and material steps in the advance from the band wheel to the present compact structure; that the invention, if any, was his; that Allen's adaptation to steam, his compact form, his saving of material, have been improvements in degree, and do not rise to the level of invention. Granting his rearrangement and adaptation of steam power, his use of the disk on the crank of the shaft (admittedly a mechanical equivalent of the pull wheel), his combination of the whole into a compact structure, were ingenious, useful, and economical, yet it is not such an advance from the Shippen device as involves invention.

To adopt, with some changes, the language of another, we may say that the development of this, as of every business, has created a constant demand for new appliances, which the ordinary skill of those versed in each branch has generally been adequate to devise, and which devising is the natural outgrowth of such development. Each forward step prepares the way for another, and to burden a great industry with a monopoly to each improver for every slight advance thus made, except where marked by invention somewhat above ordinary mechanical or engineering skill, is unjust in principle and injurious in consequence. We are of decided opinion that the substance of Allen's device was so anticipated in Shippen's that to

devise and construct the former, with the latter before one's eyes,—which, in contemplation of law, we must assume Mr. Allen had,—was the work of an adaptive mechanic, and not the province of an inventor. All the improvements claimed were, as compared with Shippen's device, within the category of degree. They produced no new result; the parts performed no new function,—it was simply a transposing or readjusting of Shippen's elements to changed conditions, to accomplish the same result they had before. It is true the radiation of the distributing rods in Shippen's device did not take place from the particular pull wheel situated above the framework where the actuating mechanism was placed, but this was because local conditions did not so require. Had they done so; had the wells been on all sides of the water power, instead of on one,—it is apparent the first pull wheel (or a revolving disk, which the patent says is its equivalent) could have been made the radiating center; and if the storage house interfered with the lateral movement, or the subsequent shifting, of the rods, it required no invention to dispense with a superstructure which performed no function whatever in the pumping. That left off, we have remaining a supporting frame for the power shaft and the pump-driving shaft, forming a house frame, and the end of the latter shaft extending above the frame, in combination with pump-actuating rods.

For the reasons above stated, we are of opinion the complainant's bill should be dismissed, and his patent held for naught. Such being the case, it is needless for us to discuss the alleged infringement. Let a decree be prepared.

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#### SMITH v. MACBETH.

(Circuit Court, E. D. New York. January 1, 1894.)

#### PATENTS—INFRINGEMENT—MAGNETO-ELECTRIC MACHINES FOR FIRING FUSES.

The Smith patent, No. 201,296, for improvement in magneto-electric machines for firing fuses in blasting, is narrowed by its claims, as allowed, to the combination of an operating device with the switch of the condensing circuit in its path, and adapted to be opened by direct impingement of it, and is not therefore infringed by defendant's device, in which the switch is not in the path of the operating device, and is not opened by the direct impingement of any of the parts constituting the operating device.

This was a suit in equity by H. Julius Smith against James Macbeth for infringement of a patent granted to complainant.

Leonard E. Curtis, for orator.

James A. Hudson and Arthur S. Browne, for defendant.

WHEELER, District Judge. This bill is brought for alleged infringement of letters patent No. 201,296, dated March 12, 1878, and granted to the orator, for improvement in magneto-electric machines for firing fuses in blasting. The electricity is developed and accumulated in a condensing circuit by the rotation of armatures moved by a rack bar forced downward by hand and working a pinion with accelerated velocity; the condensing circuit is

broken by the end of the rack bar striking a switch as it reaches the limit of its stroke, when the electricity is accumulated to its greatest intensity; and the current is sent by the working circuit to the fuses. In the original application the orator described and claimed the combination with the operating device of a rotary armature of a dynamo-magneto electric machine of a circuit breaker arranged in the condensing circuit of the machine so as to be positively operated by said rotating device, whereby the condensing circuit is broken, and the developed electric current switched therefrom to a working circuit, by which the current is conducted to the point where it is to be applied for firing. On rejection, this part of the application was changed to a description and claim of:

"(1) The combination with the operating device of the rotary armature of a dynamo-magneto electric machine of a bridge or switch arranged in the condensing circuit of said machine, and in the path of said operating device, and adapted to be opened by direct impingement of said device thereupon, substantially as described, and for the purposes set forth."

Upon the application so changed, the patent was granted; and this claim is now alleged to be infringed. In the defendant's machine the armatures are rotated by pulling upward with increasing velocity a bar attached to the end of a lever pivoted on a shaft, and moving a toothed segment meshed in a pinion. The switch in the condensing circuit is opened by a stud on a cam pivoted on the same shaft with the lever, which lifts a latch and lets a spring move it as the operating bar reaches its upward limit, and the electricity is accumulated to its greatest intensity, and the current is thereby sent by the working circuit to the fuses. The orator was apparently the first to apply the power by motion in a direct line to revolving the armatures, whereby the velocity can be more regularly accelerated than when applied by a crank, as before; and also the first to break the condensing circuit by the direct action of the operating device. Therefore, this claim of the patent is probably valid for what it covers. If the general claim first made had been allowed, and could have been sustained, it would perhaps have covered the defendant's machine; but the limitations and restrictions inserted in it to obtain it remain with it. *Roemer v. Peddie*, 132 U. S. 313, 10 Sup. Ct. 98. They narrow it to the combination of an operating device with the switch of the condensing circuit in its path, and adapted to be opened by direct impingement of it. The switch in the defendant's condensing circuit is not in the path of the operating device, which consists of the bar lever and toothed segment extending from the handle to the shaft on which the lever is pivoted, but is situated beyond the shaft, and outside the path of movement of these parts; and it is not opened by the direct impingement of any of these parts constituting the operating device, but indirectly by the shaft moving the cam which carries the stud that lifts the latch. This does not, as now understood, appear to be an infringement. Bill dismissed.



ROGERS TYPOGRAPH CO. v. MERGENTHALER LINOTYPE CO.

(Circuit Court of Appeals, Third Circuit. December 3, 1894.)

No. 11.

1. PATENTS—LINOTYPE MACHINE—INFRINGEMENT.

Letters patent Nos. 313,224 and 317,828, issued, respectively, March 3, 1885, and May 12, 1885, to Ottmar Mergenthaler for "improvement in machines for producing printing bars," consisting, in part, of a combination of a series of independent matrices representing characters, holders or magazines for said matrices, finger keys representing the respective characters, intermediate mechanism to assemble the matrices, and a casting machine to co-operate with the assembled matrices, are for inventions of unusual merit, and, in view of the prior art, entitled to liberal construction, and are infringed by the Rogers machine, which, while in some respects an improvement, operates on the same principle, contains the same general features, and produces substantially the same results.

2. SAME—FAULT IN ORIGINAL MACHINE.

The fact that the machine, when first produced, failed to justify perfectly, which fault was remedied, and perfect justification produced by improved machines subsequently made, is no reason for denying relief to the original patentee.

Appeal from the Circuit Court of the United States for the District of New Jersey.

This was a bill by the Mergenthaler Linotype Company against the Rogers Typograph Company for an injunction. There was a decree for complainant in the court below, from which decree respondent appeals.

George H. Lothrop and M. B. Philipp, for appellant.  
Frederic H. Betts, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and BUTLER, District Judge.

ACHESON, Circuit Judge. This suit was upon two letters patent of the United States granted to Ottmar Mergenthaler,—No. 313,224, dated March 3, 1885, and No. 317,828, dated May 12, 1885. The inventions relate to a machine for producing printing bars. Each patent describes and shows mechanisms whereby matrices, in any desired association of characters, are assembled in a line, such line of matrices brought into proper relation with a mold of the size required for a line of type of predetermined length, and a cast made in the mold, forming a printing bar bearing in relief the characters impressed in the matrices. The patented mechanisms produce a series of lines of type, which can be arranged into columns, and thus hand composition by individual type is dispensed with.

The specification of the first patent contains the following statement:

"This invention is directed to the rap'd and economical production of letter-press printing, and relates to a machine to be driven by power, and

controlled by finger keys, adapted to produce printing forms, or relief surfaces, ready for immediate use, thus avoiding the usual operation of typesetting, and also the more recent plan of preparing by machinery matrices from which to cast the forms. By the use of my machine, the operator is enabled to produce with great rapidity printing bars bearing in relief the selected characters in the sequence and arrangement in which they are to be printed. In short, the machine will produce printing forms or surfaces, properly justified, and adapted to be used in the same manner, and with precisely the same results, as the printing forms composed of movable type. My machine embraces two leading groups of mechanism: First, those which form a temporary and changing matrix, representing a number of words; and, second, those by which molten or plastic material is delivered to the matrix and discharged therefrom in the form of printing bars."

In the form of machine shown by the earlier patent, the matrices are impressed on the edges of long bars, or connected strips, each bar or strip bearing a complete set of characters; and there are also plain bars intended for use as "spaces." The machine is provided with a set of finger keys, and the operator, by playing upon the keyboard, and successively selecting the desired characters and spaces, is enabled to set up a line of the required length. In the machine of the later patent, a series of disconnected, separate, and independent matrices, each bearing a single character, are stored in holders, and, by the operation of the finger keys and intermediate mechanism, can, one by one, and in any desired order, be released from the holder, and dropped down and carried into the required line.

The claims here involved are the forty-seventh and sixty-third of the first patent (No. 313,224) and the first claim of the second patent (No. 317,828). These claims are in the following words:

"(47) In a machine for producing stereotype bars, the combination, substantially as hereinbefore described, of the changeable or convertible matrix, the mold co-operating therewith, and appliances, substantially such as shown, for melting metal and forcing the same into the mold."

"(63) In combination with a mold open on two sides, a series of movable matrices grouped in line against one side of the mold, a pot or reservoir acting against the opposite side of the mold, and a pump to deliver the molten or plastic material into the mold, as described and shown."

"(1) In a machine for producing printing bars, the combination of a series of independent matrices, each representing a single character, or two or more characters to appear together, holders or magazines for said matrices, a series of finger keys representing the respective characters, intermediate mechanism, substantially as described, to assemble the matrices in line, and a casting mechanism, substantially as described, to co-operate with the assembled matrices."

The court below, following the decision of Judge Coxe in the case of *Mergenthaler Linotype Co. v. Press Pub. Co.*, 57 Fed. 502, sustained these claims, and adjudged that the defendant (the appellant here) had infringed the same.

The position advanced by the appellant, and mainly relied on for the reversal of the decree, is that, if these claims are construed with reference to the state of the art and the proceedings in the patent office, the appellant's machine does not infringe. The proofs bear-

ing on that proposition have received our serious consideration. It is certainly true that line bars, such as are commonly used in newspaper headings, were old. Nor was it novel to assemble a line of type or matrices by mechanism actuated by finger keys. Neither was it new mechanically to cast single type successively. The Morgan patent of 1870, which is for a mechanical typesetter, states that, instead of type, dies may be used, and an impression therefrom made on the surface of a soft metal plate. Westcott's patent of 1871 shows and describes a machine in which, by the operation of the proper finger key, a matrix having a single character on its face is caused to close the end of a self-adjustable mold, and a type having the desired single letter is produced. Gally's patent of 1872 shows a series of types or matrices carried by flexible bands of metal, which bands are manipulated by finger keys so as to bring the required characters into line, when they may be impressed on a sheet of yielding material, line by line. But Gally says nothing about casting from a line of assembled matrices, and we fail to discover in his specification anything suggestive of that idea. Describing this part of his invention, he states that it—

"Consists—First, in a mechanism which shall mechanically arrange and rearrange an alphabet or alphabets of dies, which dies shall form impressions in the material for a mold corresponding with the composition of matter desired in a stereotype; and, second, in the same or similar mechanism with a substitution of female dies, and other appliances, changes, and attachments made necessary by such substitution of dies, and the work to be done, as shall enable the operator to produce directly the stereotype instead of the mold."

It is quite plain that all that Gally contemplated or disclosed was the production, by his peculiar method, of stereotype molds or stereotype plates.

The other patents in evidence we need not discuss. Those mentioned are the appellant's chief reliance. None of the patents, however, anticipates Mergenthaler, or detracts from the importance of his inventions here in question. We are entirely satisfied that Mergenthaler was the first to combine with mechanism for forming a matrix, composed of a series of dies adapted for transposition or rearrangement, a mold and a casting mechanism. The proofs demonstrate that his inventions embodied in the claims under consideration have effected a great advance in the printer's art. Mechanical typesetting had not proved a practical success. Mergenthaler was the first to produce a practical machine by which ordinary hand composition is superseded. Abandoning the idea of printing from single-letter type, he provided therefor a much cheaper and far better substitute. The use of cast lines of type, as the unit of composition, instead of individual type, is an improvement in the art of unsurpassed value. Not only, then, are the combinations novel, but the result is entirely new and highly beneficial. In our judgment, these inventions are fundamental, coming within the principle of the ruling in *Morley Mach. Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299. We

find nothing in the prior art to limit these claims, or to deprive the patentee of the benefit of a liberal construction thereof.

Did anything occur in the patent office, with reference to Mergenthaler's application for patent No. 313,224, requiring the limited construction of these claims upon which the appellant insists? Now, in the first place, it is to be observed that the forty-seventh claim of that patent was neither rejected nor altered. It was allowed just as originally framed. True, the application did contain another claim, numbered 68, which was rejected upon a reference to Gally's patent, and thereupon was erased. This disallowed claim read as follows:

"(68) In a machine for producing printing surfaces, the combination, substantially as described, of a series of finger keys representing the letters or characters, a convertible or changeable matrix controlled by said keys, and a casting mechanism co-operating with said matrix."

It will be perceived, however, that this claim did not mention a mold at all, whereas "the mold co-operating" with the matrix, "and appliances, substantially such as shown, for melting metal and forcing the same into the mold," are express elements of claim 47. We are unable to see that the rejection and abandonment of the proposed claim necessitate or warrant the inference that the mold of claim 47 must be of the precise form described and shown in the patent. The only legitimate effect attributable to this action of the office and the acquiescence of the applicant therein is that the claims of Mergenthaler shall not be so construed as to include Gally's apparatus. These remarks are applicable also to the changes made (upon the reference to Gally) in the sixty-third claim, whereby the mold was limited to one "open on two sides," the words, "a series of movable matrices grouped in line against one side of the mold," were substituted for "a series of metal matrices grouped side by side against the open side of the mold," and the clause, "means substantially as described for supplying the same with molten or plastic material," was changed to "a pot or reservoir acting against the opposite side of the mold, and a pump to deliver the molten or plastic material into the mold." In this connection, it must be remembered that the invention of Gally and the inventions of Mergenthaler relate to machines of different kinds. In fact, these two machines differ radically both in construction and purpose. The idea of producing printing bars is entirely foreign to Gally's patent, and he describes no "casting mechanism," in Mergenthaler's sense of the term. Nor is Gally's mold at all analogous to the mold of Mergenthaler. Gally's is a stereotype mold made out of the sheet of soft matrix-forming material.

We cannot assent to the suggestion that Mergenthaler's claim 47 is to be construed as confined to the particular matrix and the extensible mold shown in his patent, because of the language, "the changeable or convertible matrix," and "the mold co-operating therewith." It will be noted that in claim 63 the language is "a

mold." The difference in phraseology is quite unimportant, for in each instance the claim covers the designated thing "substantially as described."

Upon the whole case, in view of the primary character and great importance of Mergenthaler's inventions, we are of the opinion that his claims here involved are to be interpreted liberally, and the range of equivalents covered thereby correspondingly extended. Having reached that conclusion, we need say little upon the question of infringement. Undoubtedly, there are differences between the machines shown by the Mergenthaler patents and the defendant's machine. Thus, while the mold described in the patents is expansible and contractile, the defendant's mold is rigid and immovable; and the matrices of the defendant's machine are supplemented by expansible space bars, in lieu of the nonexpansible space bars of Mergenthaler. Yet, notwithstanding these changes and some others, the defendant really has copied the substance of the inventions in different forms. In principle the two machines are alike, and they accomplish the same result. The defendant's machine is a machine for producing printing bars, and it has all the elements of the above-recited three claims of the Mergenthaler patents, or the equivalents thereof, combined in substantially the same way, and for the same purpose. We do not overlook the fact that Mergenthaler's original machine, constructed in accordance with the description of his patents, did not have the means for the perfect justification of the lines. It could not always be depended on to produce lines conformable to the standard length with greater accuracy than 1-64 of an inch. Nevertheless, that machine did practical work. It was an operative machine, and demonstrated to the world the practicability and utility of the invention. It matters little that there was a lack of mathematical accuracy with respect to justification, and certainly the defect affords no defense here. The subsequent introduction of expansible space bars to take the place of the nonexpansible space bars of the patents undoubtedly was an improvement; but who is entitled to the credit of it, and whether it was a patentable improvement, are questions not involved in this case.

The circuit court was right in holding that the three above-recited claims of the patents in suit are valid, and that the defendant below had infringed the same; and, accordingly, the decree of the court is affirmed.

In a suit by the Rogers Typographic Company against the Mergenthaler Linotype Company, involving patent No. 474,306, granted May 3, 1892, to Jacobs W. Schuckers, for a similar improvement in type-making and justifying mechanisms, a preliminary injunction was denied. 58 Fed. 693.

## MARK et al. v. HOME INS. CO.

(Circuit Court of Appeals, Second Circuit. December 3, 1894.)

No. 7.

## MARINE INSURANCE—TERMS OF RISK.

A policy of marine insurance covered the vessel, a tugboat, while in the waters of New York harbor and sundry other inland waters "as far south as Norfolk, Va." Some time after the issue of the policy, the insured requested an extension of the risk to cover the boat while working in Charleston harbor, she being then at Norfolk, but refused to pay an additional premium. A rider was then attached to the policy, without payment of further premium, permitting the boat to use the port and harbor of Charleston, "but not to cover on trips either way between Norfolk and Charleston." The boat having been lost, after sailing from Norfolk to Charleston, but whether or not within the waters of Chesapeake Bay being uncertain, *held*, that under the language of the rider, attached to the policy, the insurer was not liable for a loss occurring on a voyage from Norfolk to Charleston, even within the limits of the waters covered by the policy as originally written. 52 Fed. 170, affirmed.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by George Mark and F. A. Fales, owners of the tugboat D. L. Flanagan, against the Home Insurance Company, to recover upon a policy of marine insurance. The district court rendered a decree for the defendant. Libelants appeal.

Robert D. Benedict, for appellants.

Samuel Park, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The libelants seek to recover under a policy of insurance, issued by respondent, for the loss of their tug D. L. Flanagan, destroyed by fire about 3:30 a. m., June 15, 1890. It is in dispute upon the testimony whether the Flanagan took fire while still within the waters of Chesapeake Bay, or after she had passed Cape Henry, on her way out to sea. It is conceded, however, that the catastrophe happened after she had sailed from Norfolk, Va., on a voyage to Charleston, S. C. The policy of insurance is dated January 7, 1890, and is for one year from January 3, noon, 1890, to January 3, noon, 1891. It covers the D. L. Flanagan, her engines, boilers, tackle, stores, etc., "to be used mainly for general towing purposes, privileged to use and navigate the port, bays, and harbor of New York, East river, and North or Hudson rivers, waters of New Jersey, Long Island Sound and shores, and as far as New Bedford, and all inland waters as far south as Norfolk, Va., and all waters adjacent, connecting or tributary to any of the above waters, and tow vessels to and from sea, and search for vessels at sea, according to the custom of the port of New York." If it be assumed that the fire broke out while the Flanagan was still on the waters of the Chesapeake, before she had passed Cape Henry, and

while navigating under the above privilege, the loss would be covered by the policy. The main question in the case, however, is whether, under the terms of a subsequent rider annexed to the policy, she was covered while on a voyage from Norfolk to Charleston by sea, although part of the voyage lay through waters which she was privileged by the original policy to use and navigate. Some time in June, George Mark, one of the owners, wishing to use the tug in Charleston harbor, called on the agents of the insurance company, and asked for an extension of the policy, stating that the "vessel was going to Charleston to work at Charleston, in Charleston harbor." He was by them informed that it would cost more money. Some further discussion ensued, as libelant testifies, touching the increase of risk involved in such extension of the policy, libelant insisting that, in his opinion, it was not as risky working in Charleston harbor as running around Chesapeake and Delaware Bays, and adding that, if the extension would cost more money, he would cancel the policies. To an inquiry by one of respondent's agents as to which way the Flanagan was going, libelant said he would take those chances himself. The result of the interview was the leaving of the policy with the agents, to see if "they could fix it up and get up a paper." Thereafter, on June 12, 1890, a rider was duly executed and affixed to the policy, whereupon the Flanagan set out from Norfolk on her voyage to Charleston. This rider is as follows:

"New York, June 12th, 1890.

"Permission is given tug D. L. Flanagan to use port and harbor of Charleston, and to go as far as the Jetties at Charleston, but not to cover on trips either way between Norfolk and Charleston."

The libelant contends that this rider shall be interpreted so as merely to add to the privileges already accorded under the policy the additional privilege of using the port and harbor of Charleston as far as the Jetties. Manifestly, it would do this if it stopped with the words "Jetties at Charleston." The insurers have gone further, however, and added the clause "but not to cover on trips either way between Norfolk and Charleston." Increasing the risk, as they understood they did, by the rider, without additional compensation, it is natural to find that they have coupled the extension with some condition reducing their consequent new risk as far as may be; and certainly they had the right so to do. The natural meaning of the words employed is that, if the assured decide to send his tug to Charleston, the insurers will not assume the risk of the trip from Norfolk to Charleston, although they agree to insure the Flanagan thereafter when using the port and harbor of Charleston. There is but little force in the argument that the phrasing of the rider is not grammatically accurate. Business documents of this character are often expressed with more terseness than the rules of grammar permit. Undoubtedly, the subject of the verb "to cover" in the sentence under consideration is something different from the subject of the verbs "to use" (the port, etc.) and "to go" (as far as the Jetties); but it seems plain that such unexpressed subject is

"the insurers." Both instruments are to be construed together. When thus read, they contain a promise by the insurers that they will cover loss when using and navigating the ports and waters enumerated in the original policy, and, when using the port and harbor of Charleston, as far as the Jetties, but will not cover loss on trips either way between Norfolk and Charleston. The district judge, in his opinion, points out a sufficient reason for thus excepting a trip between the two places named, although part of that trip might lie through waters otherwise covered:

"The conditions involved in the preparation and the equipment of the tug for the prosecution of a trip between Norfolk and Charleston would necessarily be quite different from her equipment for river or harbor or inland business. The liability of the tug to accidents while prosecuting such a trip might be greater, not merely when on the high seas, but at all stages of the voyage."

We concur with the district judge in the conclusion that the exception expressed in the rider is clear and unambiguous; and, as the loss happened on the excepted trip, the libel was properly dismissed. Decree of district court affirmed, with costs.

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#### THE FAIR WIND.

REED v. NEW YORK, N. & H. STEAMSHIP CO., Limited.

(Circuit Court of Appeals, Second Circuit. December 3, 1894.)

No. 21.

#### ADMIRALTY—COLLISION—EVIDENCE.

Testimony of experts as to the angle at which a collision between two vessels must have occurred, based upon examinations of the vessels made after the accident, is not sufficient to warrant a reversal of a finding of the trial judge based upon testimony of eyewitnesses of the collision.

Appeal from the District Court of the United States for the Eastern District of New York.

This was a libel by the New York, Newfoundland & Halifax Steamship Company against the schooner Fair Wind (Edward P. Reed, claimant) for damages for collision between said schooner and libellant's steamer Portia. The district court rendered a decree for the libellant. Claimant appeals.

William W. Goodrich, for appellant.

Wilhelmus Mynderse, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The collision happened between 10 and 11 o'clock on the night of July 30, 1892, in Long Island Sound, near Eaton's Neck. The Portia, a steamer of 731 tons, and 220 feet long, was eastward bound, on a course E. by N. 1/2 N. The Fair



Wind, a schooner of about 90 tons, and 100 feet long, was sailing on a W. by S. course, with her booms to starboard. The wind was about E., or E. by N., and the night dark and overcast, with occasional rain squalls. The district judge has discussed the evidence at some length, and held the schooner responsible on the ground that she did not hold her course, and we see no reason to reverse his decision. The testimony is very conflicting, and no theory will reconcile the statements of the witnesses from both sides. The schooner's bowsprit brought up on the port bow of the steamer, and the angle at which the vessels came together is the material point in the case. If they came together at right angles, the conclusion reached by the district judge—namely, that, to get into such relative positions from their former headings, the schooner must have luffed—is fair and reasonable. His finding that they struck at right angles controlled his decision of the case, and the libellant has sought, by new proofs taken in this court, to secure a reversal of that finding. Such new proofs comprise a photograph and a drawing of the schooner's broken bowsprit, made long after the collision, and the opinion of a ship carpenter as to the indications which its appearance affords. The libellant has sought to meet this by calling a witness who surveyed the hole stove in the steamer's bow, to describe it and give his opinion as to the angle of the blow which made it. Such evidence, however, is hardly of a character to warrant a reversal of the findings of the district judge, when several of the eyewitnesses of the collision, including the mate of the schooner, testify that the vessels came together substantially at right angles, and no witness from either vessel testifies to the contrary. Although the night was dark and rainy, the atmospheric conditions were not such as to require the steamer, navigating in the wide water where she was, to reduce speed, under the rules as they then stood. She was running  $8\frac{1}{2}$  knots an hour. Lights were not visible as far as they might be on a clear night, but still, so far as the proof shows, they could be seen at sufficient distance to avoid them when running at that rate of speed. The decree of the district court is affirmed, with interest and costs.

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THE WALLEDA.

THE HELENA.

AYER v. THE WALLEDA.

ELDERKIN et al. v. THE HELENA.

(District Court, S. D. New York. December 18, 1894.)

**COLLISION—SAIL VESSELS—NEGLIGENT LOOKOUT ON BOTH—WIND FREE—CONFLICT—WRONGFUL LUFF BY EACH.**

The schooner W., sailing W., and the H., sailing E. by N.  $\frac{1}{2}$  N., came in collision about 10 p. m. in Long Island Sound in a fresh breeze, the wind being not far from N., and the night clear. The evidence showed that the lookout on the W. was very inattentive, and that the H. was not seen until a few lengths away on the W.'s port bow, whereupon the

W. luffed. The lookout of the H. testified to seeing the W.'s green light a mile distant, from one and a half to two points on his starboard bow, which continued until near, when the W. luffed, and brought about collision. The W.'s witnesses claim that the wind was W. of N.; the H.'s witnesses, that it was N. N. E., and that the H. was sailing close to the wind: *Held*: (1) That though, considering the negligent lookout on the W., the H.'s account of the collision would have been adopted, if credible; yet that story not being credible, nor giving a possible account of the collision, no superior credit could be given to the H.'s story; (2) that the wind was nearly as given by the nearest weather bureau, viz. N.; (3) that both had the wind free, that both were negligent in lookout, and both wrongfully luffed, and damages were divided.

These were cross libels filed, respectively, by Frederick W. Ayer and Hubert W. Elderkin and others to recover damages for a collision between the schooner Walleda and the schooner Helena.

Wing, Shoudy & Putnam and C. C. Burlingham, for the Walleda. Benedict & Benedict, for the Helena.

BROWN, District Judge. At about 10 p. m. in the evening of September 25, 1894, the schooner Walleda, sailing west, and the Helena, going east on the port tack, came in collision in Long Island Sound not far from Bridgeport. The Helena's stem struck the port side of the Walleda abaft the fore rigging, and both were damaged, for which the above libel and cross-libel were filed.

The evidence shows so clearly that the lookout on the Walleda was grossly negligent, that I should have no hesitation in accepting the Helena's account of the collision, and holding the Walleda alone responsible, if the Helena's story had been consistent and probable, and furnished a reasonably satisfactory account of the collision. But the positive testimony of the Helena's witnesses that the light seen on the Walleda a mile distant was the green light, a point and a half or two points on the Helena's starboard bow, and that that green light continued in view all the time until the Walleda luffed, a few lengths before collision, is wholly incompatible with the other testimony and circumstances, and leaves the collision unexplained. It could not possibly have occurred in that way. Upon the courses the vessels were on, had the green light of the Walleda been exposed even two-thirds of a mile distant, one and a half to two points on the Helena's starboard bow (and it must, from her course, have been on that bearing) the Helena, instead of colliding, would have passed the Walleda from 400 to 500 feet, at least, to the northward. No supposable luff by the Walleda can explain such a discrepancy; nor in such a position of the Helena is any luff by the Walleda conceivable. The necessary conclusion is, that no green light could have been seen at any considerable distance; but, if at all, only just as the Helena was passing the line of the Walleda's course only a few lengths off, and just before the Walleda luffed; that the Walleda's red light was visible for a considerable time before that, and was not noticed, because no proper lookout was kept up on the Helena. This, and the gross misrepresentation as to the lights, is sufficient to deprive her witnesses of

any special confidence as to the disputed question of the direction of the wind. The Walleda's witnesses say the wind was N. by W.; the Helena's, that it was about N. N. E. At the nearest weather bureau station, namely, at New Haven, the wind up to midnight did not go E. of N.; and in the difference of testimony, I shall adopt that as the course of the wind during the hour prior to collision. This would make the Helena have the wind from one to two points free on the port side. I am confirmed in this finding, by the fact that at collision her sails were full; and as the wheelman left the wheel some moments before collision, and as he testifies that she did luff, and as the mate ran to the wheel after the wheelman had left it and put it down before collision, I have no doubt the Helena did luff at least one to two points, and still had her sails full. Having the wind on her port side and free, the Helena was bound to keep out of the way of the Walleda, which had a free wind on the starboard side. The real faults were the same in each, viz., the total want of proper watch, or any seasonable notice of the other, in consequence of which each wrongfully luffed. The schooners were not heavily incumbered, and could be easily and quickly handled in so fine a breeze; and had either paid any timely heed to the other, the collision would have been easily avoided. The damages must, therefore, be divided. Decrees accordingly; with orders of reference, if the damages are not agreed upon.

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THE GULF STREAM.

NEW YORK & W. STEAMSHIP CO. v. INLAND & SEABOARD COAST-  
ING CO.

(Circuit Court of Appeals, Second Circuit. December 3, 1894.)

No. 12.

**COLLISION—DIVISION OF DAMAGES — PURCHASE BY PARTY OF DAMAGE CLAIMS.**

On a libel for the loss of a vessel and cargo by collision, if a division of damages is decreed on the ground of mutual fault, the parties stand in the position of sureties towards each other as respects claims of owners of cargo lost by the collision; and where, pending suit, one of the parties has purchased claims of such cargo owners at less than the value of the goods lost, the other is responsible only for his proportion of the amount paid, with interest. 58 Fed. 604, affirmed.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by the Inland & Seaboard Coasting Company against the steamship Gulf Stream (the New York & Wilmington Steamship Company, claimant) for damages for the loss of libellant's steamship E. C. Knight and her cargo, by collision with the Gulf Stream. The district court found both vessels in fault, and rendered a decree for a division of the damages and costs. 43 Fed. 895. On a reference to compute the damages, exceptions to the commissioner's report were filed by the owner of the Gulf Stream, but were

overruled by the district court. 58 Fed. 604. From the final decree entered thereon, the owner of the Gulf Stream appealed.

Robinson, Biddle & Ward, for appellant.

Frank D. Sturges, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. By this appeal the owner of the steamship Gulf Stream seeks to review so much of the final decree of the court below in favor of the libelant, the owner of the steamship E. C. Knight, as denies to the appellant the benefit of a purchase of certain demands beyond the sum actually paid for the same.

The libel was filed to recover the value of the steamship E. C. Knight and her cargo, which were lost through a collision with the steamship Gulf Stream. The owner of the Gulf Stream appeared and answered, denying that the Gulf Stream was in fault, and alleging that the collision was solely caused by the fault of the E. C. Knight. The cause went to a hearing, and the court found that both vessels were in fault for the collision, and decreed in favor of the libelant for half damages. A reference to a commissioner to take proof and report the amount of damages was ordered. Upon that reference, by consent of the parties, B. F. Clyde and Clyde & Co. were permitted to intervene for the protection of their interests. They proved that, acting on behalf of the owner of the Gulf Stream, they had purchased, while the cause was pending and before it had been heard, for the sum of \$1,150, the claims of the owners of certain cargo on board the E. C. Knight, lost by the collision, of the actual value of \$3,350. The commissioner reported their damages upon the basis of the actual value of the cargo lost, but the court refused to confirm that part of the report, and decreed in their favor, upon the basis of the sums actually paid by them for the claims of the cargo owners, awarding them half damages. The legal theory adopted by the court was that, the purchase being really by the owner of the Gulf Stream, it would be contrary to equity to allow such a purchaser to make a profit out of the transaction. The district judge, in his opinion, said:

"To permit one of the parties, equally answerable, to set up purchased claims for a larger amount than was paid for them, would not only be contrary to the principle and the equity of the moiety rule that each vessel shall bear half the burden, but would sometimes, as in this case, enable one of them to make an actual profit out of the other."

We fully agree with the observations of the learned district judge. The common-law rule by which there is no contribution between wrongdoers is not applied by courts of admiralty in cases of collision caused by the mutual fault of two vessels; but as an incident of the moiety rule, adopted for the better distribution of justice between mutual wrongdoers, by which each side must bear the damage in equal parts, the one suffering least is decreed to pay the other the amount necessary to make them equal,—that is, one-half of the dif-

ference between the respective losses sustained. The Alabama and The Game Cock, 92 U. S. 695; The North Star, 106 U. S. 17, 1 Sup. Ct. 41. It necessarily results that they stand in the position of sureties towards one another as respects the claim of a cargo owner whose goods on board one of the vessels have been lost by the collision. The cargo owner may pursue either wrongdoer, and recover his whole loss from one, notwithstanding, as between themselves, each is primarily liable for half. The one who is thus compelled to pay the whole loss is in effect a surety for the other, to the extent which the latter should contribute. Because the loss is a common burden, the owner of either vessel may remove it, and become entitled to contribution against the other. Courts of admiralty are guided by equitable considerations, and no principle is better settled in equity than that parties who stand in such relations are entitled equally to all the benefits, and must bear equally all the burdens of the position. Like ordinary sureties, one cannot speculate upon the debt, to make a profit from the other; but, if one compromise, the other is entitled to the benefit, and is responsible only for his proportion of the amount actually paid, with interest. *Hickman v. Curdy*, 7 J. J. Marsh. 555; *In re Swan's Estate*, 4 Ir. Eq. 209; *Wynn v. Brooke*, 5 Rawle, 106; *Bonney v. Seeley*, 2 Wend. 481; *Lawrence v. Blow*, 2 Leigh, 30.

The decree is affirmed, with costs.

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THE PORTIA.

NEW YORK, N. & H. STEAMSHIP CO. v. CORNELL STEAMBOAT CO.

(Circuit Court of Appeals, Second Circuit. December 5, 1894.)

No. 15.

**COLLISION—FAILURE OF STEAMER TO STOP AND REVERSE PROMPTLY — PROXIMATE CAUSE.**

A steamship going down the East river, on entering the channel west of Blackwell's Island, discovered, coming up half a mile below, two tugs towing seven loaded canal boats, lashed to one of the tugs, the other tug leading with the hawser attached. They were on the easterly side of the channel, heading at an angle towards the New York shore, and the tide was flood. The steamship, proceeding at half speed near the New York shore, gave a signal of one whistle, intending to pass port to port, as required by the state statute. The leading tug responded by a similar signal, but, though she ported her wheel and went ahead at full speed, the other tug stopping her engine, their course was not materially changed, and they and the tow were carried by the tide towards the New York shore until, when the steamship had come within 300 or 400 yards, it was no longer safe for her to pass on that side. Thereupon she changed her course two points to port, and gave a signal of two whistles, to which the second tug responded by a like signal, and put her engines full speed ahead; but the movements of the tugs and tow were very sluggish, and they drifted with the tide as before. Observing this, the steamship reversed her engines, but by the time her headway was stopped her bow had swung a point to starboard, and she struck the outer starboard canal boat, which sunk. *Held*, that the steamship was in fault in failing to stop and reverse at the time of her change of course, notwithstanding that the hazardous situation was

brought about by the failure of the tugs to perform their obligations, and that their fault, though gross and inexcusable, was not the proximate cause of the collision, as the steamship could have avoided it by obeying the rule.

Appeal from the District Court of the United States for the Eastern District of New York.

This was a libel by the Cornell Steamboat Company against the steamship Portia, the New York, Newfoundland & Halifax Steamship Company, claimant, for damages for the sinking of canal boat No. 3037, while in tow of libelant's steam tugs R. G. Townsend and S. L. Crosby, by collision with the steamship. The district court rendered a decree for libelant. Claimant appealed.

Wilhelmus Mynderse and Butler, Stillman & Hubbard for appellant.

Benedict & Benedict, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The owners of the steamship Portia have appealed from a decree of the district court condemning her in damages for a collision which took place in the East river opposite Blackwell's Island. The libel and answer in the cause are commendably full and specific, and the testimony of the witnesses for both parties has been exceptionally candid. The facts are these:

The steam tugs S. L. Crosby and Townsend were proceeding up the river on a flood tide, which was running three or four miles an hour, with a tow of seven loaded canal boats. The Townsend was leading by a hawser 60 feet long, attached to the Crosby, and the Crosby had four canal boats lashed to her starboard side, and three lashed to her port side. The river at that point is about 700 feet wide, and the length of the entire tow was about 250 feet. While the tugs and tow were on a course heading towards the New York shore, in order to be able to enter the Harlem river on the flood tide, the rear of the tow being about 150 feet from the Blackwell's Island shore, and the Townsend being well out towards mid-river, they were discovered by the steamship Portia, which had just rounded Horn's Hook and had straightened down the channel, and was about half a mile away. The Portia was proceeding at half speed, well in towards the New York shore of the river. She was an ocean steamer 230 feet long. Upon discovering the tugs and tow, she gave them a signal of one whistle. The Townsend immediately responded by a similar signal, ported her wheel, and went ahead at full speed. The Crosby stopped her engine. Notwithstanding the Townsend's efforts, she could not materially change the course of the tow, and when the vessels had approached to within a distance of three or four hundred yards of each other the tugs and tow had been carried by the tide well over towards the New York shore, the Townsend being only about 250 feet away from it. Owing to the proximity of Mason's reef, the available path open to the Portia between the Townsend and the shore was not more than 150 feet

wide. Thereupon the pilot of the Portia, fearing that his vessel would be crowded upon Mason's reef, if the courses of the vessels were not altered, changed the course of the Portia two points to port, and gave a signal of two whistles to the tugs and tow. The Crosby responded to the Portia's signal by a like signal, and put her engines full speed ahead. Notwithstanding, the movements of the tugs and tow were very sluggish, and they continued to drift with the tide practically as they had been doing before. Under the influence of her starboard helm, the Portia swung towards the Blackwell's Island shore, but, observing the sluggish movements of the tugs and tow, and believing that the Portia would strike one of the starboard vessels of the tow if she continued, the pilot ordered her engines reversed. This order was immediately obeyed, but by the time her headway in the water had been stopped the bow of the Portia had swung about a point to starboard. The Portia struck the outer starboard canal boat of the tow about 10 feet from the stern, and in consequence the canal boat sank.

By a statute of this state applicable to the waters of the East river, it was obligatory upon the Portia and the steam tugs, meeting as they were, to pass one another port to port by going on their respective starboard sides of the river. Although the tugs were embarrassed by a heavy tow, and were going with the swing of the tide, the Portia had no reason to apprehend, when she first discovered them, that they were incapable of controlling their own navigation. They were well on the easterly side of mid-river. The Portia was not only justified in giving her first signal of one whistle, but, under the rules of the board of supervising inspectors, she would have been remiss in duty if she had omitted to do so. If the tugs were unable to adhere to the ordinary statutory rule of passing port to port, they should have signified their dissent by a signal of two whistles. When the Portia's signal was assented to by the answering signal from the Townsend, the Portia had a right to assume, until the contrary became obvious, that the tugs could and would so control their movements as to allow her sufficient room to pass on their port hand. As the vessels approached each other the tugs steadily encroached upon the waters available to the Portia until the time came when the Portia had a right to believe that it was no longer safe for her to persist in the course agreed upon. Her path of available waters between the Townsend and the shore was about 150 feet wide, and by the time the intervening distance of three or four hundred yards between the vessels could be covered it was manifest that the Townsend, as she was then going, would have crossed this narrow path, and it would have been occupied by her tow. Under these circumstances it would have been manifestly imprudent for the Portia to have adhered to her original purpose of passing the tugs and tow port to port. It is entirely plain that this situation was brought about by the failure of the steam tugs to perform their obligations. Whether their failure to do so was because the masters of the two tugs were at cross purposes, as they apparently were when one stopped his engine and the other

ported his wheel and went ahead at full speed, or whether it was because the tugs were of insufficient capacity to manage their heavy tow under the conditions of the tide, is not material. It suffices that they were remiss. As a consequence of their remissness the Portia was placed in a hazardous emergency and the situation involved risk of collision. Inasmuch as the tugs and tow had been drifting across the path of the Portia during all the time when they should have been swinging to the starboard, it is not strange that the pilot of the Portia should have supposed that their movements could be readily accelerated in the direction they were drifting, if the pilots would make the endeavor. But the event proves that this was a misapprehension, and, although the pilots did what they could, the tugs and tow drifted with the tide, after the Portia changed her course to port and the tugs assented to that movement, practically as they did before. When the collision took place the Townsend was quite close to the docks on the New York shore, and the situation of the tow at that time proves that it would have been impossible for the Portia to have passed on the port side if she had kept on her original course, instead of changing it to port.

Notwithstanding all the extenuating circumstances, the Portia must be held in fault for the collision. When the situation had become so critical that she was obliged to deviate from the course which had been agreed upon between the vessels, it was her imperative duty under rule 18 to slacken speed, or, if necessary, stop and reverse, unless there were special circumstances rendering a departure from the rule necessary in order to avoid immediate danger. It is not claimed that there were any such special circumstances; and the Portia's course was changed to port because her pilot supposed he could pass the tow in safety on the tow's starboard side, especially if the tugs co-operated towards rendering that maneuver safe. The situation was not one in extremis, because the distance between the vessels was ample to enable the Portia to avoid collision by reversing, especially as she was moving against a strong tide. When, instead of obeying the rule of navigation by stopping or reversing, the Portia concluded to proceed by altering her course to port, she took that course at her own risk. Although she subsequently reversed, and did what was in her power to avoid collision, her fault in disobeying the rule was fatal. The fault on the part of the tugs, though gross and inexcusable, was not a proximate cause of the collision. An antecedent act of negligence is remote when, notwithstanding, the other vessel, by the exercise of ordinary care, can avoid a collision; and if, notwithstanding the fault of the tugs, the Portia could have avoided the collision by obeying the rule, which under the circumstances was imperative, she alone must be condemned.

The decree of the district court is affirmed, with costs.



## THE CARL KONOW.

## GORLEY v. THE CARL KONOW.

(District Court, E. D. Pennsylvania. December 17, 1894.)

No. 96.

## COLLISION—DRAGGING ANCHORS IN STORM.

During a storm, whose approach was plainly visible, the defendant vessel dragged her anchor, and came in collision with libellant's vessel, which was properly moored a safe distance away. The defendant vessel did not put out a second anchor until after the storm had increased to a hurricane, and after such anchor was put out she did not continue to drift. *Held*, that she was solely liable for the collision.

This was a libel by William Gorley, master of the steamship San Domingo, against the steamship Carl Konow, for a collision.

Convers & Kirlin, for libellant.

John Q. Lane, for respondent.

BUTLER, District Judge. While the respondent was at anchor in the Delaware river off Kaighn's Point near Philadelphia, August 22, 1893, the libellant anchored a safe distance from her, 1,000 feet probably astern and considerably nearer the Pennsylvania shore. On the 24th the respondent, having a single anchor out, drifted downward some distance, and two days later returned to or near her former position. In the night of the 28th an unusual storm arose during which she drifted upward, within reach of the libellant, where she swung about, doing considerable injury to the latter.

Is she responsible for the injury? The case presents no question of law or seamanship. Having collided with the libellant the respondent is presumably liable for the injury inflicted. To the claim she answers that the collision was inevitable—the unavoidable consequence of the storm; that she took all proper measures to guard against it ineffectually. This the libellant denies, charging failure to make proper use of her anchors, asserting that but one was down until after the drifting had occurred. If this is true she is responsible. The danger was apparent for hours previously; the approach of the storm was plainly visible, and should have been provided for. If both anchors were not down before the vessel commenced drifting she was clearly in fault. If they were down, her alleged case of inevitable accident is made out. Thus the inquiry is reduced to this narrow point, and so the parties have presented it. Was the second anchor down before the drifting occurred? I am satisfied it was not. As usual in such cases the testimony is conflicting, but its weight is with the libellant. A discussion of the subject would be little more than a contrast of what is said on one side, with what is said on the other. It is clear that this anchor was dropped some time after the storm arose; at what particular period is uncertain. But it is certain that when dropped

the anchor held, and the vessel drifted none subsequently. On the respondent's brief, at page 7, this is conceded: "All admit she did not drift afterwards." It follows necessarily that she drifted before, (otherwise she could not have collided with the libellant,) and that therefore the anchor was not down in time. Had it been it would have held her where she originally lay, as it held her at the point to which she drifted. The respondent's master plainly admits that this anchor was not down before the drifting occurred.

"When the storm had increased to a hurricane, what did you do? I let the anchor go."

"Q. After you had both anchors out, how did the ship ride? Did she drift any?"

"A. No."

"xQ. When you dropped your second anchor were the steamers in the same relative position as they are marked on the diagram referred to, (positions before storm)."

"A. No, it could not be."

"xQ. Had the Carl Konow at that time gone astern of the San Domingo?"

"A. No, sir."

"xQ. What change had taken place in their relative positions?"

"A. Carl Konow was coming a little more astern, but not astern of the San Domingo?"

"xQ. Where was her bow as compared with the bow of the San Domingo? How many points aft or forward after you had paid out the first time?"

"A. The Carl Konow's bow was about amidships of the San Domingo."

It is true he says in chief "when the wind commenced to blow" he let the anchor go. This is evidently not accurate. The wind commenced to blow hours before, when it is plain the anchor had not been put down. What he meant, doubtless, to say is that he let it go when the wind commenced to blow a hurricane, or very hard. It is probable from what appears that he then commenced preparation to put it down. But as is evident he did not get it down until the vessel had moved back. The libellant's witnesses testify positively to seeing the anchor put down after the drifting had occurred.

The respondent's theory that the vessels came together without either leaving its original anchorage—by swinging in opposite directions at the same time under the same wind—seems impossible, and is disproved by the evidence that the respondent did drift, and thus reached the libellant.

Question was suggested whether the libellant should not have put out more chain after the respondent drifted back, but I see nothing in the suggestion: the libellant appears to have been blameless. The libel must therefore be sustained.

## WOOD et al. v. PERKINS.

(Circuit Court, D. Massachusetts. December 21, 1894.)

No. 353.

## TRUSTS—LACHES.

Plaintiffs, in 1872, conveyed to defendant certain lands, to be put by him into a pool, in exchange for shares of stock of the pool, under the terms of a contract or declaration of trust partly written and partly oral. In 1893 plaintiffs filed their bill, alleging that defendant had put such lands into the pool, but had never paid over the money received by him for the same to the plaintiffs, and held such money as trustee for them, and had fraudulently concealed the fact of his receipt thereof. The evidence was conflicting as to whether certain payments in cash had been made to the plaintiffs, and whether certain orders upon a third party had been accepted by them as cash; but it appeared that one of the plaintiffs, who were joint owners, seasonably knew all that was essential to plaintiffs' rights, whatever they were, and that such orders, if delivered, had been retained so long as materially to diminish their value to defendant. *Held* that, under these circumstances, plaintiffs' delay in bringing suit amounted to laches, and their bill should be dismissed.

This was a suit by Alvinus B. Wood and others against Thomas H. Perkins to establish a trust. A demurrer to the bill was overruled. 57 Fed. 258. Defendant answered and the cause was heard on bill, answer, and proofs.

Henry S. Dewey, for complainants.

Francis Peabody, Jr., for defendant.

PUTNAM, Circuit Judge. By the opinion passed down August 22, 1893, this court, on demurrer, determined the point of laches against the defendant; but now, on opening the record on bill, answer, and proofs, the same point has an essentially new aspect. The allegations of the bill make a case against the defendant as trustee of certain lands of the plaintiffs, to be put by him into a pool in exchange for four shares, of the par value of \$3,000 each, of the stock of the pool, which became known as the Perkins Silver Land Pool, and \$1,500 in cash. The bill rests for this on a written contract, accompanied with a verbal agreement, necessary to the case and supplementing the written matter. The transaction occurred in 1872, and the bill was filed in 1893. That opinion said, concerning the defense by laches, as follows:

"On the face of the bill, there is a complete answer to this defense, even if it could bring to its support the express language of the statutes of limitation, because the act charged against the respondent was a clear breach of trust, a fraud in equity, and, as the correspondence shows, was industriously, and therefore fraudulently, concealed. With reference to the defense of laches, which is the proper form of defense with regard to a claim of this character, the concealment of the respondent's breach of trust, already referred to, is an ample answer. Another answer is found in the fact that in his letter of March 9, 1889, set out in the bill, he fully recognized the trust by stating therein that he had no objection to reconveying, and taking up the receipt which he gave, although he again industriously concealed the fact that he had already obtained a consideration for the interests intrusted to him. In no view of the case can the rule be invoked that interested parties are sometimes put on inquiry touching a breach of trust, or quasi trust, even though they have no actual knowledge of the facts, because the lack of in-

quilty in this case has not resulted to the detriment of the respondent. There has been no changed condition of circumstances, such as form a frequent basis for the application of the rule of laches, as, for example, in *Johnston v. Mining Co.*, 148 U. S. 360, 13 Sup. Ct. 585, as the entire controversy relates to money received into the possession of the respondent, and there ever afterwards retained."

The allegations in the bill setting out the plaintiffs' case—that is, the stating parts—would have left it demurrable for laches. Thereupon the plaintiffs inserted the charges found in the seventh paragraph, stating, among other things, that the plaintiffs "had no personal knowledge as to the formation of the contemplated pool," which the opinion of August 22d necessarily assumed to be true, and which saved the bill at the hearing on demurrer. These charges were specifically denied in the answer. The denial was relied on at the hearing on bill, answer, and proofs; and in the opinion of the court the charges referred to were not proven, and we are again compelled to meet the defense of laches. For convenience, we will use the word "plaintiffs" in describing the original transactions, although plaintiff Palmer came in subsequently by assignment to him.

In the light of the events supplied by the proofs in the present record, the correspondence referred to, especially the defendant's letter of March 9, 1889, does not bear out the expressions cited from the former opinion; and the case as now made shows that, while the defendant may have departed from the precise terms of the trust in a particular referred to hereafter, he was not guilty of concealment or fraud. It appears, as alleged in the bill, that other persons than the plaintiffs, operating also through the defendant, put other lands into the same pool, to be paid for in cash, or other shares of the same stock; that plaintiff Wood represented these other lands; that all the lands, including the plaintiffs', were computed at 5,228½ acres; that subscriptions were made for 20 shares, amounting to \$60,000, for some of which subscriptions the defendant received payment in cash; that the defendant claims he had the option to pay in cash for the lands put in by the plaintiffs; and that in 1872 plaintiff Wood gave the defendant the receipt, of which the following is a copy:

"Boston, April 23rd, '72.

"Received of Thomas H. Perkins, trustee, forty-three thousand five hundred dollars, being in full payment account purchase of 5,228½ acres land on north shore, Lake Superior, being property of the Perkins Land Association. Corresponding with the deeds.  
A. B. Wood."

Plaintiff Wood testifies that in exchange for this receipt the defendant paid him only \$28,500 in cash, of which only \$4,500 was for the plaintiffs' land, including the \$1,500 referred to, and the balance of \$24,000 was for the other lands which he (Wood) represented, and that the deficiency of \$15,000 has never been paid to him, in any form. This directly contradicts the bill in a serious particular, because the bill alleges positively that no payment whatever had been made on account of the four shares, and that none of them had been procured for the plaintiffs, or turned over to them. It is

true the bill was signed in behalf of Wood by his solicitor, but it was signed and sworn to by Carlisle. As no explanation of the discrepancy is given, it is to be presumed that Carlisle had not been advised by Wood of the facts in this particular, although he afterwards stated them in his deposition in a perfunctory manner; also, plaintiff Palmer testifies that he did not know them before the bill was filed. Defendant testifies that the balance of \$15,000 was paid by him to Wood in five receipts of \$3,000 each, in the name of William H. Stevens. Mr. Stevens was a subscriber for five shares in the Perkins Silver Land Pool, and, according to defendant's balance sheet with the pool, had not paid him for them, and there is no evidence otherwise. The receipts for such subscriptions were in the following form:

"Received of ——— three thousand dollars as a part of purchase 5,228½ acres land No. shore, Lake Superior.  
 "Boston, Apr. 22d, 1872.  
 T. H. Perkins, Trustee.  
 "\$3,000.00."

The effect of the defendant's testimony is that for this balance he delivered Wood receipts in that form, covering five shares, operating in substance as an order on Stevens in favor of Wood for \$15,000, and that Wood accepted these as cash. The defendant, in his sworn answer, admits that he received payment for plaintiffs' lands, and asserts that he paid for the same to Wood. Both the admission and the assertion are strictly responsive to the allegations of the bill. Against this, Wood testifies that the cash received by him in excess of \$4,500 was in payment for the other lands referred to, but this stands wholly on his unsupported evidence. Wood now admits that he received in cash for himself and for his coplaintiffs \$4,500, of which only \$1,500 was reported to his associates; so that, although it is not necessary to charge him with intended fraud, yet this dereliction or omission was serious enough to prevent our accepting his unsupported testimony as sufficient, either on the question of the delivery to him of the Stevens receipts, or on that of the application of payments. It is apparent that the defendant also has fallen into errors of statement in his attempts to explain these transactions. The plaintiffs set up a joint interest, and indeed Wood testifies that the lands were owned jointly. But more than 20 years before the bill was filed he knew all the facts necessary to enable the plaintiffs to assert their rights, and also, in behalf of all of them, made, as already explained, a settlement with the defendant, in whole or in part, the details and effect of which the bill states with an essential error, and, in connection with the settlement, Wood gave him what is, on its face, a full and formal written acquittance. If the receipts to Stevens were in fact turned over, in any part, on plaintiffs' account, Wood should have promptly returned them, if not cashed by Stevens; and the retention of them by Wood, if delivered to him, must have materially diminished their value to defendant many years ago. Thus we have long lapse of time, loss of an accurate knowledge of material facts, serious difficulties in the way of weighing the proof accurately, and, for aught that can be plainly seen to the contrary, a changed condition,

seriously detrimental to defendant, if the bill is sustained. In all respects the case is a just one for the application of the equitable doctrine of laches. As, however, defendant's letters undoubtedly caused plaintiff Palmer to misconstrue his rights, and thus induced the filing of this bill, defendant is not equitably entitled to costs, even though his errors were unintentional, as will be further explained hereafter.

Some additional observations are necessary to make it apparent that we have considered the case in all its phases: The allegation in the answer that defendant was given the option to pay plaintiffs in cash is directly responsive to the bill, and is not necessarily contradicted by the written contract between the parties, because the bill itself alleges that this did not constitute the entire arrangement; and it is in harmony with the payment, which Wood now admits was made by defendant, of \$3,000 for one share. It is also in harmony with the terms of the receipt of April 23, 1872. The explanation which Wood attempts to give for executing a receipt in full, in advance of settlement, is not sufficiently detailed or supported by explanation to weigh against the effect of the receipt itself, and the testimony of the defendant. Some of the letters written by the defendant to Palmer and Carlisle are not on their face consistent with a claim that he had purchased all the plaintiffs' shares. He alleges in his answer that he received \$3,000 for each of the plaintiffs' shares, and paid the same to them; yet he afterwards corresponds with at least two of them as though they were still interested. This is perhaps explained by the letter of April 3, 1874, which will be alluded to in another connection.

We are strenuously pressed with the fact that the defendant's answer states that he received \$3,000 for each of the plaintiffs' shares, and paid the same to them, and that Wood testifies that only \$4,500 of the cash paid him was on account of their lands. We have already referred to the fact that plaintiffs' claim as to the application of payments depends wholly on Wood's evidence. We may also add that the answer does not state that these transactions were in actual cash, and that it is not necessarily inconsistent with the hypothesis that both defendant and Wood treated the receipts as cash, as such papers are capable of being used, and are in fact frequently used, in a qualified way. But we do not find ourselves required to solve these inconsistencies, or other such difficulties. They impress us with an increased sense of the practical wisdom involved in the equitable rules touching laches. It is true that according to the ordinary rule, if the plaintiffs inquired of the defendant, or had a right to rely on him, and were misled in consequence, they would not necessarily be guilty of laches. *Loring v. Palmer*, 118 U. S. 321, 345, 6 Sup. Ct. 1073. It is also true that errors of statements in some of the defendant's letters might well have led some of the plaintiffs, especially Palmer, into misunderstandings; and if all the plaintiffs had been in ignorance of the facts the defendant might not be relieved, even though he also honestly misunderstood. But Wood seasonably knew all that was essential to plaintiffs' rights, as has been already said. Not only

was there the receipt of April 23, 1872, but May 5, 1872, in reply to Wood's letter of May 3d, defendant wrote him a detailed description of the declaration of trust under which the pool lands were held, which, it is apparent from the correspondence, Wood then understood had been completed. This letter Wood acknowledged May 13, 1872; so that at that date Wood knew that the defendant's obligation to deliver the stock under the agreement with the plaintiffs, set up in the bill, had matured, and that the plaintiffs had then a legal right to enforce that obligation, unless Wood had discharged it, in whole or in part, by the transactions and receipt of April 23d. Moreover, the defendant's letter to plaintiff Carlisle, of April 13, 1874, put into the case by plaintiffs, leads to the belief that Carlisle also understood the situation. This letter, after referring to Mr. Stevens, and the shares he had agreed to take, says:

"My understanding was that the shares which were taken were to be accounted to the parties he represented as so much cash, but I judge from the inquiries made by those parties of me that his idea was not precisely the same."

This confirms the defendant's testimony that he made up the balance of \$15,000 in receipts running to Stevens, and also that he understood that it was to be determined between the parties directly in interest whether Stevens would settle for the receipts with the persons to whom they belonged, whoever they might be, in cash or in stock. It also explains why in some of his letters, especially that of March 9, 1889, he might be led to assume that some at least of the plaintiffs were shareholders, or rather holders of receipts entitling them to stock, of the form we have described. However, the state of facts is clear as to Wood. As we have already said, the other plaintiffs had a joint interest with him; they have seen fit to make him a party plaintiff in the bill, and their rights under it can rise no higher than his. Nothing in our conclusions is intended to prejudice any right, if any there is, which the plaintiffs may have in the lands themselves, either separately or with others, or to an accounting as legal or equitable shareholders, if such they are. Bill dismissed, without cost to either party.

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PIDCOCK v. HARRINGTON et al.

(Circuit Court, S. D. New York. December 20, 1894.)

MONOPOLIES—SUIT BY PRIVATE INDIVIDUAL.

The act "to protect trade and commerce against unlawful restraints and monopolies" (Act Cong. July 2, 1890) confers no right upon a private individual to sue in equity for the restraint of the acts forbidden by such statute, an action at law for damages being the only remedy provided for private persons, and the right to bring suits in equity being vested in the district attorneys of the United States.

This was a suit by John F. Pidcock against Dennis Harrington and others for an injunction and accounting. Defendants demurred to the bill.

This is a suit in equity against the above-named defendant, and a number of others, praying for an injunction and an accounting on the ground that the defendants have conspired to ruin complainant's business as a commission merchant and dealer in live stock. The bill alleges that the defendants have ceased dealing with the complainant and have threatened to cease dealing with people who deal with him. The action is founded upon the act of congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209).

William F. Randel, for complainant.

Edward C. Boardman, for defendants.

COXE, District Judge. At the argument the counsel for the complainant was asked whether he sought to maintain this action under the general equity principles of the common law or under the provisions of the act of July 2, 1890. He answered that it was founded solely upon the statute. It is unnecessary, therefore, to discuss the proposition whether or not the action can be maintained independently of the statute. The demurrer challenges the jurisdiction of this court to maintain, under the act in question, a bill in equity filed by a private individual and his solicitor. It is clear that the right to maintain such a suit is not expressly conferred by the act. Indeed, such right is, by implication, denied—First, because a private person is given (section 7) the right to maintain an action at law; and, second, the district attorneys of the United States, under the direction of the attorney general (section 4), are charged with the duty of commencing suits in equity. If it were the intention of the law-makers to vest in every irresponsible individual, who may deem himself aggrieved, the right to invoke the drastic and far-reaching remedies conferred by the act, is it not reasonable to suppose that they would have said so in unambiguous terms? The first three sections are penal statutes. They give no civil remedy. Section 4 vests the right to institute proceedings in equity in the district attorneys of the United States, and, together with section 5, prescribes the procedure in such suits. Section 6 provides for the seizure and forfeiture to the United States of property illegally owned under the provisions of the act. So far, then, the act is a public act providing no private remedy. If it ended with section 6 there would probably be no pretense that it sanctioned a suit like the one at bar. What follows, however, in no way strengthens the complainant's position. The only section which gives a private remedy is the seventh, which is as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

But for this section no private person would have any standing in court, and as the only right conferred by it is the right to sue for damages in a court of law, it follows that the point presented by the demurrer is well founded. The precise question was decided in favor of the views here expressed in *Blindell v. Hagan*, 54 Fed. 40, affirmed 56 Fed. 696, 6 C. C. A. 86. The demurrer is allowed.



## CLEVELAND, C., C. &amp; ST. L. RY. CO. v. TARTT.

(Circuit Court of Appeals, Seventh Circuit. December 14, 1894.)

No. 129.

## 1. DEATH BY WRONGFUL ACT—PLEADING—NEGLIGENCE.

In an action for death by wrongful act, an allegation that the deceased was killed by reason of defendant's "gross and reckless and wanton negligence" does not amount to a charge that the killing was willfully done.

## 2. RAILROAD COMPANIES—INJURIES TO PERSONS ON TRACK—LICENSE.

One who is killed by a train while walking along the track for his own convenience without any invitation from the railroad company, although it has permitted others to walk along it, is at most a mere licensee, for whose death no recovery can be had unless it was caused willfully, or by negligence so gross as to imply willfulness.

## 3. EVIDENCE—ORDINANCE—PROOF OF PUBLICATION.

Under Starr & C. Ann. St. Ill. c. 24, § 66, which declares that "all ordinances and the date of publication thereof may be proven by the certificate of the clerk under the corporation seal," a copy of an ordinance so certified to is admissible in evidence without proof of its publication. *Lindsay v. City of Chicago*, 3 N. E. 443, 115 Ill. 120, followed.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

Action on the case by James T. Tartt, administrator of the estate of Jesse H. Phillips, Sr., against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company for causing the death of said Phillips. Plaintiff obtained judgment. Defendant brings error.

On July 7, 1891, the deceased, Jesse H. Phillips, Sr., the plaintiff's intestate, was killed by a collision with a train of the appellant (the defendant below) in the village of Venice, in the state of Illinois. The declaration, consisting of a single count, charges, in substance, that the defendant, on July 7, 1891, at a point within the incorporated village of Venice, killed the plaintiff's intestate, and avers that at the time of the collision, and immediately before his death, the deceased was on defendant's track, exercising all due care and diligence in seeking to rescue his minor son, aged eight years, who was in imminent peril from said train and engine, and that while exercising due care and diligence in that behalf he was killed; that there was in force in the village of Venice an ordinance by which it was provided that railroads should not run engines or trains within its limits at a greater rate of speed than 10 miles an hour; that, at the time of the killing of the deceased, the defendant's servants were running the engine and train at a rate of speed in excess of 10 miles an hour, to wit, at the speed of 60 miles an hour or thereabouts, in violation of said ordinance; that defendant's servants in charge of said engine and train saw the child upon the tracks in time to have enabled them, by the exercise of slight care, to have reduced the speed and averted the danger, "yet with gross and reckless and wanton negligence" they failed and neglected to reduce the speed until the collision occurred, and "with said gross and wanton negligence" they failed to give any signal or warning of the approach of said train, and that by reason of "said gross and wanton negligence" the deceased was killed; that the deceased left surviving him a widow and two minor children, who have suffered damage in the sum of \$5,000. The pleas were the general issue, and that the deceased came to his death by his own negligence, to which latter plea there was a replication in denial.

The deceased had lived for about two months in a house located close to the railroad tracks. Every morning many trains passed his house, to and through the village of Venice, at a rapid rate of speed. The train which came into collision with him passed on the same track every morning at

substantially the same rate of speed as on the morning of the fatal accident. The decedent either knew or was chargeable with knowledge of these facts. In going from his home to the village of Venice, the deceased could take the wagon road, a public highway which passed near his house and led directly into the village, running parallel with and immediately adjoining the railway, or he could take the railroad track or right of way. He took his son, aged eight years, and started to walk down the railroad, and on its right of way, to the village of Venice, distant about one mile from his home. He was killed at a point about 2,400 feet distant from his house. The defendant's track was straight and level for a distance of about 2,400 feet from the point where the injury occurred in the direction from which the train was coming, and a person on the track at that place could have been seen for that distance before the train reached him. Neither Phillips nor his son was seen by the engineer or fireman until the train was under the Merchants' bridge, distant from the point of collision only 785 feet; that, when seen, the deceased was walking along the east side of the track, and his son was walking between the rails, a few steps behind the father. They were going in the same direction as the train, and did not appear to be giving any attention to avoid danger from approaching trains. As soon as they were seen, the danger signal was sounded, and the emergency air brakes applied, but the speed of the train was so great, being from 50 to 60 miles an hour, that it did not stop until it had reached a point some 1,700 feet beyond the point of collision. The decedent did not seem to have had any apprehension of the approach of the train until the danger signal was sounded, when he sprang to the rescue of his son, and, crossing the track from east to west, he caught the lad in his arms, and sought to carry him out of danger, but before he got off the track he was struck by the engine, and both were killed. The point of collision was 2,390 feet from the house of the deceased. On the trial of the cause, to support the issues on his behalf, the plaintiff offered in evidence a copy of an ordinance of the village of Venice prohibiting the running of trains through that village at a greater rate of speed than 10 miles an hour. A certificate was attached thereto, which, so far as material, reads thus: "I, A. L. Summers, hereby certify that the annexed and foregoing is a true copy of Ordinance No. 32 of the village of Venice, passed July 7, 1877, and duly published according to law." The defendant objected to the introduction of the copy of the ordinance in evidence on the ground that it did not appear that it had been published in any of the modes prescribed by law. The objection was overruled, and the copy read in evidence over the objection and exception of the defendant. The plaintiff also offered in evidence a copy of the ordinance in question, contained in a pamphlet copy of ordinances, whose sole authentication was as follows: "Ordinances Adopted by the Board of Trustees of the Village of Venice, in Madison County and State of Illinois, John Haps, Printer, 1884,"—which authentication was printed on the cover of said pamphlet. The defendant objected to the admission of the printed copy of the ordinance in evidence on the ground that it did not purport to be published by authority of the board of trustees of said village. The objection was overruled, and the copy of the ordinance was read in evidence, to which the defendant saved an exception. The court, after stating the material averments of the declaration, charged the jury as follows: "The burden of establishing the negligence imputed in the declaration to the defendant, or such portion of it as constitutes a cause of action or creates a liability against the defendant by the weight or preponderance of the evidence, rests on the plaintiff; and, if the evidence is equally balanced on this point, you should find the defendant not guilty. The plaintiff's intestate was bound under the law, in order to warrant recovery, while on or dangerously near defendant's track, to exercise due care and caution, such as the dangerous position in which he found himself would naturally and reasonably have suggested. If, however, the weight or preponderance of the evidence in this case shows that the deceased father was struck and killed while attempting to rescue his child from danger of the approaching train, the railroad company would be liable if it was guilty of negligence with respect to the child before the father attempted the rescue, or with

respect to the father and child after an attempt to save the child began, although the father might have been guilty of contributory negligence in permitting the child to go on the track. If the evidence shows that at the time of the accident the defendant's engine and train of cars were running through the incorporated village of Venice at a greater rate of speed than ten miles per hour, and, while running at such excess of speed within said incorporated village, struck and killed plaintiff's intestate, from such act of excessive speed, the jury may presume negligence on the part of the defendant. But this act of negligence on the part of the defendant, if proven, would not absolve the deceased from using due care under all the circumstances surrounding him at the time; but the rule of law ordinarily obtaining (that, if the immediate cause of the injury can be traced to want of ordinary care and caution in the parties injured, there can be no recovery) must be taken subject to the qualification that contributory negligence on the part of the injured will not defeat the action, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured parties' negligence,"—to the giving of which charge to the jury, and each and every part of the same, the defendant, by its counsel, then and there excepted. The defendant seasonably presented to the court 15 written instructions, and asked the court to give them in charge to the jury. The court refused to give any one of said instructions, and the defendant duly excepted. Such of these instructions as are deemed material to the determination of this cause will be referred to in the opinion of the court. Some other subordinate questions are presented, but their consideration is unimportant, in the view which we take of the case.

John T. Dye and George F. McNulty, for plaintiff in error.

Amos R. Taylor and William L. Murfree, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

After making the foregoing statement, the opinion of the court was delivered by BAKER, District Judge:

The declaration, the course pursued on the trial, and the charge of the court place the right of recovery on the ground of negligence in one or all of the following particulars, namely: (1) In running the engine and train of cars through the village of Venice at a rate of speed in excess of 10 miles an hour, in violation of an ordinance; (2) or in failing to give timely warning of the approaching train; (3) or in failing to use care and diligence to stop the train before the fatal collision occurred. The case was not tried on the theory that the plaintiff's intestate was purposely and intentionally killed by the employés of the defendant in charge of the train. The declaration sounds in tort for the negligent, and not for the intentional, killing of the decedent. It is true that it charges that the engineer and fireman saw the boy on the railroad track in time to have enabled them to reduce the speed of the train, and thus to have averted the danger, and that "with gross and reckless and wanton negligence" they failed to do so, and that by reason of "said gross and wanton negligence" the decedent was killed. The gravamen of the charge, however, is negligence, and nothing is added to its force by the vituperative adjectives employed to characterize the degree or kind of negligence. The words "gross," "reckless," and "wanton," do not imply the same thing as "willful" or "intentional." These terms have been used in some cases as though they might import something more than negligence, and

were the equivalent of willfulness. In the better considered cases, however, these terms have been held to mean less than willfulness, and nothing more than negligence. Negligence is negative in its nature, implying the omission of duty, and excludes the idea of willfulness. Willful or intentional injury implies positive and aggressive conduct, and not the mere negligent omission of duty. The charge of negligence does not, *ex vi termini*, import any actual or implied intention to do harm. *Railroad Co. v. Huffman*, 28 Ind. 287; *Railroad Co. v. Graham*, 95 Ind. 286; *Ivens v. Railway Co.*, 103 Ind. 27, 2 N. E. 134; *Railway Co. v. Schmidt*, 106 Ind. 73, 5 N. E. 684. "To say that an injury resulted from the negligent and willful conduct of another is to affirm that the same act is the result of two exactly opposite mental conditions. It is to affirm in one breath that an act was done through inattention, thoughtlessly, heedlessly, and at the same time purposely and by design." *Railway Co. v. Bryan*, 107 Ind. 51, 7 N. E. 807; *Beach, Contrib. Neg.* 67, 68; *Palmer v. Railroad Co.*, 112 Ind. 250, 14 N. E. 70. The railroad company has no right to inflict willful and intentional injury upon persons who are unlawfully on its right of way; and, where human life and limb are concerned, that injury may well be considered willful when, although able to do so, its servants neglect to arrest the engine and train which they have good reason to believe will, without an effort to stop them, result in injury to the wrongdoer. A trespasser is not necessarily an outlaw, whose life may be willfully destroyed. The declaration, however, as already stated, counts upon negligence, and not upon willfulness as the ground of action, and it is not necessary to express an opinion whether or not, upon the facts disclosed in the record, an action could be maintained for the willful killing of the decedent. The case made by the declaration is for negligence alone. It was tried by the parties, and submitted by the court to the jury, on this theory alone.

The decedent, accompanied by his son, was, when killed, walking on or dangerously near to the track of the company. He was not on or near any high way or street crossing. He was traveling along the right of way for his own convenience, without any invitation, express or implied, and with knowledge of the danger to life and limb from passing trains. It is true that he was killed while attempting to rescue his son from impending peril, but he had, by his own voluntary act, brought his son into a situation of danger, which gave rise to the peril. The only excuse offered for such conduct was that the defendant had suffered other people to travel along its right of way without interference or objection. He was traveling upon the defendant's right of way, not for any purpose of business connected with the railroad, but for his own convenience, as a footway, in reaching the village of Venice. The right of way was the exclusive property of the defendant, upon which no unauthorized person had the right to be for any purpose. It was a place of known danger, and there was nothing to exempt the decedent from the character of a wrongdoer and trespasser in traveling along the right of way further than the implied consent

of the defendant arising from its failure to interfere with the previous like practice by others. But because the defendant did not enforce its rights, and warn people off its premises, no right was thereby acquired to use its roadbed as a place for public travel. At most, it was used by sufferance, which amounted to no more than a mere naked license, and imposed no obligation on the part of the owner to provide against the danger of accident. The person who used the right of way for his convenience went there at his own risk, and enjoyed the implied license with its attendant perils. *Elevator Co. v. Lippert*, 18 U. S. App. —, 11 C. C. A. —, 63 Fed. 942. The decedent, then, stood in no more favorable position than that of a wrongdoer or trespasser. He was at the time of the accident in the exercise of no legal right, and at most was in the enjoyment of a naked license implied from the previous use of the right of way by others; and the rights and obligations of the decedent and the company are to be measured as in the case of parties thus situated. Where both parties are equally in the position of right which is enjoyed by each independently of the other, the plaintiff is only bound to show that the injury was occasioned by the negligence of the defendant, and that he exercised ordinary care to avoid it. But where the plaintiff is a wrongdoer or trespasser, or is in the enjoyment of a naked license for his own convenience, without any invitation, express or implied, from the owner of the premises, he cannot maintain an action for an injury without averring and proving that the injury was willfully inflicted, or that it was caused by negligence so gross as to authorize the inference of willfulness. As he was a trespasser, no action will lie against the company for causing his death unless the act of its employes in charge of the train was willful. A trespasser cannot maintain an action where the tort complained of consists of nothing more than the omission to exercise care. *Railroad Co. v. Graham*, 95 Ind. 286; *Pennsylvania Co. v. Sinclair*, 62 Ind. 301; *Palmer v. Railroad Co.*, 112 Ind. 250, 14 N. E. 70; *Beach*, Contrib. Neg. (2d Ed.) §§ 198-201, 203. In the case of *Railroad Co. v. Godfrey*, 71 Ill. 500, it is held that the right of way of a railroad company is its exclusive property, upon which no unauthorized person has a right to be for any purpose, and that any one who travels upon it for his own convenience is a wrongdoer and trespasser; that the mere acquiescence of the company in the use of its right of way by persons passing along it for the purposes of travel does not give such persons a right of way over the track, nor is the company bound to protect or provide safeguards for persons so using it; and that a person so traveling along the right of way, where he is liable to come in collision with a passing train, is guilty of gross negligence, and he cannot maintain an action for an injury received while so traveling without averring and proving that the injury was willfully or wantonly inflicted, or that the negligence of the company was so gross as to justify the inference of willfulness. In the case of *Railroad Co. v. Hetherington*, 83 Ill. 510, it is held that, where an ordinance of a city prohibits railway companies from running their trains in the city at a greater rate of speed than six

miles an hour, the running of a train at the rate of fifteen miles an hour, resulting in the death of one wrongfully upon the track, will not make the injury willful on the part of the company. In the case of *Blanchard v. Railway Co.*, 126 Ill. 416, 18 N. E. 799, it is held that, where a person is killed by an engine or train while wrongfully on a railway track,—as, where he is walking thereon for mere convenience or pleasure, not at a public crossing,—he is guilty of such gross negligence as to preclude a recovery by his personal representative against the company operating the engine or train, unless his death is caused willfully or wantonly, or the company is chargeable with such gross negligence as is evidence of willfulness. The case of *Railroad Co. v. Mehlsack*, 131 Ill. 61, 22 N. E. 812, affirms the same doctrine. In *Johnson v. Railroad Co.*, 125 Mass. 75, it is held that a person injured while trespassing on a railroad track, by coming in collision with a train, is guilty of negligence which, as matter of law, will preclude his maintaining an action therefor unless the injury was willfully inflicted. This doctrine is affirmed by the same court in cases too numerous to justify citation. Such is the settled law in other jurisdictions. *Railroad Co. v. Munger*, 5 Denio, 255; *Chrystal v. Railroad Co.*, 105 N. Y. 164, 11 N. E. 380; *Cusick v. Adams*, 115 N. Y. 55, 59, 21 N. E. 673; *Heil v. Glanding*, 42 Pa. St. 493; *Gillis v. Railroad Co.*, 59 Pa. St. 129; *Railroad Co. v. Filbern*, 6 Bush, 574; *Canal Co. v. Murphy*, 9 Bush, 522; *Railroad Co. v. Depew*, 40 Ohio St. 121; *Railroad Co. v. Houston*, 95 U. S. 697.

Nor is the plaintiff's intestate entitled to recover because he was killed while attempting to rescue his son. He and his son were trespassers and wrongdoers at the time the fatal collision occurred. The decedent voluntarily, for his own convenience, exposed his son to the peril from which he attempted to rescue him. If he had been where he had a right to be, and if he had not been chargeable with exposing his son to peril, his attempt to rescue him would not have constituted such an act of negligence on his part as to preclude a recovery for an injury caused by the negligence of the railroad company.

While the charge of the court is erroneous, we would not be justified in reversing the case for that reason, because no proper exception was reserved. *Association v. Lyman*, 9 C. C. A. 104, 60 Fed. 498. The appellant asked the court to direct the jury to return a verdict in its favor, which direction ought to have been, but was not given. The appellant also asked the court to instruct the jury, in substance, that if they believed from the evidence that the deceased, for his own convenience and that of his son, at or before the time he was struck, was walking along the track, he was not a lawful traveler thereon, and had no right there, and that the railroad company was under no obligation to give him or his son the right of way over its track in preference to its trains; "and if the deceased, at and before he was struck, was walking with his son on or near the track, and in consequence of so walking along the track his son was placed in danger, and he tried to rescue him, and was hit, you must find for the defendant unless the injury was

willfully inflicted." This instruction enunciated a proposition of law in harmony with the views expressed in this opinion, and it ought to have been given. There are other instructions which were tendered and refused, but it is not needful to determine their accuracy, because the case was tried on a wrong theory, and, if a retrial should be had, other principles of law will govern the case on such retrial.

It is insisted that there was a fatal variance between the averments of the declaration and the proof in this: that it is alleged that the plaintiff brought suit as a public administrator, while the proof shows that he was a private administrator. It is not necessary to consider this question, for the reason that, if another trial is had, it will be necessary to amend the declaration, and the alleged error may be cured by amendment.

It is earnestly insisted by counsel for the appellant that the court erred in admitting in evidence a certified copy of Ordinance No. 32 of the village of Venice, which prohibited the running of railroad trains through the village at a rate of speed in excess of 10 miles an hour. The copy of the ordinance was certified by the village clerk, under the corporate seal, as a true copy of Ordinance No. 32 of the village of Venice, passed July 7, 1877, and duly published according to law. The introduction of the copy of the ordinance was objected to on the ground that it did not appear that it had been published in any one of the modes required by law, and that the statement of the clerk that it had been "duly published according to law" was a conclusion, and not a statement of fact. It is conceded by the appellee that it is necessary to show the passage and publication of the ordinance in the manner prescribed by the statute of the state, to give it effect as a local law. It is also conceded that the clerk, as the custodian of the village records, could not certify to anything but copies of such records, and that his certificate to any conclusion, either from the records or outside of them, is beyond his power and unauthorized, unless his common-law authority has been enlarged by the statute. It is insisted that the statute, as construed by the decisions of the supreme court of the state of Illinois, has wrought such change. The statute touching this matter is as follows:

"All ordinances, and the date of publication thereof, may be proven by the certificate of the clerk, under the corporation seal. And when printed in book or pamphlet form, and purporting to be published by authority of the board of trustees, or the city council, the same need not be otherwise published; and such book or pamphlet shall be received as evidence of the passage and legal publication of such ordinances, as of the dates mentioned in such book or pamphlet in all courts and places, without further proof." 1 Starr & C. Ann. St. p. 474, c. 24, § 66.

In the absence of authority, we might have reached the conclusion that, to authorize a certified copy of an ordinance to be read in evidence, the clerk's certificate should have stated that the copy was a true and complete one, and also it should have stated the date of its publication; and that the statement that it was "duly published according to law" was the statement of a mere conclu-

sion, and ineffective for any purpose. It is, however, held by the supreme court of Illinois that a certified copy of an ordinance, under the seal of the corporation, with nothing further, is evidence of its passage and legal publication. In *Lindsay v. City of Chicago*, 115 Ill. 120, 123, 3 N. E. 443, the court say:

"It is too plain to admit of argument that where the ordinances of a town or city have been printed in book or pamphlet form, purporting to be published by authority of the board of trustees or city council, the book shall be received as evidence of the passage of the ordinance, because this is the plain language of the statute. But a book of ordinances was not put in evidence. The petitioner, in lieu of the book, put in evidence a certified copy, attested by the clerk, under the seal of the corporation. This, in our opinion, proved the passage of the ordinance as effectually as the fact would have been proved had a printed book of ordinances been admitted. The language found in the first part of section 4 [section 66, *supra*], 'All ordinances and the date of publication may be proven by the certificate of the clerk, under the seal of the corporation,' will admit of no other construction. It is said this means that you may thus prove the contents of an ordinance. But such is not the language of the act. The language is, the ordinance may be proven. The legislature no doubt intended, by the use of this language, that a certified copy of an ordinance, under the seal of the corporation, made by the clerk of the council, should have the same force and effect, as evidence, as a printed book of ordinances, which, in express terms, is made evidence of the passage and publication of an ordinance."

To the same effect is the case of *Railroad Co. v. Voelker*, 129 Ill. 540, 22 N. E. 20. In this case the court say:

"Under these decisions, as well as upon principle, it must be held that the copies of the ordinances in this case, certified by the city clerk and authenticated by the corporate seal, were competent evidence tending to show that said ordinances had been duly passed by the city council, and that they had gone into effect in one of the modes prescribed by the charter."

The construction placed upon the statute by the supreme court is binding on us, and it follows that no error was committed in permitting the copy of the ordinance in question to be read in evidence to the jury. This view renders it unnecessary to express any opinion on the question whether or not the printed pamphlet copy of ordinances was improperly admitted in evidence. If it were conceded to be incompetent, it was merely cumulative evidence of a fact already proven by competent evidence, and hence it was harmless. The judgment is reversed, at the cost of the appellee, and remanded to the court below with instructions to grant a new trial, and to permit the declaration to be amended if the appellee so desires.

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#### CLEVELAND, C., C. & ST. L. RY. CO. v. TARTT.

(Circuit Court of Appeals, Seventh Circuit. December 14, 1894.)

No. 128.

#### RAILROAD COMPANIES—INJURIES TO PERSONS ON TRACK—INSTRUCTIONS—INFANT.

Where a bright, intelligent boy, eight years and seven months old, is killed by a train while walking along the track, it is reversible error to refuse to instruct the jury, in an action for his death, that if he entered the right of way for his own convenience, and walked along the track in a dangerous position, and did not use his faculties as a person of like age could,



and failed to use ordinary prudence to learn if a train was approaching, when by so doing he might have avoided injury, he was not exercising ordinary care, and the plaintiff could not recover unless the injury was willfully inflicted.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

Action on the case by James T. Tartt, administrator of the estate of Jesse H. Phillips, Jr., against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, for causing the death of said Phillips. Plaintiff obtained judgment. Defendant brings error.

John T. Dye and George F. McNulty, for plaintiff in error.

A. R. Taylor, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

BAKER, District Judge. The plaintiff's intestate was a boy eight years, seven months, and six days old at the time he was killed. He was a strong and healthy boy, and bright and intelligent for his age. The facts in this case, and the circumstances connected with the fatal collision, are sufficiently disclosed in the case of *Railway Co. v. Tartt* (just decided) 64 Fed. 823. A number of questions are presented by the assignment of errors which have been argued by counsel. The decedent was old enough to be prima facie responsible for his trespasses, as well as chargeable with contributory negligence for a failure to exercise ordinary care, having regard to his age and intelligence, and the circumstances in which he was placed when killed. The court declined to instruct the jury that if they believed that the deceased, for his own convenience, entered on the right of way of the railroad company, and walked along the track, either on it or close to it, in a dangerous position, and did not use his faculties as a person of like age could, and failed to use ordinary prudence to learn if a train was approaching, when the use of such faculties as he possessed would have notified him that a train was approaching in time to avoid the injury, he was not exercising ordinary care, and the plaintiff could not recover unless the injury was willfully and wantonly inflicted. This instruction, and others of like character, stated a proposition of law with substantial accuracy, which was applicable to the facts of the case, and it was error to refuse so to instruct the jury. The charge given by the court did not clearly and distinctly embody the substance of the above instruction. In view of what is said in the case of *Railway Co. v. Tartt*, nothing further need be added in this case. The case is reversed, at the costs of the appellee, and remanded to the court below with instructions to grant a new trial, and to permit the appellee to amend his declaration if he so desires.

## FISHER v. HANOVER NAT. BANK.

(Circuit Court of Appeals, Second Circuit. December 3, 1894.)

No. 10.

## SET-OFF—MATURITY OF DEMANDS—FRACTIONS OF A DAY.

May 8, 1891, the H. Bank of New York was indebted to the S. Bank of Philadelphia for a balance of deposit of \$9,688.17, and held the S. Bank's demand note for \$25,000. On that day, about 11 a. m., the H. Bank telegraphed the S. Bank, demanding payment of the note. On the same day, between 11 and 12 o'clock, the bank examiner took possession of the S. Bank, and closed its doors. *Held*, that the court should not be astute to divide the day into fractions, to deprive the solvent debtor of a just defense, and that the note might be set off against the deposit balance in an action to recover the latter.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action by Benjamin F. Fisher, as receiver of the Spring Garden National Bank, against the Hanover National Bank, to recover a balance of deposit. Judgment was rendered in the circuit court for the defendant. Plaintiff brings error.

Silas W. Pettit, for plaintiff in error.

Thos. S. Moore, for defendant in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The Spring Garden National Bank of Philadelphia was taken possession of by the bank examiner, by direction of the comptroller of the currency, on May 8, 1891, it being then insolvent. The plaintiff in error was duly appointed its receiver. On May 8, 1891, the Hanover National Bank of New York was indebted to the Spring Garden Bank in the sum of \$9,688.17, balance of deposit account. At the same time the Hanover Bank held a note of the Spring Garden Bank originally for \$30,000, on which \$5,000 had been paid, and secured by a pledge of several promissory notes as collateral security. This action was brought to recover the deposit balance and the collaterals, or their proceeds. When the proofs were completed, however, all question as to the collaterals was eliminated from the case, and the only point left to be determined is whether the Hanover Bank was entitled to set off its claim upon the \$30,000 note against the receiver's claim for the deposit balance.

The note of the Spring Garden Bank was a demand note, and the evidence shows that "about 11 o'clock of May 8, 1891, or shortly after," the Hanover Bank telegraphed the Spring Garden Bank, calling the loan for immediate payment. The bank examiner took possession of the latter bank "some time between 11 and 12 o'clock on the 8th of May, 1891." On the day of the failure, therefore, the defendant bank owed the Spring Garden Bank the balance of deposits, and the Spring Garden Bank owed defendant bank the amount of the loan. There is no reason in justice or in equity why a court should be astute to divide the day into fractions, in order to deprive the solvent

debtor of a righteous defense. On May 8, 1891, both were debts presently due, and either was a proper set-off against the other. Judgment of the circuit court affirmed.

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In re SHEFFIELD et al.

(Circuit Court, D. Kentucky. December 1, 1894.)

1. CONSTITUTIONAL LAW—TAXATION—PATENT RIGHTS.

The exclusive right to make, use, and vend an invention or discovery, granted by letters patent of the United States, cannot be taxed by a state.

2. SAME.

A statute of Kentucky declared that all itinerant persons, vending patent rights, should be deemed peddlers, and imposed a license tax upon peddlers, which, for vendors of patent rights, was double the amount required of others. *Held*, that this was a taxation of patent rights granted by the United States, and so unconstitutional and void.

This was a petition for a writ of habeas corpus by C. P. Sheffield and S. O. Edmunds, alleging that they were illegally restrained of their liberty by the jailer of Simpson county, Ky. The jailer made return to the writ that the petitioners were in his custody upon a surrender by their bail in a prosecution for selling patent rights without payment of license tax, in violation of a statute of Kentucky.

R. S. Brown, for relator.

G. T. Finn, for respondent.

BARR, District Judge. The material question which arises on the return of Davidson, jailer of Simpson county, is whether or not the statute of Kentucky which requires the payment of a license tax and the obtaining of a license from the county court of a county by peddlers before they can sell or offer for sale a patent right, or any territory covered by such patent right, which has been granted by the United States, is constitutional. It appears in this case the petitioners have paid a license tax and obtained a license from the county court of Simpson county to sell a patent article known as "Animal Releasing Devices" in said county. But they have not paid the license tax or obtained a license from said county court to sell or offer for sale the patent right itself or any part of the territory covered by said patent. The petitioners are being prosecuted for selling or offering for sale this patent right without having paid said license tax to thus sell and offer for sale said patent right. They gave bond for their appearance to the next term of the court, and have been surrendered by their bail to the jailer who had them in custody at the time of the service of the writ of habeas corpus, and who has produced them in the court with his return of the cause of their detention. The 4216th section of the Kentucky Statutes declares that "all itinerant persons vending lightning rods, patent rights or territory for the sale, use or manufacture of patent rights, \* \* \* shall be deemed peddlers." Section 4219 declares that the county court of each county shall have exclusive jurisdiction to grant ped-

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diens' licenses, and that the applicant for license shall prove in open court, by at least two credible witnesses, that the applicant is a person of good moral character. Section 4225 fixes \$100 as the license tax for peddlers for the entire state, and one-fourth thereof for each county when license is issued for one county; but declares vendors of patent rights, or territory for the sale of patent rights or patent articles, shall pay double that sum.

The provision of section 4219 is, we think, the exercise of the police power of the state, but the other provisions are clearly the exercise of the power of taxation. Thus the question arises whether "the exclusive right to make, use, and vend the invention or discovery" of a patentee or his assignee, which is granted by the United States, can be taxed by a state. The right to make, vend, and use an invention or discovery by the inventor or discoverer exists independent of the authority of the United States. But the exclusive right to make, use, and vend an invention or discovery is given to the patentee and his assignees by the United States. This right of exclusion is a species of incorporeal property which is valuable. The right, without the exclusion, would not be and is not such a right as could be taxed as property. The invention or discovery, so long as it remains with the inventor or discoverer, is ideal merely; and it is only when the invention or discovery takes shape, and results in some material thing, it can be called property and taxed as such. This right of exclusion is an incorporeal right, which is valuable, and may be considered personal property. The Kentucky statute recognizes this, and therefore seeks to tax the patent right (the right of exclusion) by requiring for its sale the payment of a license tax. This license tax is double that required for the sale of goods, merchandise, and other property. The question is not whether the state of Kentucky can tax a patented article or thing as other property is taxed, or tax the dealing in such articles or things as dealings in other property are taxed, by requiring the payment of a license tax. Hence the decision of the supreme court in *Webber v. Virginia*, 103 U. S. 344, and the principle therein announced, have no application to the case under consideration, nor has the decision in *Patterson v. Kentucky*, 97 U. S. 501, any application. In the *Webber Case* the license tax was upon the sale of the article manufactured under a patent, and it was decided that there was a discrimination in the tax required for the sale of articles manufactured out of the state of Virginia and those manufactured in that state. For the sale of the latter no license tax was required, and this was held unconstitutional. In that case the supreme court, by Justice Field, say:

"The right conferred by the patent laws of the United States to inventors to sell their inventions and discoveries does not take the tangible property in which the invention or discovery may be exhibited or carried into effect."

And again, in discussing the exercise of the police power of a state, the court say:

"A patent for the manufacture and sale of a deadly poison does not lessen the right of a state to control its handling and use. The legislation respecting the articles which the state may adopt after the patents have expired, it

may equally adopt during their continuance. It is only the right to the invention or discovery—the incorporeal right—which the state cannot interfere with.”

These quotations show, while the present question was not before the court, Justice Field had in his mind and drew a distinction between the tangible property which is the fruit of an invention or discovery and the incorporeal right,—the exclusion of others from making, using, or vending an invention or discovery. The Case of Patterson was where “an improved burning oil,” which had been patented, did not come up to an inspection required by a state statute, and had been condemned as unsafe for illuminating purposes, and its sale for such purposes prohibited. The supreme court, affirming the Kentucky court of appeals, held this statute was a proper exercise of the police power of the state, and that the patent did not give the patentee the absolute right of sale without regard to the safety to others or the exercise of the general police power of the state. This was the view of the Kentucky court, who said:

“The discovery or invention is made property by reason of the patent, and this right of property the patentee can dispose of under the law of congress, and no state legislation can deprive him of this right; but when the fruits of the invention or the article made, by reason of the application of the principle discovered, is attempted to be sold or used within the jurisdiction of a state, it is subject to its laws, like other property.” 11 Bush, 312.

But it is insisted that this license tax is a tax on the business of the person who peddles. Yet it must be a tax on the sale of the patent rights sold, and this is made clear by the statute itself, which makes the license double that for the sale of goods, merchandise, and other property. *Machine Co. v. Gage*, 100 U. S. 678. Thus the question must be, can a state tax, or authorize a county or city to tax, a right—an incorporeal right—which is granted by the United States, and which, under the constitution, can alone be granted by the United States? We think that question must be answered in the negative, under the principle settled in the case of *McCulloch v. State of Maryland*, 4 Wheat. 316, and the many subsequent cases. In the case of *Weston v. Charleston*, 2 Pet. 449, the court held that a tax on stock of the United States held by an individual citizen of a state is a tax on the power to borrow money on the credit of the United States, and cannot be levied by or under the authority of a state. In that case Chief Justice Marshall took occasion to state the principle upon which the previous case of *McCulloch v. State of Maryland* was decided, and said:

“The question decided in that case bears a near resemblance to that which is involved in this. It was discussed at the bar in all its relations, and examined by the court with its utmost attention. We will not repeat the reasoning which conducted us to the conclusion thus formed; but that conclusion was that ‘all subjects over which the sovereign power of a state extends are objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation.’ ‘The sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission,’ but not ‘to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States.’ ‘The attempt to use’ the power of taxation on

the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give."

The court said in that case that "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operation of the constitutional laws enacted by congress, to carry into execution the powers vested in the general government." See, also, *Dobbins v. Erie Co.*, 16 Pet. 435, and the *National Bank Cases*, in which the shares in these banks are taxed because of the provision of the national banking law passed by congress. 2 Black. 620; 2 Wall. 200; *Van Allen v. Assessors*, 3 Wall. 573; *First Nat. Bank v. Kentucky*, 9 Wall. 358; *Bradley v. People*, 4 Wall. 459.

But, without reviewing the many cases in which the authority of a state to regulate the manufacture, use, and sale of patented rights and patented articles are discussed and decided, we think the correct doctrine is that the grant of patent rights is given by the United States subject to the exercise of the police power of the several states of the Union, and that the patented articles are subject to the taxing power of the several states, if there be no discrimination in such taxation as between other property in the state and the patented article or thing. But the patent right itself, i. e. the right to exclude all others from the manufacture, use, or sale of the invention or discovery, which is a grant by the United States, cannot be taxed by a state. If the authority to tax such a right of exclusion exists at all, the limitation upon its exercise must depend alone upon the constitution and laws of the several states, and such an authority is utterly inconsistent with the grant of the patent right which is by the constitution of the United States given exclusively to congress. This view is fully sustained by the case of *Ex parte Robinson*, decided by Justice Davis, and reported in 2 Biss. 313, Fed. Cas. No. 11,932, and the case of *State v. Butler*, reported in 3 Lea, 222, and is entirely consistent with the opinions in *Webber v. Virginia* and *Patterson v. Kentucky*, supra, and the decision of Judge Cooley in *People v. Russell*, 49 Mich. 617, 14 N. W. 568. In this case the state of Kentucky has not only levied a tax upon the inchoate right (patent right) which has been granted under the authority of the United States, but has made a discriminating tax by requiring the payment of a license tax in double the amount required for peddling goods, merchandise, and other property. We conclude the statutes of Kentucky, under which the petitioners, Sheffield and Edmunds, are prosecuted and imprisoned, are unconstitutional and void. They (Sheffield and Edmunds) are therefore imprisoned without lawful authority, and should be released from the custody of said Davidson, jailer of Simpson county, and it is so ordered.

**ENTERPRISE SAV. ASS'N v. ZUMSTEIN, Postmaster.**

(Circuit Court, S. D. Ohio, W. D. November 10, 1894.)

**LOTTERIES—USE OF MAILS—PROHIBITION BY POSTMASTER GENERAL—DISCRETION—CONTROL BY COURTS.**

Rev. St. § 396, makes it the duty of the postmaster general to instruct all persons in the postal service with reference to their duties, etc. Sections 3929 and 4041 provide that the postmaster general may, "upon evidence satisfactory to him" that any person is conducting a lottery, etc., or any scheme for obtaining money through the mails by false pretenses, instruct postmasters to mark "fraudulent" and return registered letters, directed to such person, to the postmasters at the offices at which they were mailed, to be returned to the writers thereof; and may forbid the payment by any postmaster to any such person of any postal money drawn to his order or in his favor. *Held*, that the discretion of the postmaster general in respect to the matters referred to in such statutes cannot be supervised or controlled by the federal courts.

This was a bill by the Enterprise Savings Association against John Zumstein, postmaster of the city of Cincinnati, Ohio, for an injunction. Defendant demurred to the bill.

Chas. W. Baker and Michael G. Heintz, for complainant.  
Harlow Cleveland, U. S. Atty., for defendant.

**SAGE**, District Judge. The bill sets forth the articles of incorporation, by-laws, and plan of business of the complainant, which issues certificates "in blocks of three," the purchaser paying for each certificate, in cash, the sum of \$15,—that is to say, \$5 for each certificate,—at the time of their issuance and delivery to him. By the terms of the contract of the certificate, it is paid up in full by monthly payments in 5 years and 5 months from its date, the full amount being \$100. Thereupon the holder receives a paid-up certificate in lieu of the original contract certificate, and is released from any further payments, the association agreeing to redeem the same not later than 120 months from the date of the original contract certificate. The holder meantime is to receive interest at 6 per cent. per annum, and finally the principal, together with his share of such profits as in the meantime have been made by the association. The initial payment of \$5 on each certificate, or \$15 on each block of certificates, is applied to the establishment and support of agencies and of canvassing, and the payment of incidental expenses. Of the \$1.50 required to be paid each month succeeding the first month, \$1 is paid into what is known as the "maturity fund," out of which the certificates maturing are paid. Twenty-five cents goes to the maintenance of the general expenses of the company, and the other twenty-five cents to the reserve fund. This is, in short, the published scheme of the company. A maturity table is prepared and employed, which begins with the certificates, which are numbered, with the lowest numbered certificates then in force, beginning with number 1, and proceeding by multiples of three of the live certificates. The bill sets forth that since the complainant began doing business, which was shortly after its incorporation, on the 26th of April, 1894, it has issued 1,524 certificates. On the last day of July, 1894, there were 995 certificates not lapsed, matured, or for-

feited, while up to that time 1,500 certificates had been issued. The complainant was created and organized under the laws of the state of West Virginia. It opened an office in the city of Cincinnati almost immediately after its incorporation, and has maintained it ever since.

The complaint of the bill is that the defendant, being postmaster of the city of Cincinnati, arbitrarily, illegally, and without right, has undertaken to interfere with, stop, and prevent the employment and the use by the complainant of the mails and the registry department of the post-office department of the post office of the city of Cincinnati, and that the defendant bases his action in such interference and denial to complainant of the postal facilities of the post office of the city of Cincinnati, upon an order received by him from the postmaster general of the United States, under date March 31, 1894, which the defendant has exhibited to the complainant, and which the defendant makes as his excuse for his action aforesaid. The order is as follows:

"Order No. 100.

"It having been made to appear to the satisfaction of the postmaster general that the Enterprise Savings Association, S. A. Stevens, Pres., J. C. Groene, Vice Pres., W. R. Sypher, Treas., C. K. Ebban, Secy., J. S. Munsell, Genl. Manager at No. 610 Neave Building, Cincinnati, O., are engaged in conducting a lottery or similar enterprise for the distribution of money or personal property by lot or chance through the mails, in violation of the provisions of section 3894, Revised Statutes of the United States, as amended:

"Now, therefore, by authority vested in the postmaster general by sections 3929 and 4041, Revised Statutes of the United States, and by act approved Sept. 19, 1890, I do forbid the payment by the postmaster at Cincinnati, O., of any postal order drawn to the order of said company and its officers aforesaid, and that the said postmaster is hereby directed to inform the remitter of said postal money order that payment thereof has been forbidden, and that the sum of said money order will be returned upon presentation of a duplicate money order applied for and obtained under the regulations of the department.

"And, upon the same evidence, the postmaster at Cincinnati, O., aforesaid, is hereby instructed to return all registered letters which shall arrive at his office, directed to the said company and its officers aforesaid, to the postmasters at the offices at which they were originally mailed, with the word 'Fraudulent' plainly written or stamped upon the outside of such letters.

"[Signed]

W. S. Bissell, Postmaster General.

"To Postmaster, Cincinnati, O."

The bill then specifies instances of the defendant's refusal to recognize or pay postal money orders in favor of and presented by the complainant, and instances of his refusal to deliver registered letters received in said post office, and addressed to the complainant, charging that said letters were stamped with the word "Fraudulent" across the envelopes, and returned to the post offices from which they were sent. The prayer is for an injunction prohibiting the defendant from interfering with the employment of the post office of Cincinnati in the conduct of complainant's business, and from withholding registered letters received and addressed and directed to the defendant, and from withholding payment of money orders addressed to and received by him. The defendant has filed a general demurrer for insufficiency.



Section 396 of the Revised Statutes makes it the duty of the postmaster general to instruct all persons in the postal service with reference to their duty, and to superintend generally the business of the department, and execute all laws relative to the postal service.

Section 3834 requires every postmaster, before entering upon the duties of his office, to give bond for the faithful discharge of all duties imposed on him either by law or the rules and regulations of the department. This section subjects the postmaster to the orders of the postmaster general.

Section 3926 authorizes the postmaster to establish a uniform system of registration for the greater security of valuable mail matter. It provides that neither the post-office department nor its revenue shall be liable for the loss of any mail matter on account of its having been registered.

Section 4027 authorizes the postmaster to establish and maintain, under such rules and regulations as he may deem expedient, a uniform money-order system at all suitable post offices, which shall be designated as "money-order offices." This authorization, it is expressed in the section, is to promote public convenience, and to insure greater security in the transfer of money through the mail.

Sections 3929 and 4041 read as follows:

"Sec. 3929. The postmaster general may, upon evidence satisfactory to him that any person is engaged in conducting any fraudulent lottery, gift-enterprise, or scheme for the distribution of money or of any real or personal property, by lot, chance or drawing of any kind, or in conducting any scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations or promises, instruct postmasters at any post office at which registered letters arrive, directed to any such persons, to return all such registered letters to the postmasters at the offices at which they were originally mailed, with the word 'Fraudulent' plainly written or stamped upon the outside of such letters; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the postmaster general may prescribe. But nothing contained in this title shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself."

"Sec. 4041. The postmaster general may, upon evidence satisfactory to him that any person is engaged in conducting any fraudulent lottery, gift-enterprise, or scheme for the distribution of money, by lot, chance, or drawing of any kind, or in conducting any other scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster, to any such person of any postal money drawn to his order or in his favor, and may provide by regulations for the return, to the remitter, of the sums named in such money orders. But this shall not authorize any person to open any letter not addressed to himself."

The sections above cited and quoted vest in the postmaster general complete control and authority over the money-order and registered letter department of the postal service. They make every postmaster subject to his orders. They also vest in him a discretion, "upon evidence satisfactory to him" that any person is conducting any fraudulent lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or in conducting any other scheme or device for obtaining money through the mails by means of false or fraudulent

pretenses, representations, or promises, to instruct postmasters at any post office at which registered letters arrive, directed to such person, to return such letters to the postmasters at the offices at which they were mailed, after writing or stamping upon the outside of such letters the word "Fraudulent;" and all such letters, when so returned, are to be delivered to the writers thereof, under such regulations as the postmaster general may prescribe. The payment of postal money orders drawn to the order of or in favor of any such person may be forbidden by the postmaster general upon evidence satisfactory to him that any person is engaged in conducting any fraudulent lottery, gift enterprise, or scheme as above set forth; and the postmaster general may provide for the return to the remitter of the sums named in such money orders. No citizen has a vested right to the use either of the registered letter or postal money order system. Every citizen has the privilege of both, subject to the discretion which is vested in the postmaster general. It is the duty of every postmaster to obey the orders of the postmaster general, made in pursuance of the statutory provisions above quoted, and in the exercise of his discretion. The question then is whether this discretion can be supervised or controlled by federal courts. It is not a new question. It was first considered in the case of *Marbury v. Madison*, 1 Cranch, 137. In that case, at page 166, the supreme court was of opinion that the president is vested with certain political power, to be exercised in his own discretion. Whatever opinion might be entertained of the manner in which that discretion was used, there existed and could exist no power to control it.

It has been repeatedly held by the supreme court that a mandamus will not lie to the head of a department to enforce the performance of an executive duty involving the exercise of judgment or discretion. See *Bank v. Paulding*, 14 Pet. 497; *Brashear v. Mason*, 6 How. 92; *U. S. v. Seaman*, 17 How. 225; *Gaines v. Thompson*, 7 Wall. 347. In *Gaines v. Thompson* it was held that the act of the secretary of the interior and of the commissioner of the land office in canceling an entry for land is not a ministerial duty, but is a matter resting in the judgment and discretion of those officers, as representing the executive department; and that the court would not interfere by injunction more than by mandamus to control it. Mr. Justice Miller, in delivering the opinion of the court, reviews the cases from *Marbury v. Madison* down. A ministerial duty was defined in *Mississippi v. Johnson*, 4 Wall. 475, as one in respect to which nothing is left to discretion. In *Gaines v. Thompson* the court held that an officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion with which he is vested by law. The reason given by the court is that the law reposes the discretion in the officer, and not in the courts.

To the same effect are *U. S. v. Black*, 128 U. S. 40, 9 Sup. Ct. 12, and *U. S. v. Windom*, 137 U. S. 636, 11 Sup. Ct. 197.

In the case now before the court, the postmaster general was authorized to act upon evidence satisfactory to him. What he did under that authorization cannot be regarded as a ministerial act.

It was in the exercise of a discretion, and it cannot be supervised or controlled by this court.

The demurrer will be sustained, and the bill dismissed, at the cost of the complainant.

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PILLSBURY et al. v. PILLSBURY-WASHBURN FLOUR MILLS CO.,  
Limited.

(Circuit Court of Appeals, Seventh Circuit. November 27, 1894.)

No. 193.

1. UNFAIR COMPETITION—COLORABLE IMITATION OF BRAND.

C. A. P. & Co. had for many years been engaged in manufacturing and selling flour which had acquired a high reputation and extensive sale. In 1872 they adopted a mark or brand which they applied to the packages containing their flour, consisting of the name P., the name of the place of manufacture, "M., Minn.," the letters "XXXX," and the word "Best," in large letters of a peculiar design, all arranged in a circular form, surrounded by two lines of dots, with the name P. in a vertical line at each side, the whole being printed in blue, except the word "Best," which was printed in red. The business of C. A. P. & Co., and the right to use such mark or brand, were sold in 1889 to complainant, a corporation organized and managed by the members of the firm, which continued the manufacture and sale of the flour and the use of the mark or brand. In 1893 defendant L. F. P. commenced, at a small town in Illinois, the business of buying flour and putting it up and selling it in packages on which he placed a mark or brand of similar form to that of complainant, in which the name L. F. P. was substituted for the name P. alone, in the same part of the circular device and in the vertical lines, the word "Minnesota" was substituted for "M., Minn.," the letters "XXXX" were placed above instead of below the word "Best," which was printed in letters of the same size but slightly different design from those on complainant's brand, the word "Patent" was added, and the lines of dots surrounding the circular device were increased to three; the whole, except the word "Best," being printed in blue, and the word "Best" in red. *Held*, that defendant's mark constituted a colorable imitation of complainant's mark, manifestly intended to dress up defendant's goods in the appearance of complainant's goods, and mislead the public into buying them as such, and that its use should be enjoined.

2. SAME—COMING INTO EQUITY WITH CLEAN HANDS.

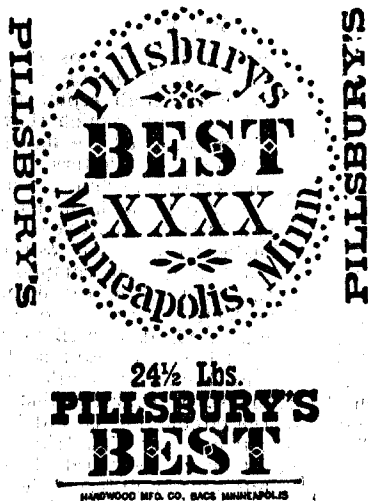
*Held*, further, that even if the use of the mark by a corporation actually managed by a member of the firm which originally manufactured the flour and devised the mark could be considered a false representation as to the actual makers of the flour, the fact that prior to defendant's commencing business the corporation had begun to stamp all its packages with its own name, as "successor" to the former firm, obviated any objection on this ground to complainant's right to an injunction.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This was a bill in equity, brought by the Pillsbury-Washburn Flour Mills Company, Limited, against L. F. Pillsbury and Ephraim Hewitt, to restrain the use by defendants of a mark or brand alleged to be a fraudulent imitation of complainant's brand. The circuit court made an order granting to complainant a preliminary injunction. Defendants appeal.

This is an appeal from the order of the court below passed on the 2d day of July, 1894, granting a writ of injunction, and the question is upon the validity of the restraints thereby imposed.

The bill filed by the appellee charges that the firm of Charles A. Pillsbury & Co. had for many years been engaged in the business of manufacturing, putting up, shipping, and selling flour and operating certain flour mills in the city of Minneapolis; that their flour had, by reason of its high and uniform grade and excellence of manufacture, acquired a great reputation, and was known and sold throughout the continents of America and Europe; that in 1872 the firm adopted a trade-name or brand for identifying their high grade of wheat flour, which consisted of a certain device of the words "Pillsbury's Best," which words and device were printed, branded, and marked upon the packages, sacks, and barrels of flour, of which brand the following is a facsimile:



The words "Pillsbury's XXXX, Minneapolis, Minn." were printed in blue ink, and the word "Best" in red ink, in large letters, having a position centrally across the head of the barrel or across the sack. That the flour, in the sale of which such trade-name was used, was flour manufactured at their mills from spring wheat of a very high grade or quality, the flour being manufactured by the "patent" process, which consists in subjecting the grain to the operation of successive rollers, whereby the external portions of the kernels of the grain are disintegrated, removed, and carried away successively, so as to leave the interior or core of the grain, containing the gluten, for disintegration last, the process being to first remove the husk of the grain, which is made into bran, shorts, and screenings, and then the exterior coatings of starch inside the hulls or husks, which are made into a cheap grade of flour, and finally to entirely and separately disintegrate the interior or gluten of the wheat and make it into a flour comprising from 45 to 50 per cent. of gluten and the balance starch. This last-named flour is known as the "patent process" flour, and is of a high grade and quality, highly nutritious, produces a white and fine quality of bread, and commands a high price. It was in connection with this quality of flour that the firm used the trade name and mark described, as a means of identifying the origin and manufacture of the flour by them.

By means of extensive advertising, and of the excellent quality of their product, their flour became extensively known in connection with such trade-name, and was commonly called in the trade "Pillsbury's Best" and "Pillsbury's Best XXXX" flour, and was ordered and sold under those names, which became substantive terms in connection with the word "Pillsbury," identifying the brand of flour manufactured, sold, and advertised by that firm.

In 1889 the appellee, complainant below, was incorporated, and succeeded

to the business of the firm of Charles A. Pillsbury & Co., and by purchase became the owner of the property, mills, machinery, trade-marks, trade-names, etc., theretofore used by the firm in their business, which it thereafter continued and now successfully prosecutes. The members of the firm of Charles A. Pillsbury & Co. became largely interested as shareholders in the corporation, and Mr. Charles A. Pillsbury, who had personal supervision of, and who had built up and established and conducted the business of, the former firm, immediately became, continued to be, and is now managing director of the corporation, and conducts, controls, and regulates its business to the same extent and in the same manner as he conducted, controlled, and regulated the business of Charles A. Pillsbury & Co. The corporation has continued to use the same trade-name and brand upon its product that were used by the old firm, and prior to this suit placed upon the sacks containing its flour so manufactured and identified by the trade-names mentioned the words "Pillsbury-Washburn Flour Mills Company, Ltd., Successors to," above the monogram "C. A. P. & Co.," that had been used by the firm of Charles A. Pillsbury & Co. upon their packages of flour.

The bill further charges that in 1893 L. F. Pillsbury, one of the appellants, then residing in the village of La Grange, Cook county, Ill., who has never been engaged in the business of milling or manufacture of flour, fraudulently conceived the plan and idea of using, allowing, and selling the use of his name "Pillsbury," and of selling flour with a simulated trade-name that would deceive and fraudulently induce the public to purchase his flour as the flour of the appellee, and pursuant thereto began to sell flour and feed in this suburban village of La Grange, and for a few months carried on a small retail business thereat, purchasing flour, which he put into sacks branded with the trade-name or trade-mark, a facsimile of which is as follows:



L. F. Pillsbury's  
**BEST**

—The words "L. F. Pillsbury XXXX," "patent," "Minnesota," being printed in blue ink, and the word "Best" in red ink, and in large letters.

It is charged that the flour, which he purchased from various dealers, was of inferior grade to the product of the appellee so known and identified by its trade-name, and that he fraudulently used that name upon the sacks with the design and intent of deceiving the public into the belief that the flour so sold by him was the product of the mills of the appellee; that he was a man without capital, had no mill, and was never the owner or proprietor of or interested in any mill for the manufacture of flour, and that his plan was simply a false and fraudulent scheme to impose upon the public, and to palm off his flour as the flour manufactured by the appellee; that in the beginning of the year 1894 L. F. Pillsbury ceased to do business at La Grange, and entered into a contract with the appellant Ephraim Hewitt, who was a wholesale dealer in flour in the city of Chicago, whereby, for a certain royalty or commission upon sales, L. F. Pillsbury permits Hewitt to use his false and simulated brand and trade-name upon barrels and sacks of flour which Hewitt may have for sale, not of the appellee's manufacture, but purchased from various mills and millers, some of which are not located in the state of Minnesota, and which flour is of a quality and grade inferior to that of the appellee; that the appellants extensively advertise and sell flour under the names of "L. F. Pillsbury's Best," "Pillsbury's Best," and "Pillsbury's Best XXXX," and have entered into contracts with wholesale and retail dealers in flour by which they are selling spurious flour put up in sacks and barrels bearing the simulated brand, and delivered with the understanding that the purchaser shall resell the same as the true and genuine flour manufactured by appellee, and that such dealers have succeeded in and are now selling false and spurious flour as the genuine "Pillsbury's Best" or "Pillsbury's Best XXXX" flour manufactured by appellee, and, because of its inferior quality, at a less price than the appellee can afford to sell its product.

The answer of the appellants, so far as it relates to their transactions, asserts that L. F. Pillsbury was engaged in buying and selling flour at La Grange for some time prior to the 15th of November, 1893, but for what length of time prior to that date it does not state; that while so engaged he invented a brand or trade-name of which a facsimile has been exhibited, and built up a considerable trade in his brand of flour; that being in want of the necessary capital to conduct the business, and believing that the city of Chicago would be a much more desirable point at which to handle flour than the village of La Grange, at that date he entered into an agreement with his co-defendant, Hewitt, to enter into the business of buying and selling flour, and that thereafter they continued to sell flour put up in sacks, barrels, and packages with the brand thereon of which the facsimile is above given. They deny that the agreement is a scheme or device to interfere with any trademark or brand of the business of complainant, but "aver and charge the fact to be true that they are advised that they had the right to make the agreement, and put up and handle flour as aforesaid." They deny that they have offered for sale or sold an article of flour in imitation of the flour of complainant to deceive customers or to injure the complainant, and allege that they "have always stated, and made known to their customers that said flour so handled by them under said brand is not the flour of said complainant, but is a flour put up under said brand by themselves, manufactured from Minnesota wheat, and that said flour, in their judgment, is equal to, if not superior to, that sold by "Pillsbury-Washburn Flour Mills Company, Limited." They assert that no person can be deceived by their brand into the belief that it is the flour of complainant; that the brand used by them is so dissimilar to the brand used by said complainant that it will arrest the attention of the most casual observer; that the formation of the letters in the word "Best" are different, and "that the general arrangement of said brand is so dissimilar from that of the complainant that the most casual observer can readily see there is no similarity between the devices used by these defendants and the said complainant." They further assert that one side of the sacks used by them is entirely plain, while both sides of the sacks used by the appellee are covered with words, letters, and brands. They assert their right to deal thus in flour under the brand and trade-name which they are using; that the name

"Pillsbury" cannot be appropriated by the appellee so as to deprive L. F. Pillsbury of making any lawful use thereof, or placing the flour upon the market by the device shown. They allege that all of the flour put up and sold by them is made of the best quality of wheat grown in Minnesota or adjoining states, and manufactured by millers located in Minnesota, and is, in their judgment, a flour superior to that manufactured by the complainant.

The motion for a writ of injunction was heard upon the pleadings and upon numerous affidavits, upon which hearing the court below ordered the issuance of a writ of injunction restraining the appellants until the final hearing "from putting up, shipping, and delivering any flour in packages, barrels, sacks, bags, and other receptacles bearing the aforesaid trade-mark, trade-name, or brand, 'Exhibit I' of said complainant, or any colorable imitation thereof, and from manufacturing, putting up, shipping, and delivering any flour in packages, barrels, sacks, bags, or other receptacles bearing the aforesaid trade-mark, trade-name, or brand of said defendant, or any colorable or deceptive imitation thereof; and from dressing up flour in packages, sacks, or bags so as to resemble the packages, sacks, and bags used by complainant; and from selling, palming off, or representing the flour contained in any such sack, bag, barrel, or receptacle as the flour of complainant."

John P. Hand, Thomas E. Milchrist, and Ben M. Smith, for appellants.

Frank F. Reed, Clarence S. Brown, and Harry K. Allen, for appellee.

Before WOODS and JENKINS, Circuit Judges, and GROSSCUP, District Judge.

JENKINS, Circuit Judge, after statement of the case, delivered the opinion of the court.

The right of appellees to relief is not rested upon any notion of right to or property in a technical trade-mark, but upon principles applied by courts of equity in cases analogous to cases of trade-marks, where the relief is afforded upon the ground of fraud, which in turn rests upon the hypothesis that the party proceeded against had deliberately sought to deceive the public, and to defraud another by palming off his own goods as the goods of that other. The general principles by which courts are guided in such cases are well and correctly stated in *Cement Co. v. Le Page*, 147 Mass. 206, 208, 17 N. E. 304, as follows:

"A person cannot make a trade-mark of his own name, and thus debar another having the same name from using it in his business, if he does so honestly, and without any intention to appropriate wrongfully the good will of a business already established by others of the name. Every one has the absolute right to use his own name honestly in his own business for the purpose of advertising it, even though he may thereby incidentally interfere with and injure the business of another having the name. In such case the inconvenience or loss to which those having a common right to it are subjected is *damnum absque injuria*. But although he may thus use his name, he cannot resort to any artifice or do any act calculated to mislead the public as to the identity of the business firm or establishment, or of the article produced by them, and thus produce injury to the other beyond that which results from the similarity of name."

The principle there announced is sustained by high authority. *Croft v. Day*, 7 Beav. 84; *Holloway v. Holloway*, 13 Beav. 209; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Thompson v. Montgomery*, 41 Ch. Div. 35; *Howard v. Henriques*, 3 Sandf. 725; *Meneely v. Meneely*, 62 N. Y. 427; *Lawrence Manuf'g Co. v. Tennessee Manuf'g*

Co., 138 U. S. 537, 11 Sup. Ct. 396; *Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625; *Coats v. Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966.

We have had occasion to consider the subject in *Meyer v. Medicine Co.*, 18 U. S. App. —, 7 C. C. A. 558, 58 Fed. 884, and there asserted the doctrine as follows:

"While the right of no one can be denied to employ his name in connection with his business, or in connection with articles of his own production, so as to show the business or product to be his, yet he should not be allowed to designate his article by his own name in such a way as to cause it to be mistaken for the manufacture or goods of another already on the market under the same or a similar name. Whether it be his name, or some other possession, every one, by the familiar maxim, must so use his own as not to injure the possession or right of another."

The point is settled. Disguise is the principle. "No one has a right to dress himself in colors or adopt or bear symbols to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose either that he is that person, or that he is connected with and selling the manufacture of such person, while in reality he is selling his own." *Croft v. Day*, *supra*. Disguise defeats the very end and object of legitimate competition, which is the free choice of the public. One may not legally use means, whether marks or other indicia, or even his own name, with the purpose and to the end of selling his goods as the goods of another. If such means tend to attract to himself the trade that would have flowed to the person previously accustomed to use them, their use will be restrained by the law.

The question is therefore resolved into one of fact upon the evidence spread upon the record whether the means here employed expose the unwary to mistake one man's goods for the goods of another; whether they tend to divert from the appellee and attract to the appellants the legitimate trade that belongs to the former; and whether the use of the name of L. F. Pillsbury, as it is here employed, is not a fraud upon the rights of the appellee. It is without doubt true that flour brands are numerous, and the general shape and style are necessarily similar, because the packages which contain the flour are necessarily of like shape and character. But the question is not whether there is a general similarity of the brands in form necessitated by the general similarity in the shape of the packages which contain flour, but whether here is such marked simulation, and such conduct upon the part of the appellants in the marketing and sale of their goods, that lead to the conviction that they deliberately and fraudulently sought to impose upon the public, and to palm off their own goods as the manufactured product of the appellee. We are constrained to the conclusion that they have so done.

Considering first the two brands in question, there appears, we think, a studied attempt to simulate the brand of the appellee, and a studied design to incorporate in the brand of the appellants such differences only as shall, upon close investigation, serve to distinguish it from the brand of the appellee, which differences would not be



observed by the ordinary purchaser. The differences strike us as merely colorable; distinguishable upon comparison of the two brands, but not so to the eye of the purchaser without opportunity of comparison. The color of the sacks and of the letters in the two brands are the same, and the corresponding letters are printed in ink of the same color. The word "Best," in ink, is prominently displayed, and in substantially the same arrangement in the brand. In the one, the letters in the word "Best" are solid, in the other, with a diamond center. In the one, the letters "XXXX" are above and, in the other, below the word "Best." In the one, "Minnesota" is substituted for "Minneapolis, Minn." in the other. The circle in the one, surrounding the brand, is composed of three lines of blue dots, and the other is of but two lines. The name "Pillsbury" is similarly arranged, at the top, within the circle, and on each side of the brand; and "Pillsbury's Best" appears in ink below the circle, the only difference being that in the simulated brand the initials "L. F." are prefixed. But these differences are not such as would attract the attention of the ordinary purchaser, the two devices being otherwise alike in detail and general effect. The question, however, is of resemblances, not differences. A test which applies only after the deviations have been pointed out favors the counterfeit. We think it clear beyond reasonable doubt that the simulation is such as to deceive the ordinary purchaser desiring to buy the flour of the appellee into purchasing the flour thus put upon the market by the appellants. We must remember, in considering this and like cases, that the purchaser of goods, with respect to brands by which the goods are designated, is not bound to exercise a high degree of care. A specific article of approved excellence comes to be known by certain catch-words easily retained in memory, or by a certain picture which the eye readily recognizes. The purchaser is required only to use that care which persons ordinarily exercise under like circumstances. He is not bound to study or reflect; he acts upon the moment. He is without the opportunity of comparison. It is only when the difference is so gross that no sensible man, acting on the instant, would be deceived, that it can be said that the purchaser ought not to be protected from imposition. Indeed, some cases have gone to the length of declaring that the purchaser has a right to be careless, and that his want of caution in inspecting brands of goods with which he supposes himself to be familiar ought not to be allowed to uphold a simulation of a brand that is designed to work a fraud upon the public. However that may be, the imitation need only to be slight if it attaches to what is most salient, for the usual inattention of a purchaser renders a good will precarious if exposed to imposition.

An inspection of these brands shows that they are similar in appearance and in colors, and from the testimony in the case we are satisfied that the brand adopted by the appellants is not only calculated to, but does in fact, deceive the public into the purchase of the goods put upon the market by the appellants as the goods manufactured by the appellee. We are constrained to the conclusion that

the brand of the appellants was gotten up for that specific purpose, The appellant L. F. Pillsbury, prior to the time in question, had never been engaged in the flour business. He evidently was acquainted with the brand used by the appellee. He must have known that the product of the appellee had acquired under that brand a high reputation in the market, and was of ready sale. He was not, and had never been, engaged in milling, and, so far as we are informed by the record, knew nothing about it. He purchased flour from millers, putting it in sacks, branding the packages with this simulated device. He could not reasonably hope to compete in business with the appellee. He was of little or no means, residing and trading in a small suburban town. He could not hope to purchase of millers and undersell a miller. He could not reasonably expect in that way to obtain from the manufacturer a flour of the same quality as that manufactured by the appellee, and sell it for a less price than was asked by the appellee. The great competition in the manufacture of flour is well known, and the margin of profit must be small. It is only because of immense sales that the business can be made lucrative. And yet we are asked to believe that L. F. Pillsbury, without means, without knowledge of the business, without business connection, could purchase flour of manufacturers, in small quantities, of like quality, if not superior, to the flour of the appellee, yielding the usual profits of manufacture, repack it in barrels and sacks, put it upon the market, and, with a profit to himself, undersell the appellee in the sale of an article which had for years been produced at the Minneapolis mills, and had acquired a high reputation and a ready market over two continents. We do not credit the assertion of the appellants that the flour they thus put upon the market was of equal quality to that manufactured by the appellee. If it were so, it could make no difference in the consideration of the question whether, by the use of this simulated brand, the purchaser would likely be deceived in respect to the particular flour he desired to purchase. It is no answer to the charge of using a false and simulated brand that the article covered by the brand is of a superior quality to that which the purchaser desired to buy. You may not deceive a purchaser for his own benefit. The public will not be permitted to be deceived even for their own good. A purchaser has a right to buy the particular article he desires, and to be protected in the purchase.

We are forced to believe that the appellants have put upon the market an inferior article of flour, and in order to dispose of it profitably to themselves have placed upon it this false and simulated brand, that it may be sold upon the market as and for the flour manufactured by the appellee, and thus to obtain advantage to themselves from the high repute which the product of the appellee has acquired. The record is replete with evidence in support of this conclusion, not needed to be here recalled. We find confirmation of the fact in the manner in which the charge in this respect is met. It is asserted in the bill that the appellants use this simulated brand as a means of palming off their flour upon the public as the product of the appellee. The answer asserts that "they have always stated and made known

to their customers that said flour so handled by them under said brand is not the flour of the complainants, but is a flour put up under said brand by themselves, manufactured from Minnesota wheat, and that said flour, in their judgment, is equal to, if not superior, to that sold by Pillsbury-Washburn Flour Mills Company, Limited." It may be remarked, in passing, that if these brands are so dissimilar that the "most casual observer" cannot be imposed upon, why assure purchasers, wholesale and retail dealers, who are expected to be, and are naturally, more careful than a purchaser of a single package, that the goods sold were not the product of the Pillsbury Mills? If the dissimilarity was manifest, there would seem to exist no necessity for such assurance; and yet we are inclined to give credence to the assertion of the appellants in this respect, and therein we think we discover the keynote of this scheme. They sell their goods with the false and simulated brand upon them to wholesale and retail dealers at a price below that for which the genuine product of the Pillsbury Mills can be purchased by them. They disclose to the retail dealer their mode of procedure and their object. They appeal to the greed of their customers to purchase an inferior quality of flour thus falsely branded with the name of a superior article, that the dealers may palm it off as the genuine article. No ingenuity could devise a more effectual way to pirate a good will. In the large, bold, displayed words "Pillsbury's Best" and "Pillsbury's Best XXXX" they address the general public. In their dealings with middlemen they declare the truth, making them accomplices in the fraud for their share of the profit. True representations in aid of false ones but aggravate the fraud. A conclusive case to this point arose in a French court. *Bardou v. Sabatou*, *Annales de la Prop.*, tome 14, p. 140, affirmed on appeal to the court of Paris, *Annales de la Prop.*, tome 15, p. 115. A certain paper had for a trade-mark the word "Job." Another manufacturer put on the market a paper inclosed in wrappers of the same color, but differing in ornaments. This he thus described: "*GUERRE A JOB PAPIER TRES SUPERIEUR*. Paris 80 Rue de Rivoli, 80. TAKE NOTICE—LET NO PERSON BE SURPRISED. I AM NOT THE SAME MARK of the cover which bears the title Job. But I guaranty that I enclose a paper superior to Job by the addition of hygienic substances." He also issued an advertisement in which he recognized the distinction between his paper and that of the proprietors of the Job paper, challenging them to deny the superiority of his. In enjoining him, the court said, *inter alia*:

"Whereas, the lawful competition which should exist between merchants cannot be extended to include right to take the distinctive denomination of a rival even for advertisements and circulars, with the design of diverting his custom; whereas, it is manifest that Sabatou, in the use of the name 'Job,' and in indicating the superiority of his paper, had no other object than to destroy the reputation enjoyed for the paper sold under the title of 'Job,' and to cause confusion by holding forth the said name; therefore," etc. *Browne, Trade-Marks*, § 398.

To similar effect is *Seixo v. Provezende*, 1 Ch. App. 192. We have said enough to show the manifest character of this scheme. It  
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falls, we think, clearly within the principle by which courts of equity are guided. The appellant Pillsbury has an undoubted right to use his own name in any honest way, but he has not the right to make the use of it here disclosed, to deceive the public, and to defraud the appellee.

In the consideration of this question we have not overlooked the case of *Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151. That was the case of a trade-mark pure and simple, in which it was held that one cannot acquire the right to the exclusive use of the word "Columbia" as a trade-mark. The court, at page 467 (150 U. S., and page 151, 14 Sup. Ct.) of the opinion, observes:

"It is also shown by the testimony in this case that the flour manufactured from spring wheat, such as that dealt in both by the complainant and the defendant, is never bought or sold simply on the brand, but usually, if not always, by actual sample; and the proof fails to establish that the brand of the appellees was calculated to mislead, or did actually deceive or mislead, any one into supposing that the flour of the complainant was being bought, so that it cannot be said that the defendants were personating the complainant's business by using such a description or brand as to lead customers to suppose that they were trading with the appellant."

This case does not hold to the contrary of the principle which we have asserted, but, impliedly at least, approves the principle that if the brand had actually deceived or misled, or that one was personating another's business by using a description or brand that was deceptive, the case would fall within the principle we have stated. There it appeared that the flour was not sold or bought on the brand, but usually by actual sample; here the proof is different. There the proof failed to establish that the brand was calculated to mislead or deceive; here the proof is overwhelming to the effect that the brand used was designed to mislead, and actually did deceive and mislead.

It is further urged that the appellee should not receive equitable relief, for the reason that during the first years after its incorporation and acquirement of the business it failed to indicate the fact of transfer in connection with its use of the trade-name, and that thereby it worked deception upon the public in attempting to pass upon them goods purporting to be made by the original proprietors of the mills. It is claimed that this fact should avail to the denial of relief, within the authority of *Siegert v. Abbott*, 61 Md. 276; *Partridge v. Menck*, 1 How. App. 558; *Medicine Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. 436. It may well be doubted if this case, upon its facts, falls within the reason of the authorities cited. Here the transaction was really but the incorporation of the parties who had built up and operated the business and mills in association with others; the supervision, superintendence, direction, management, and control of the business remaining and continuing in Mr. Charles A. Pillsbury as managing director, who had from the first controlled it, and under whose management the product of the mills acquired its high reputation. Under such circumstances it may well be said that the trade-name continued to assert the truth in its spirit and essence, and gave truthful assurance to the public that the flour was the genuine product of the Minneapolis mills operated and controlled

by Mr. Pillsbury, notwithstanding the legal and technical change in ownership wrought by the incorporation. Can such conduct be fittingly characterized as misrepresentation and falsehood, preventing relief in equity? But, however that may be, it sufficiently appears that prior to this suit the appellee adopted the custom of stamping upon its packages of flour, in connection with and immediately preceding the monogram of the former firm of Charles A. Pillsbury & Co., the words, "Pillsbury-Washburn Flour Mills, Ltd., Successors to," thereby announcing the technical legal ownership of the mills and business and the origin of the product. We are therefore of opinion that in restraining the unlawful acts of the appellants we should do no violence to the principle that "he who comes into a court of equity seeking equity must come with pure hands." We see no occasion for the imputation of fraud to the appellee. Affirmed.

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BUNDY MANUF'G CO. v. COLUMBIAN TIME-RECORDER CO.

(Circuit Court of Appeals, Second Circuit. December 3, 1894.)

No. 26.

PATENTS—WORKMEN'S TIME RECORDER—INFRINGEMENT.

The Bundy patent, No. 482,293, for a workmen's time recorder, in which the impression platen is operated by a check in the hands of the workmen, is not entitled to a broad construction as a primary invention, and is not infringed by the English machine, in which the platen is operated by clockwork previously wound up.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a suit by the Bundy Manufacturing Company against the Columbian Time-Recorder Company for infringement of a patent. The circuit court dismissed the bill for want of infringement (59 Fed. 293), and complainant appeals.

Cornelius W. Smith, for appellant.

Alan D. Kenyon, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The bill in equity in this case was founded upon an alleged infringement of the first, second, fifth, thirteenth, and fourteenth claims of letters patent No. 482,293, applied for March 3, 1892, dated September 6, 1892, and issued to William L. Bundy, for a workman's time recorder. The defendant denied infringement, but, if the machines which were made by the respective parties should be considered to be substantially alike, relied upon priority of invention. It manufactures under letters patent for a workman's time recorder, No. 461,822, applied for May 22, 1891, dated October 27, 1891, and issued to John C. English. A large part of the testimony related to the date of the Bundy invention, the complainant endeavoring to show that Bundy was the earlier inventor, and to excuse any apparent lack of diligence in the practice of his invention

and in its presentation to the patent office. Without discussing this question, the circuit court for the Southern district of New York dismissed the bill upon the ground of noninfringement. 59 Fed. 293. As we concur with the circuit court in both its results and its reasons therefor, and as Judge Wheeler's opinion states with clearness and succinctness the vital differences in the mechanism of the two machines, and leaves very little to be added by way of further explanation, we quote his opinion in full:

"This suit is brought for alleged infringement of letters patent No. 482,293, dated September 3, 1892, and granted to the orator as assignee of William L. Bundy for a workman's time recorder. In these machines, time wheels, with dates to hours and minutes in type on their faces, are moved by clockwork, so as to present these dates synchronously with the clock to an impression platen moving on a rock shaft set in motion by a check on which the workman's number is placed in type sent down a chute in which it is stopped near the time wheels; and this number and the time are there printed from the type on a strip of paper passed along under a ribbon by a blow from the platen, and the check is then released and dropped into a receptacle below. Thus the time of inserting the check for beginning or quitting work by the workman represented by the number on the check is correctly recorded and kept on the strip of paper. Machines for recording the time of workmen by printing from types on the faces of time wheels on the turning of cranks or keys existed before this invention. By the method of the orator's patent the check, when inserted by force of the workmen, moves a lever which is connected by a rod to a crank arm on the rock shaft, and moves the platen away from the faces of the time wheels against the force of a spring, to where it is held until the check in falling strikes another lever extending into the chute and releases the platen, which by force of the spring and its own weight is brought back and prints the number of the check and the time on the strip of paper. Five claims are alleged to be infringed, which are for:

"(1) In a workman's time recorder, a check, in combination with a check chute, a lever projecting into it, a rod connected to said lever, a rock shaft, and a crank arm thereon to which said rod is connected.

"(2) In a workman's time recorder, a check, in combination with a check chute, a lever projecting into it, a rod connected to said lever, a rock shaft, a crank arm thereon, to which said rod is connected, and an impression platen mounted upon an arm secured to said rock shaft."

"(5) The combination, with the impression platen, of a rock shaft, to which it is connected, and means to rotate said crank shaft, actuated by the insertion of a check into the check chute."

"(13) In a workman's time recorder, a clock, time wheels synchronous therewith, a rock shaft, and an impression platen connected thereto and actuated thereby, in combination with a check chute, a rod connected to said rock shaft, a lever connected to said rod and projecting into the check chute, and a check operatively engaging with said lever to rotate said shaft when inserted into said chute.

"(14) In a workman's time recorder, a check, a check chute, and a sliding stop holding the check upon the printing line, in combination with an impression platen thrown away from the chute by the insertion of the check into the chute, and an arm upon the platen engaging said stop to release said check at the same moment that the impression blow is given by the platen."

"In the defendant's machine the impression platen is moved on a rock lever to strike its blow by clockwork separate from the time works, wound up and carried by a spring, and set in motion at the right moment for printing the number and time by the weight of the check falling upon a lever extending into the chute, and connected with this clockwork. The first question made for the defendant is whether this is an infringement of any of these claims. These claims do not in themselves refer to the previous description of the parts of the machine mentioned in them, but they must be taken as in effect referring to the whole of the instrument in which they belong. *Westinghouse v. Air-Brake Co.*, 2 Ban. & A. 55, Fed. Cas. No. 17,450; *Bruce v. Marder*, 10

Fed. 750. In this view the several elements of those claims are to be considered as parts of mechanism for bringing the impression platen into operation upon the types on the check and time wheels at the proper time. If the invention had been of a time-recorder as a new thing containing these parts the claims might cover all modes of so bringing the impression platen into operation, but as it was not they can cover only substantially these means. *Railway Co. v. Sayles*, 97 U. S. 556. In the machine of the patent the impression platen is operated by the check in the hand of the workman; in the defendant's machine it is operated by the clockwork previously wound up. This substantial difference seems to run through the whole, and to take the defendant's machine out of the scope of all of these claims. In this view the several serious questions as to the validity of these claims need not be examined into."

The complainant relied upon the alleged fact that its patent was for a primary invention and was therefore entitled to a broad range of equivalents. *Miller v. Manufacturing Co.*, 151 U. S. 186, 14 Sup. Ct. 310. Upon the character of the invention the question of infringement really depended. The complainant's position was that prior to the alleged date of the Bundy invention no time recorder existed in which, after the insertion of the check, all the work was performed automatically. Other machines existed in which, after the check was placed in the chute, printing was effected through lever mechanism actuated by a key or a cam or a crank which was operated by the workman. This is true, but the result which is claimed by the complainant does not necessarily follow. The "check machine" was not one which accomplished an important result, or a necessary or a greatly desired improvement upon its predecessors, and was not, therefore, a broad invention. Bundy's "key machine," patented November 20, 1888, by letters patent No. 393,205, was and is, as subsequently improved, a very successful machine. It contains the fundamental idea of his subsequent invention, and, while the check machine, which seeks to require nothing of the workman but to drop the check into the chute, is an improvement, it is an invention which covers only that area of equivalents over which patents for improvements ordinarily extend.

Turning now to the question of infringement, in the Bundy machine the weight and the momentum of the check, operating through a series of levers, moved the impression platen. In the machine of the English patent the falling check rocked a lever, whose depression operated a trip which released the platen. The platen was then impelled to strike the blow by a spring which had previously been wound up. The circuit court correctly defined the substantial difference to be that "in the machine of the patent the impression platen is operated by the check in the hand of the workman; in the defendant's machine, it is operated by the clockwork previously wound up." The complainant's counsel urges that the circuit court confined itself to the machine as shown in the English patent, and did not advert to the English machine as made and shown in the model, which he claims differs from the machine of the patent in two respects:

- (1) In the patent the wound-up spring impels the platen to strike an impression blow, being released for that purpose by a trip which is operated by a falling check; while in the machine a trip mechan-

ism, operated by the falling check, released the wound-up spring to swing or throw the platen back and set it ready to strike its blow; and (2) in order to provide means to strike the blow, a coiled spring is used, which is in construction and operation the same as the spring in the Bundy patent. If the alleged difference exists, it is not material upon the question of infringement. In the patent the previously stored up force in the clockwork impels the platen to strike a blow, while in the machine as made the clockwork throws the platen back into position to strike its blow. The substantial difference found by the circuit court still exists, which is that in the Bundy machine the force of the check alone moves the platen, whereas in the English machine the previously stored up force in the clockwork brings the platen into position to strike the blow. The decree of the circuit court is affirmed, with costs.

### CARRINGTON v. SILVER & CO.

(Circuit Court, S. D. New York. December 6, 1894.)

#### 1. PATENTS—INFRINGEMENT—CHANGE OF FUNCTION BY NATURAL BREAKAGE.

It is no ground of a decree for infringement that the glass chimneys in defendant's gas stove become broken, and that such stove, if used without the chimney, would infringe complainant's patent, where the evidence is uncontradicted that defendant never sold a stove without a chimney, and has replaced a great many broken chimneys, and there is no evidence that the stove was ever used without a chimney.

#### 2. SAME—GAS STOVES—INFRINGEMENT.

Carrington's patents, Nos. 419,827, 420,255, for improvements in gas stoves, the fundamental principle of which is the free radiation of heat at all points, and particularly at the lower portion of the stove, and the avoidance of upward drafts and chimney-like effect above the burner, held not to be infringed by a stove markedly similar in appearance, but in fact designed, by the use of a glass chimney, to create an upward draft.

**Final hearing in equity.** This was a suit by Anna A. Carrington against Silver & Co., a corporation, for infringement of letters patent.

The complainant is the owner of two letters patent, granted to James H. Carrington, for improvements in gas stoves. The first of these, No. 419,827, was granted January 21, 1890. The application was filed November 1, 1889. The patentee says: "My invention consists of a stove the body of which is composed of perforated metal, designed for burning to the best advantage illuminating or nonilluminating gas. By my invention I obviate all centralization of drafts or currents of air or heat, and the heat is given free outward radiation at all points, so that there are no jets of air drawn in at the base and no chimney-like effect above the burner, which results from confining the heated air, as with common stoves of this class. The top of the stove is by preference closed or imperforate to deflect the heat outward." He says further that the body of the stove is of perforated metal—preferably sheet iron—and may be from one foot to three or more feet in height. The perforations are by preference small and close together. From one hundred to three hundred perforations to the square inch produce the best results. The top of the stove is without apertures and serves to intercept the rising currents of heated air and causes them to be deflected downward and outward. The burner may be of any approved type and is located at the base of the stove. The bottom of the stove consists of a perforated plate. There is practically no draft into the stove except through this bottom plate. For high stoves a centrally located per-



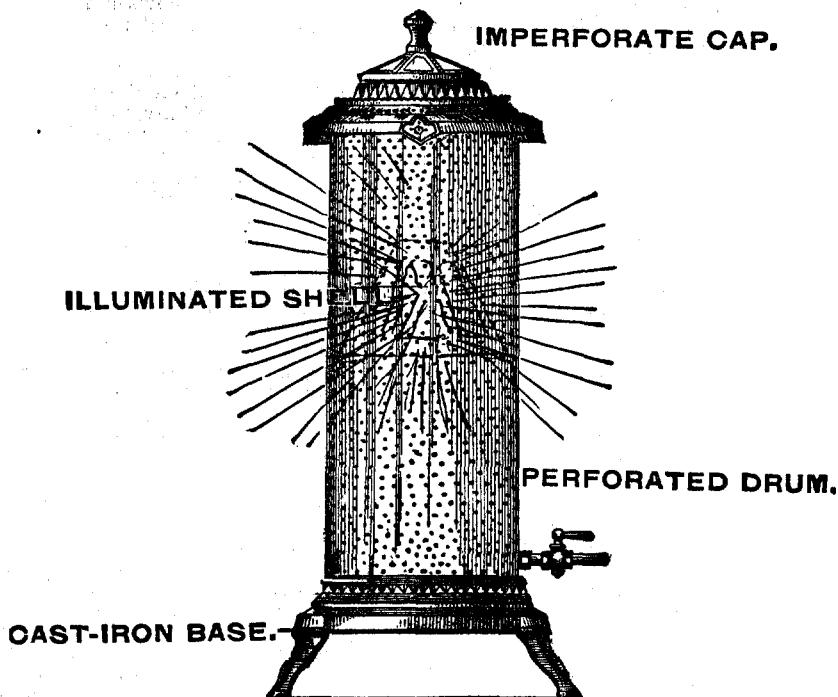
forated plate is used to deflect the heat and throw it out more at the base of the stove and intercept upward drafts. This construction allows a full supply of air and produces thorough combustion and a full lateral radiation of heat at all parts of the body of the stove.

The claims are as follows: "(1) As a new article of manufacture, a gas stove consisting of a base, a hollow body portion mounted on the base and having small interstices or perforations extending substantially to its lower end, and a burner within the body portion and near the lower end thereof, substantially as set forth. (2) As a new article of manufacture, a gas stove consisting of a base, a burner, a hollow body portion inclosing the burner mounted on the base, and having small interstices or perforations extending below the normal level of the flame of the burner, substantially as set forth. (3) As a new article of manufacture, a gas stove consisting of a base, a hollow body mounted on the base and having small perforations or interstices extending substantially to its upper and lower ends, a burner within the body portion near the lower end thereof, and a cap closing the upper end of the body, substantially as set forth. (4) As a new article of manufacture, a gas stove consisting of a hollow body closely perforated or intersticed throughout its length, a supporting base, a perforated or intersticed bottom for the body, a burner within the body adjacent to the upper side of said bottom, and a cap closing the upper end of the body, substantially as set forth. (5) As a new article of manufacture, a gas stove consisting of a base, a hollow body portion mounted on the base and having small perforations or interstices extending substantially to its lower end, a burner within the body portion near the lower end thereof, and a transverse deflector within the body above the burner, substantially as set forth."

The second patent, No. 420,225, was granted January 28, 1890. The application was filed November 16, 1889. The patentee says: "My invention relates to certain improvements in gas heating stoves; and it has for its object to provide an illuminated gas stove, or stove in which the reflection from the flame is made to light up and give a pleasing effect to an illuminated transparent shell placed within the foraminated or woven-wire casing forming the body of the stove. It has been common to employ a bright metal reflector in gas stoves; but these become tarnished, and besides do not produce an effect visible from all sides of the stove. My invention consists of a shell made in the shape of a cone or dome and formed of transparent material, preferably of different colors, so as to form a pleasing and mellow glow from the reflected light received from below, and which is visible through the foraminated casing from all sides of the stove, as hereinafter fully described." He says further that within the cylindrical casing is an adjustably supported transparent shell open at its top and bottom. This shell is preferably shaped like a dome or a truncated cone and is made of mica, porcelain or colored glass. The light from the burner strikes the inner wall of this shell and the illumination thus produced is clearly visible through the perforations of the cylinder. This produces a pleasing effect upon the eye. The shell, like the deflecting plate of the previous patent, also serves to check the upward passage of heated air and forces it out through the perforations below the shell and near the floor. The remaining portions of hot air pass through the opening at the top of the shell and are deflected through the upper perforations. "In this way the stove is made to heat uniformly from bottom to top, an excessive heat at the top is avoided, and the heat is kept down in the lower portion of the room, where it does the most good."

The claims are as follows: "(1) In a gas stove, the combination, with the foraminated or woven-wire casing and a subjacent burner, of an illuminated shell placed above the burner within the circumference of the casing, substantially as shown and described. (2) A gas stove having above its burner an illuminated shell surrounded by an outer casing of foraminated sheet metal or woven wire, substantially as shown and described. (3) In a gas stove, the combination, with the foraminated or woven-wire casing and a subjacent burner, of a cone-shaped or converging shell having its larger end at the bottom and sustained upon the outer casing at or near its middle, substantially as shown and described."

The following diagram will serve to illustrate the stove of both patents.



The defenses to both patents are lack of patentability and noninfringement.

H. A. West, for complainant.

J. E. M. Bowen, for defendants.

COXE, District Judge (after stating the facts). The fundamental principle upon which the Carrington stove operates is the free radiation of heat at all points and particularly at the lower portion of the stove. To produce this result the casing is perforated from top to bottom with small holes close together and is closed at the top with an imperforate cap. In high stoves a deflecting plate is suspended centrally in the drum to intercept the heat and throw it out at the base of the stove. What the patentee wished to gain was free lateral radiation at all points—at the bottom as well as the top of the stove. What he wished to avoid was upward drafts and chimney-like effects above the burner. In this distinction lies whatever merit there is in the Carrington stove. Its novelty consists in departing from the old method of utilizing upward drafts by the substitution of mechanism, the principal object of which is to destroy such drafts and substitute horizontal radiation therefor. This proposition is very clearly stated in complainant's brief as follows:

"The rapid circulation of air is localized at the bottom of the room by numberless forced jets, like so many horizontal chimneys, each jet having

a lateral impetus causing mainly a horizontal circulation of air instead of a vertical circulation as in other gas stoves; that is to say, instead of a chimney-like vertical column of air ascending to the ceiling as with common stoves, a horizontal projection of currents is produced by the Carrington stove."

In view of the conclusion reached upon the question of infringement it is unnecessary to discuss the prior art further than to say that at the date of Carrington's application gas stoves were old. They had been known for years, and, in appearance, were similar to the stove of the patent. Perforated bottom plates and drums and burners located near the bottom plates were well known. So were drums filled with small perforations, in similar structures. A broad construction of the claims is, therefore, inadmissible. The similarity in appearance between the defendant's stove and the Carrington stove is so marked that there is danger of being misled upon the question of infringement. An examination of the two structures will, however, demonstrate the fact that they operate upon radically different principles. Indeed, the defendant has taken pains to retain the very features which Carrington denounced as defects and endeavored to eliminate by every means in his power. The defendant's stove is constructed with an interior glass cylinder, just inside the sheet-metal casing, extending about three-fourths of the distance from the base to the cap. Below this glass cylinder the casing is perforated as in the Carrington stove, but above it the openings are comparatively very large, leaving an almost unobstructed passage for the heated air at the top of the stove, after first being superheated by a cast-iron radiator located at that point. The glass cylinder acts as a chimney to carry the heated air directly to the top of the stove and effectually prevents any passage of air through the small perforations. The perforations are there to add beauty to the stove and protect the glass; not to perform any heating function. The stove would operate in precisely the same way if the lower casing were removed and the upper casing with the large perforations made to rest directly on the glass chimney. So, too, the operation would be the same if the chimney were omitted altogether and the drum made without perforations, except the large ones at the top. This is clearly proved by the defendant, and, subsequently, admitted by the principal witness for the complainant who says: "The inside glass chimney is carried up to such a height that it partially destroys the desired result, that of having the cold currents of air passing over the flame." In short, Carrington's purpose was to get heat from the bottom of the stove, that of the defendant to get heat from the top only. The defendant may have copied Carrington's design but not his mechanical arrangement—not his principle of heating.

It is argued that the glass chimneys become broken and that, if used without the chimney, the defendant's stove will infringe. The answer is that the evidence is uncontradicted that the defendant never sold a stove without a chimney and that it has replaced a great many broken chimneys. There is no evidence that defendant's stove was ever used without a chimney, certainly none that defendant was privy to such use. As the defendant's drum, for all purposes except ornamentation, is without the small perforations,

the glass chimney operating to close them for all mechanical functions, it must be held that the defendant does not infringe the claims of No. 419,827.

It is also clear that the claims of No. 420,225 are not infringed. The defendant does not use an illuminated shell above the burner. The glass chimney is not an equivalent for this shell, for it is not conical or dome-shaped, it is not adjustable, and it is not supported or suspended above the burner in the sense of the patent. Its mechanical function is the direct opposite of that attributed to the patented shell. Neither can it be said that the cast-iron radiators at the top of the defendant's stove are equivalents because they sometimes become red hot. The object of the Carrington shell is to prevent this maximum of heat at the top of the stove. In material, position, shape and function the radiators are totally different from the shell of the patent. It follows that the bill must be dismissed.

#### BONSACK MACH. CO. v. NATIONAL CIGARETTE CO.

(Circuit Court, S. D. New York. October 2, 1894.)

#### PATENTS—INJUNCTION AGAINST INFRINGEMENT—MOTION TO PUNISH FOR CONTEMPT.

The question whether defendant infringes by making a machine differing in some respects from one previously held by the court to be an infringement cannot be tried on a motion to punish for contempt, when the new machine is made under a patent issued after the injunction was granted.

This was a suit by the Bonsack Machine Company against the National Cigarette Company for the infringement of certain letters patent for cigarette machines. An injunction was heretofore granted (63 Fed. 835), and a motion is now made to punish for contempt for alleged violation thereof.

Duncan & Page, for complainant.

Cowen, Dickerson & Brown, for defendant.

LACOMBE, Circuit Judge. This is a motion to punish for contempt. When the suit was originally brought, defendants were using a machine which the court has, after argument, held to be an infringement of complainants' patents. The defendants are now using a machine which in some respects differs from the infringing machine already passed upon, and it appears that it is made under a patent issued subsequent to the decree. The weight of authority is clearly against the proposition that in such a case the question of infringement is to be settled on a motion to punish for contempt. The new machine is brought into court with prima facie proof that, in the opinion of the patent office, it is patentably different from the machine of complainants. Whether it is an infringement or not should be settled by application for injunction, not for commitment for contempt. *Buerk v. Imhaeuser*, 2 Ban. & A. 465, Fed. Cas. No. 2,107; *Onderdonk v. Fanning*, 2 Fed. 568; *Wirt v. Brown*, 30 Fed. 187; *Truax v. Detweiler*, 46 Fed. 117. Motion denied.

## NEW DEPARTURE BELL CO. v. BEVIN BROS. MANUF'G CO.

(Circuit Court, D. Connecticut. November 16, 1894.)

No. 748.

## 1. PATENTS—LOOSELY PIVOTED BELL STRIKER—LIMITATION OF CLAIM.

The Rockwell patent, No. 456,062, for a loosely pivoted bell striker, adapted to rotate and wear evenly, should be limited to the specific construction claimed, since loosely pivoted bell strikers are old, and are not infringed by a loosely pivoted bell striker which presents each time the same point to the gong. *Manufacturing Co. v. Weeks*, 9 C. C. A. 555, 61 Fed. 405.

## 2. SAME—CONSTRUCTION OF CLAIM.

Claim 2 of the Rockwell patent, No. 471,982, for a bicycle bell which accomplishes results shown by the previous art to be desired, is not anticipated by the futile attempts of others, and such patent should not be construed so narrowly as to be fatal to it.

## 3. SAME—INFRINGEMENT.

Such claim is infringed by a device which, though not identical in structure, contains all the elements claimed, and operates to perform the same function in substantially the same way, the alleged differences of operation being merely such colorable and formal ones as result from the use of mechanical equivalents. *National Typographic Co. v. New York Typograph Co.*, 46 Fed. 114.

## 4. PATENTS—PRIOR ART.

The Rockwell patent, No. 471,983, for a bell having a striker arm with free rotary movement in either direction, is limited by the previous art to the precise construction described and claimed, and is not infringed by a device which cannot be rotated in either direction at will.

## 5. SAME—DIVISION OF INVENTIONS—CONSTRUCTION.

Where an inventor divides up his invention so as to present certain elements in different patents, he is thereby "limited to a more strict and narrow construction than might otherwise have been necessary" (*Electrical Accumulator Co. v. Brush Electric Co.*, 2 C. C. A. 682, 695, 52 Fed. 130), and the construction of the patents must be in conformity with the self-imposed limitations which are contained in the claims (*Groth v. Supply Co.*, 9 C. C. A. 507, 61 Fed. 284, 287; *Judd v. Fowler*, 10 C. C. A. 100, 61 Fed. 821).

## 6. SAME—AMENDMENT.

A bill of complaint failed to allege any sale of the infringing goods, or that the infringed goods were marked "Patented," or that the defendant had notice that they were patented, but the evidence showed the sale of the infringing goods. An amendment had been offered before the hearing, containing an averment of the sale, the answer containing no averment of want of knowledge, and it appeared that the defendant had actual knowledge of the patents and notice of the claim of infringement. *Held*, that the bill may be amended in accordance with these facts after issue tried and infringement declared.

This was a bill in equity by the New Departure Bell Company against the Bevin Bros. Manufacturing Company to restrain the infringement of certain letters patent, and for an accounting.

Newell & Jennings, for complainant.

C. L. Burdett, for defendant.

TOWNSEND, District Judge. This is a bill in equity for an injunction and accounting by reason of the alleged infringement of patents No. 456,062, dated July 14, 1891, and Nos. 471,982 and

471,983, dated March 29, 1892, and all granted to E. D. Rockwell, the manager of and assignor to the complainant corporation, all of said patents being for improvements in bells. They relate specifically to the striking mechanism in the class of bells which give forth a continuous ring, thus producing a sound resembling that of an electric bell. The defendant's bell is adapted for use as an alarm bell on bicycles. The defenses interposed are want of patentability and denial of infringement.

The single claim of patent No. 456,062 is as follows:

"A bell striker having a central aperture for loosely pivoting it to a rotating hand, and various striking points or surfaces around its exterior, and adapted to be rotated on its pivot by each blow to bring to bear a new striking surface, substantially as set forth."

It appears from the specification that the object of the patentee was to produce a more effective and more durable device for gongs and alarm bells. He states that the objection to previous devices "has been that the striker would become by constant use worn in places, so that the bell would either refuse to sound at all or sound imperfectly," and that the object of his invention is "to produce a striker which, on account of its peculiar construction, will wear evenly, and for that reason obviate the difficulty named." The patentee further says:

"My invention belongs to that class of bells in which the strikers are loosely carried on a revolving part, and are thrown against the side of the adjacent gong by the revolution of the part to which they are attached."

The complainant's exhibit "Complainant's Bicycle Bell" comprises a circular base plate, a raised stationary plate, a gong provided with a lug, and a centrally mounted revolving arm or striker bar, with a gear adapted to receive rotary motion from a pinion with which it meshes. This arm extends nearly across the diameter of the gong, and carries metal strikers loosely held in place by pivots extending vertically through central apertures in said strikers. In said bell the striker arm is centrally mounted, and is connected with a lever and spring adapted to rotate it in opposite directions. But in patent No. 456,062 the arrangement shown is that of a striker arm supported at one side of the center, and a gong without a lug, and the means by which rotary motion is imparted to said striker arm through the gearing is not stated. The evidence as to the state of the art prior to the date of this patent shows several patents for devices which produced a similar sound in such bells. Patent No. 365,241, granted to Comstock & Buxton, June 21, 1887, shows a device wherein a pivoted hammer strikes the gong. And in patent No. 386,632, granted to Victor Germain, July 24, 1888, a similar hammer strikes a lug on the side of the gong. Patent No. 428,198, granted to Allen & Goulden, May 20, 1890, shows a hammer loosely pivoted upon the striker arm so as to permit a recoil upon striking the gong. In these structures there is no provision whereby the hammer or striker is caused instantly both to rebound and rotate on its pivot so as to present a new striking surface. It may be assumed, so far as the evidence in this case shows, that

this result is new and useful and involved invention. The patentee further says, in his specification, as follows:

"It is necessary for the perfect operation of my machine to have the strikers thrown by centrifugal force against the inside of the gong and to fly back instantly. A space should therefore be provided between the pivot pin of the striker and the arbor, within which the striker may retreat out of the way of the gong."

The defendant claims that this does not recite an advantage or object of the invention, but a necessity, which is a limitation or restriction, and without which the strikers would not be whirled upon their pivots; and that such rebounding stroke was not new, and was not claimed as new, in the art. Complainant strenuously contends that this rebound was one of the features of the invention, and that it was new in the art. He claims that the distinction between the operation of prior devices and that of the patent in suit is that the former strike a dragging and glancing blow like that of a flail, while in the latter the blow is a direct one, with an instant rebound. This is true as to the pivoted hammers of the Comstock & Buxton and Germain patents, but not as to the said Allen & Goulden patent, in which the hammer is so loosely riveted as to permit the striker to rebound upon coming in contact with the gong. Another patent,—No. 174,754,—granted March 14, 1876, to Allen & Lathrop, shows said feature of blow and rebound, and may be fairly claimed to also embody in its operation the rotation upon a pivot, whereby new striking surfaces are presented. But, as neither the Allen & Goulden nor the Allen & Lathrop bell belongs to the class under consideration, or embodies the mechanism herein, and as the device of complainant is an improvement thereon, neither of them anticipates this patent. The striker of defendant is held in place on a revoluble striker bar by pins extending horizontally from opposite sides of the striker itself, and which move in spaces cut in the upturned edges of the striker bar. There are no central apertures in the strikers, and no means for adapting them to be rotated on their pivots. Centrifugal force causes the strikers to slide out on the striker arm. The complainant claims that this device was ingeniously contrived to secure the benefit of the Rockwell invention by the use of a mechanical equivalent. It will be apparent upon inspection of the exhibit of defendant's bell, and is practically admitted by the expert for complainant, that whenever, by reason of centrifugal force, the striker is at the extreme limit of its outward movement, it will ordinarily present the same point on its surface to the gong, and that it cannot, by reason of its construction, revolve upon its pivot. The language of the specification and claim shows that the chief object of the patentee was to secure different striking surfaces, so as to avoid the wear on the striker. This result is not accomplished by defendant's device. The question, then, arises whether the claim of this patent should be allowed such broad construction as to cover the means by which the direct blow rather than the glancing blow is produced.

There is nothing in the language of the claim itself which can refer to this operation, except the words "substantially as set forth."

The evidence shows that the so-called "electrical effect" in such bells was not new. If the patentee believed that such prior strikers were defective by reason of glancing or dragging effects, and that he had invented a means to obviate such defects, or that he had, by his invention, produced a better electrical effect than would otherwise have been possible, or the same result by a new striking device, such result and means would naturally have been referred to in the specification and distinctly claimed. It is true that the patentee is entitled to all the beneficial uses of his invention, whether specifically claimed by him or not. *Manufacturing Co. v. Robertson*, 60 Fed. 900, 904, and cases cited. But in the construction of the patent it is important to determine what object the inventor had in view, and how he sought to accomplish that object. The language of the specification certainly indicates that the patentee, when he proposed to produce a more effective and more durable device, had in mind the objection as stated by him, "that the striker would become, by constant use, worn in places, so that the bell would either refuse to sound at all, or sound imperfectly," and that he proposed to obviate it by a striker operated substantially as described. Inasmuch as loosely pivoted bell strikers are not new, the patentee must be limited to the construction claimed by him. Irrespective of the considerations already suggested, if he intended to embrace the production of an old result, namely, an electrical sound, by new means, he should have indicated what was the new means employed, and claimed it. A hammer or striker which should fly back instantly was old in the art. The patentee in his specification refers to the class of loosely pivoted strikers as old, and states that the serious objection which he proposed to obviate was defect in sound by reason of the wear of the striker in particular places, and confines himself, in this claim, to a specific construction whereby a striker, having a central aperture, was adapted to be so rotated on its pivot, by each blow, as to bring to bear a new striking surface. Inasmuch as the striker of defendant's device has no central aperture, does not rotate, and does not by each blow bring to bear a new striking surface, it does not embody the invention claimed in said patent, and is not an infringement thereof. *Manufacturing Co. v. Weeks*, 9 C. C. A. 555, 61 Fed. 405.

It is next claimed that defendant has infringed the second claim of complainant's patent No. 471,982. Said claim is as follows:

"The combination, with a base plate, of a revoluble striker bar, spring-actuated in one direction, a lever operatively connected therewith, and adapted to rotate the striker bar in opposition to the force of the spring, and a gong, substantially as set forth."

The gist of the invention claimed in this case is a combination of base plate, striker bar, lever, spring, and gong, so related to each other as to operate in a certain way, and to secure a certain result. These elements would manifestly not produce the desired result without other mechanism for rotating the striker bar. Such combination is stated by the patentee to be especially designed and adapted for a bicycle bell. A geared pivoted lever is connected with a spring and revoluble striker, and extends beyond the base plate,



so as to be operated by the thumb or finger of the bicycle rider. In the operation of this bell the pressure upon the thumb piece causes the striker arm to revolve in one direction, and, when the pressure is relaxed, the spring causes it to revolve in the opposite direction.

The defendant has introduced a mass of exhibits in support of the claim of anticipation. Several of the patents, especially those of Kirtner, Serrell, Allen & Lathrop, Eddy & Nichols, and the exhibit "Starr Bros. Bell of March, 1890," have no relevancy in support of this defense. The Comstock & Buxton, Germain, and the second Allen & Goulden patents, contain some of the elements of the claimed combination, but no one of them embraces the same organization of elements, or shows the same mode of operation as that covered by the claim of the patent in suit. The patent of Allen & Goulden of 1890 is the only device which has a spring for driving the bar in the opposite direction. None of the patents, except that to Serrell, show devices adapted for use on bicycles. Some of them are designed to be turned by the thumb and fingers, others by pulling upon a wire, neither of which operations would be practicable in the case of a rider upon a bicycle. The device which most nearly resembles that of complainant is British patent No. 2,425, granted to Alfred Bennett, June 22, 1877, for a call bell. This patent shows a revoluble striker bar, spring actuated in one direction, and a lever connected with a horizontally movable rod. These elements are so differently combined and operated, and are adapted to such different uses and purposes, and are so incapable of use in connection with a bicycle bell, that the combination does not anticipate said patent. It falls within the rule that where a device is neither intended nor adapted nor actually used for the performance of certain functions, it is not sufficient to constitute anticipation that it might be so modified as to accomplish such function. *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825; *Walk. Pat.* p. 54. "If an old device or process be put to a new use, which is not analogous to the old one, and the adaptation of such process to the new use is of such a character as to require the exercise of inventive skill to produce it, such new use will not be denied the merit of patentability." *Ansonia Brass & Copper Co. v. Electrical Supply Co.*, 144 U. S. 11, 12 Sup. Ct. 601. The great number of patents introduced into this case, all issued since the British patent, shows the amount of inventive skill which has been brought to bear upon this class of inventions. If the changes necessary to adapt this call bell to a bicycle bell were such as would occur to the ordinary mechanic skilled in the art, it would seem as though it must have occurred to some one during the 14 years of the life of said patent. A comparison of the bell with the "Starr Bros. bell of March, 1890," and the "Bevin Bros. Manufacturing Company's bicycle bell of December 9, 1890," previously manufactured by defendant, shows how crude and imperfect were the latest devices of the prior art, and furnishes additional evidence in support of the claim of patentable novelty and of utility, which latter claim is abundantly established by undisputed evidence. This device of complainant does not belong to the class referred to in *Mill Co. v. Walker*, 138 U. S. 124, 11 Sup. Ct. 292, and in *Duer v. Lock Co.*, 149 U. S. 216,

13 Sup. Ct. 850, where the patentee, by the exercise of the skill of the artisan, has produced a better article than those which preceded it, or has, by carrying forward original conceptions, produced a greater degree of improvement; nor does it belong to the class referred to in *Knapp v. Morss*, 150 U. S. 221, 14 Sup. Ct. 81, and cases there cited, and in *Trimmer Co. v. Stevens*, 137 U. S., at page 433, and 11 Sup. Ct., at page 150, where the demand for new devices, by reason of the development of a certain art or manufacture, has been met by the adaptation of old and well-known principles and devices of the same general character to a new use. The mass of evidence offered by defendant shows that the desired results have been accomplished, after repeated and futile attempts on the part of others, by a device which, upon defendant's own showing, is only anticipated by the earliest of all the devices,—the Bennett British patent of 1877 for a door bell. Under such circumstances the courts are not inclined to give such a narrow construction to the patent as will be fatal to it. *Manufacturing Co. v. Adams*, 151 U. S. 139, 144, 14 Sup. Ct. 295; *Miller v. Manufacturing Co.*, 151 U. S. 186, 14 Sup. Ct. 310; *Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.*, 10 C. C. A. 194, 61 Fed. 958, 962; *Smead Warming & Ventilating Co. v. Fuller & Warren Co.*, 6 C. C. A. 481, 486, 57 Fed. 626. Even if complainant's patent should be limited to the construction shown, including the other devices, and as applied to a bicycle bell, it is infringed by defendant. The defendant's device embodies all the elements of the combination covered by the second claim of said patent. It is true that in the patent in suit the base plate is stationary, while in the defendant's device it is caused to rotate, and that the levers are differently arranged in the two devices. But in each case the different parts operate to perform the same functions in substantially the same way, and the alleged differences of operation are merely such colorable and formal ones as result from the use of mechanical equivalents. *National Typographic Co. v. New York Typograph Co.*, 46 Fed. 114.

The single claim of patent No. 471,933 is as follows:

"In bell mechanism, the combination, with a frame and gong and lug upon the gong, of a centrally pivoted pinion loosely mounted on a central post on the frame, and having an arm upon one side, strikers upon the arm, and mechanism for communicating motion to it through the pinion, substantially as set forth."

The object of the invention was "to produce an improved bell that can be operated without the use of springs of any kind, and can be caused to emit a continuous ringing sound resembling that of an electric bell." Complainant's exhibit "Complainant's Door Bell," constructed in accordance with the specifications of said patent, shows a knob with a square shank secured within an escutcheon on the outside of an object, such as a door, and connected with a spindle on the inside of such door. Upon this spindle is a cogwheel, by which motion is communicated to a centrally mounted revoluble striker arm carrying loosely pivoted strikers. There is also a gong provided with a lug. The device may be operated in either direction by a turn of the knob. It will be seen that this construction

shows the loosely pivoted strikers claimed in patent No. 456,062, and the centrally mounted revoluble striker arm described, but not claimed, in patent No. 471,982, and substitutes, for the lever and spring therein claimed, mechanism which dispenses with said spring device. Similar mechanism, similarly operated, is shown in patent No. 460,347, granted to Allen & Goulden, April 14, 1891, for door bells. The Bennett patent for door bells, already considered, shows such a centrally mounted revoluble striker arm. The spring, however, in the Bennett device, prevents its being operated in either direction at will. The striker arm of the said Allen & Goulden patent may be revolved in either direction at will, but it is not centrally mounted. The state of the art, therefore, requires that the patentee be limited to the precise construction described and claimed, and which includes the free rotary movement of the striker arm in either direction, and the mechanism for communicating such motion to the striker through the pinion. The defendant's device cannot be rotated in either direction at will; it is only adapted to bicycle bells; it is operated by means of a lever and spring device copied from that claimed in patent No. 471,982; and, except for its adaptation to a bicycle bell by the infringement of 471,982, it more nearly resembles the Bennett device than that of complainant. Patent No. 471,983 is intended for and is adapted to stationary bells to be used on doors. It is specially designed so as to dispense with the necessity of using the device claimed in No. 471,982. *Westinghouse v. Air-Brake Co.*, 59 Fed. 581,607.

Various suggestions are made in support of the claim of novelty in the centrally pivoted swinging arm. Thus it is said that the arm must extend almost across the inside of the gong, and be adapted to swing around its entire diameter. But the Bennett patent shows the arm swinging around the entire diameter of the gong, and it surely would not require invention to duplicate said arm by extending it in the same way on the opposite side. The Bennett strikers, it is true, are different, but the specific striker described in this patent is not, and could not be, therein claimed, because it had been already described and claimed in 456,062. The fact that the arms are differently mounted does not affect the practical identity in construction and similarity in function and operation. The conclusion reached from these considerations is that the defendant has not infringed patent No. 471,983.

It sufficiently appears that Rockwell was the first inventor of valuable improvements in bell mechanism described in the patents in suit. That his device is useful is admitted; that it marked a decided advance in the art is proved. And it may be fairly assumed that a former employé of complainant,—Hathaway,—having acquired a knowledge of the inventions covered by complainant's patents, has inequitably attempted to appropriate them for the benefit of defendant. But the determination of the questions involved in the interpretation of the specifications and claims of the patents in suit depends upon settled principles of law. The public has an interest not merely in the result of this litigation, but it has a right

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to demand that such construction and interpretation shall be guided by uniform principles. The inventions covered by said patents embody a combination which comprises certain new devices and certain old devices in novel combinations, and adapted to new purposes. But the patentee has so divided up his invention as to present only certain elements of the combination in each patent, and is therefore limited to a more strict and narrow construction than might otherwise have been necessary. As was said by the circuit court of appeals in the case of *Electrical Accumulator Co. v. Brush Electric Co.*, 2 C. C. A. 682, 695, 52 Fed. 130;

"When one inventor makes a generic invention, and also subordinate specific inventions, and presents the whole series in a set of contemporaneous applications, the patentee must not be enabled, by an ingenious use of general terms, to enlarge the boundaries of each invention to extend each into the borders of another, and obtain a series of overlapping patents."

I am not unmindful of the principle already referred to and applied in the consideration of patent No. 471,982, upon the assumption that the invention of the patentee is in a certain sense of a primary character, and therefore the claims of the patent should have a liberal construction. "This just principle is one that is well recognized, but another principle is at the present stage of the patent law of equal force, which is that the construction of the patent must be in conformity with the self-imposed limitations which are contained in the claims." *Groth v. Supply Co.*, 9 C. C. A. 507, 61 Fed. 284, 287; *Judd v. Fowler*, 10 C. C. A. 100, 61 Fed. 321.

In regard to patent No. 471,982, which is held to be valid, and to have been infringed, it is claimed that no damages can be recovered, because the bill of complaint fails to allege—First, any sale of the infringing goods; or, second, that the complainant's bells were marked "Patented," or that defendant had notice that they were patented. Inasmuch as the evidence shows the sale of the infringing goods, and before the hearing an amendment was offered containing an averment of sale, it does not seem that any injustice would be done to the defendant if the court, in its discretion, should permit such amendment. The defendant cites the recent case of *Dunlap v. Schofield*, 152 U. S. 244, 14 Sup. Ct. 576, to support its second claim. The answer contains no averment of want of knowledge. The defendant "who relies upon a want of knowledge upon his part of the actual existence of the patent should aver the same in his answer." *Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. 799; *Winchester Repeating Arms Co. v. American Buckle & Cartridge Co.*, 54 Fed., at page 711. The proceedings between Rockwell and Holaday and the correspondence between the parties show actual knowledge of the patents on the part of defendant, and notice of the claim of infringement. The complainant, therefore, has the right to amend. Let the allegations of the bill be amended in accordance with the facts found upon this point, with leave to the defendant to be heard thereon, if it so desires, within two weeks from the date of the filing of the opinion. If the defendant does not wish to be heard, let a decree be entered for an injunction against the infringement of patent No. 471,982, and for an accounting.

## THE GUILDHALL.

PETERSON et al. v. SCHULZE-BERGE et al.

(Circuit Court of Appeals, Second Circuit. December 3, 1894.)

No. 14.

## BILL OF LADING—EXEMPTION FROM LIABILITY—PERSONAL NEGLIGENCE.

Claimants' steamship was in collision, off the English coast, with another vessel, and proceeded to London for repairs, which were made under the supervision of her owners. While making repairs it was found that part of the cargo in the fore-hold had been damaged by the shock of the collision, and required reconditioning. No examination of cargo in the after-hold was made, but the steamship proceeded on her voyage across the Atlantic. The packages of a part of the cargo in the after-hold were so damaged by the collision that their contents were lost during the voyage across the Atlantic. *Held*, that the owners, having had charge of the repairs, were personally negligent in failing to examine the cargo in the after-hold while making the repairs, and were liable for its loss, notwithstanding a clause in the bill of lading exempting them from liability for neglect of their servants, collision, and other dangers, but saying nothing about personal negligence.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by Paul Schulze-Berge and others against the steamship Guildhall (Peterson, Tate & Co., claimants) for damages to a part of the cargo of the steamship, consigned to libelants. The district court rendered a decree for the libelants for \$961.21. 58 Fed. 796. Claimants appeal.

J. Parker Kirlin, for appellants.

Wilhelmus Mynderse, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The libelants are consignees of 250 barrels of alizarine, shipped from Rotterdam by the Guildhall. The shipment was stowed in the between-decks of No. 4 hatch, which was one of the after-hatches of the vessel, and came within 18 inches of the upper deck. Some 20 or 30 bales of straw were stowed on top of them. The Guildhall was a British steamship, hailing from Sunderland, England. She sailed from Rotterdam, October 15, 1892, with a miscellaneous cargo, bound on a voyage to New York. At about 5 a. m. of October 16th she was in collision with the English steamer Mira, about four miles to the westward of Dungeness. The claimants concede that the Guildhall was in fault for the collision. Her captain had joined the vessel at Sunderland, before she sailed thence to Rotterdam, and from that day until he fell overboard, on October 17th, and was drowned, he was, except for a few hours, continuously intoxicated. The Guildhall was damaged about the bow, so that her fore peak filled with water, and she put into London, October 17th, for repairs. It was found possible to effect these without going into dry dock, by discharging about half the cargo in the No. 1 and No. 2 holds, so that the bow rose out of water. It was

then found that, besides damage by water, some of the cargo thus discharged was damaged by the shock of the collision. It was reconditioned and reshipped. The Guildhall arrived in New York November 23d, after a very tempestuous voyage. The casks containing the alizarine were strong and heavy, bound with iron bands. Upon discharging the shipment in New York, nine of the casks were found damaged. Two of them had lost their heads, or portions of their heads, and the contents of those two were entirely lost. Seven of them had their chime hoops shoved on the head, and, the casks thus becoming loose by reason of the staves starting, most of their contents had gradually dripped or leaked out. The evidence as to the condition of the nine casks leaves no doubt in our minds that the shock of the collision caused a shifting of that part of the cargo fore and aft. Cargo stowed in the between-decks, as both the chief mate and the second mate testified, was more liable to damage by shock than that in the lower hold, the greater part of the shock being on the upper part of the ship. In consequence of this shifting, these casks "telescoped," heads were cracked or broken, and hoops were started; but the actual loss of alizarine occurred mainly by gradual subsequent leakage, not during the 24 hours from Dungeness to London, but in the voyage across the Atlantic, when the tempestuous weather produced an unusual amount of pitching and rolling. There is nothing to show any insufficiency in packing or in strength of packages.

The bill of lading under which the cargo was carried contained the following exceptions:

"The act of God, \* \* \* loss or damage resulting from any of the following causes or perils, namely, viz.: Insufficiency in packing, or in strength of packages, \* \* \* of breakage, \* \* \* neglect, \* \* \* default or error in judgment of the master, mariners, engineers, or others in the service of the owners, \* \* \* collision, \* \* \* perils of the seas, rivers, navigation, or otherwise, of whatsoever nature or kind, and howsoever caused. \* \* \* The rights of parties in relation to the carriage and delivery of the said goods and otherwise under the bill of lading shall be governed by English law, except that general average shall be adjusted according to York-Antwerp Rules, 1890."

The claimants contend that this clause in the bill of lading relieves them from liability for the loss of the alizarine. It is not necessary to enter into a discussion of the questions of law, which have been argued at great length, as to the validity of such a stipulation, inserted by a common carrier in a bill of lading, when the carrier undertakes to deliver the cargo safely here, and the stipulation is valid in the country in which it is made, and in that to which the ship belongs. It is not contended that it exempts the carrier from his personal negligence. In the case at bar it is expressly admitted by formal stipulation that "the steamer was repaired and dispatched from London under the supervision of her owners." Had the damage to the vessel been external only, and such as could be repaired without discharging cargo, it might fairly be contended that there was no negligence in the failure to remove the hatches and examine into the condition of the cargo, in order to see whether some unexpected damage had resulted from the collision. With the Guildhall, how-

ever, when cargo was removed from the two forward holds in order to effect the repairs to the hull, it was found that the collision had caused damage to several of the packages contained therein of such a character that, although slight then, it would in all probability become serious if the voyage was further prosecuted without reconditioning the packages. When such a result of the collision, although unanticipated, was brought directly home to the knowledge of the owners, they must be held negligent for not inspecting, even by such examination as could be given without breaking bulk, the packages in the after-hold, which were stowed in the between-decks, a place which the evidence shows was sensitive to the shock of a collision. The proof shows that such an examination as could be secured by removing the hatch and some 20 or 30 bales of straw would have shown that some of these 9 casks of alizarine were so damaged by shifting or telescoping as to require reconditioning before proceeding on the voyage. And the breaking out of these casks for that purpose would no doubt have revealed the condition of the others. As the bulk of the damage was caused by this failure to recondition, and the neglect so to do occurred when the vessel was under the supervision of her owners, we concur with the district judge in the conclusion that the exemptions are insufficient to absolve them, even if treated as valid, and applied according to English law. The decree of the district court is affirmed, with interest and costs.

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#### HASTORF v. MAYOR, ETC., OF CITY OF NEW YORK.

(District Court, S. D. New York. November 14, 1894.)

#### MOORING UNSAFE — GOING ADRIFT — ANCHOR ENTANGLED BY CHAIN — NEGLIGENCE — WINTER ICE.

Upon the facts, it being found that the libelant's scow, in charge of the defendant and moored to a stake boat, went adrift with the stake boat, because the anchor of the latter had become partly unserviceable from being entangled with the chain through failure to examine and straighten out the chain after the winter's ice: *Held*, negligence of the defendant, for which it was answerable to the plaintiff in damages.

This was a libel by Albert H. Hastorf against the mayor, etc., of the city of New York, for damages to libelant's scow.

Stewart & Macklin, for libelant.

William H. Clark, Corp. Counsel, and James M. Ward, Asst. Corp. Counsel, for mayor, etc.

BROWN, District Judge. On the night of the 20th or 21st of April, 1893, the permanent stake boat in Gravesend Bay used by the defendant as a place for tying up scows before they were taken to the dumping grounds at sea, drifted from her mooring during a northeast gale, carrying with her several boats attached to her, including the libelant's scow *Arcadia*, which in consequence was damaged by stranding on the Staten Island shore.

The evidence shows that the scow had been used for these purposes for several years; that she was provided with heavy anchors,

which had weathered many storms without drifting, when at least an equal number of boats had been attached. I have no doubt that the anchors were sufficient, and would not have dragged, had the anchors been in proper position; as the gale was not one of extreme severity, being certainly less severe than many which the scow must have passed through without drifting.

The only rational explanation, I think, is that the position of the anchors had not been properly examined and adjusted after the outflow of the ice of the preceding winter; that there had been such drifting of the scow caused by the ice as to bring the two arms of the anchor fastenings so much in line with the chain leading from the swivel to the scow, that upon the swinging of the scow with the daily changes of tide, the chain became entangled with the flukes of the anchors so as to diminish greatly their holding power. When the scow's anchors were examined after the scow had drifted a considerable distance, the chains were found thus entangled. This circumstance does not make it absolutely certain that the chains were thus fouled before the scow drifted, as there was more or less swinging of the scow at her anchorage after she had drifted, and before she was picked up and the anchors examined. But the description of the completeness of the tangle seems to point to a longer period during which the anchor chains were swinging about the flukes than the interval of a couple of days after she drifted.

The testimony shows that reasonable prudence required that a scow moored for such purposes, and in that manner, should have her anchors and their position carefully examined after each winter season's ice; and no such examination was made in the spring of 1893. There is also testimony by the witness who moored the scow that he observed that she had drifted some. Comment has been made by counsel upon the fact that this witness would not specify how much he considered she had moved; but in the absence of bearings by which anything definite could be stated, it would be too much to refuse any credence to the witness' testimony upon such grounds, in the absence of any accurate bearings by which any definite distance could be estimated. No other adequate cause of drifting is suggested, save the possibility that the storm at Gravesend Bay may have been much more violent than the records show it was at the office of the weather bureau in the Equitable Building, where it did not appear to exceed common gales. It is further suggested that if the anchors had been thus entangled, similar drifting should have been expected in two storms which occurred in the early part of the same month, which from the records of the New York weather bureau had an equal force of wind. But these considerations seem to me of little weight. The fouling of the chains would naturally increase with time, and their holding power be continually diminishing; and in the storms in the early part of April, not only was the fouling probably less, but there is no sufficient means of comparing the positions, number and weight of the boats on these different occasions.

In the absence of any other reasonable explanation I am con-



strained to find that the dragging arose from the neglect of the defendant to examine the anchors and see that they were in proper position after the preceding winter's ice, as the evidence showed to be necessary.

Decree for the libellant, with costs, and order of reference to compute the damages.

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THE ALLIANCA.

COMMERCIAL UNION INS. CO., Limited, v. PROCEEDS OF THE ALLIANCA.

(District Court, S. D. New York. November 26, 1894.)

GENERAL AVERAGE—JETTISON—NO LIEN ON SHIP FOR CARGO'S SHARE—LACHES—MORTGAGEE.

The owner of the steamship A. having collected in 1891 from cargo owners the amounts imposed on them by a general average adjustment for a jettison: *Held* (1) that a lien on the ship in behalf of the insurer of cargo jettisoned is limited to the ship's own share, as adjusted, and does not extend to sums collected by the ship owner from the owners of cargo saved; (2) that no action for a general average charge is maintainable until an average adjustment is made, though the lien therefor was previously inchoate; (3) that there having been great delay in completing the general average adjustment, and a loss of the bill of lading as a necessary voucher, the delay of about nine months after the libellant had notice of the adjustment was not such laches as to bar its lien as against a mortgagee of the ship claiming the proceeds.

This was a suit by the Commercial Union Insurance Company, Limited, of London, to enforce a claim for general average against the proceeds of the steamship Allianca.

Butler, Stillman & Hubbard and Mr. Mynderse, for libellant.

Carter & Ledyard and E. D. Baylies, for Atlantic Trust Co., mortgagee.

BROWN, District Judge. The above libel was filed to recover a sum due for general average on account of the jettison of 100 cases of turpentine from the steamship Allianca during her voyage from this port to Rio de Janeiro in June, 1889. The cause has been submitted upon an agreed statement of facts, from which it appears that the libellant insurance company, as insurers, had paid Crossman & Co., the shippers and owners of the goods, for the loss of the turpentine; that the turpentine was shipped under a bill of lading which accepted losses arising from perils of the seas or jettison; that the jettison was a proper one, under the circumstances of the voyage; that an adjustment of the general average against ship and cargo was made after the arrival of the ship at Rio, first, by Johnson & Higgins, adjusters at this port, which, with certain corrections, was afterwards adopted and adjusted at Rio, and completed there on May 16, 1891; that the whole average amount payable on account of the jettisoned turpentine was \$533.69; that the United States & Brazil Mail Steamship Company, the owner of the Allianca, upon the arrival of the vessel at Rio, took an average bond from the cargo owners for the payment of their shares when adjusted, and subsequently collected

substantially all the amounts payable by the cargo according to the adjustment, amounting to about one-half of the whole average; that the steamship company became insolvent in February, 1893; that the libelant claims by subrogation the amount of average payable to Crossman & Co. on account of the goods jettisoned; that various steps were taken from time to time by letters of inquiry of the agents of the assured at Rio, urging attention to the matter and to procure payment of the claim; but that through the loss of the bill of lading, which had been previously forwarded thither before the adjustment was completed, and apparently through some dilatoriness in the proceedings on the part of those agents at Rio, no legal steps were taken, nor was any proper presentation of the claim with the necessary suitable documents made to the Brazil Company, prior to its failure in February, 1893; that in December, 1889, the Atlantic Trust Company became a mortgagee of the steamship *Allianca* and the other property of the said steamship company, as security for the bonds of the company issued to the amount of \$1,250,000, which were thereafter negotiated and are still outstanding; and that at the time of the execution of said mortgage and the issue of bonds, the trust company, and the owners of the bonds secured by the mortgage had no knowledge of the jettison above stated; that the libel herein was filed on the 30th of June, 1894.

Although the *Allianca* and the steamship company, her owner, were not liable for the act of jettison itself, (*Lawrence v. Minturn*, 17 How. 100,) the ship remained bound to contribute its proper share of average, as the same should be afterwards properly and legally adjusted, so as to indemnify the owner for the property that had been lawfully jettisoned for the common benefit of ship and cargo. The pro rata share thus legally charged against the ship in general average, became also a maritime lien upon her, in favor of the owner of the turpentine, and of the libelant, by subrogation. *Dupont v. Vance*, 19 How. 162, 168-172. It has also been adjudged that had the master upon the arrival of the ship at the foreign port neglected to take a proper average bond from the cargo owners in the interest of the property jettisoned, whereby the remedy of the owner of the property jettisoned might be lost or imperiled, such an omission would be a breach of a maritime duty owed by the master to the property jettisoned, which would make the ship responsible for the shares payable by the cargo. See *Heye v. The North German Lloyds*, 33 Fed. 60, and cases there cited. *Strang v. Scott*, 14 App. Cas. 606; *Crooks v. Allan*, 5 Q. B. Div. 38, 42.

There was no such neglect, however, in the present case. The average bond was taken, and the shares payable by the cargo were some time afterwards collected by the carrier company for the benefit of those interested. As respects this part of the claim, plainly there was not originally any lien upon the ship. Each was chargeable only for its pro rata share (*Strang v. Scott*, supra); and there was no breach of duty by the master in the delivery of the goods saved, since a proper bond was taken, and the ship's duty was thereby wholly performed as respects the cargo delivered. I do not think the long-subsequent collection of average by the ship owners from the consignees created

any new and additional lien on the ship for the cargo's share; or that it made the ship, in effect, a guarantor of the continued solvency of the steamship company for the libelant's benefit. I cannot find, therefore, that any lien ever attached upon the Allianca in respect to the shares of average payable by the cargo, and afterwards collected by the steamship company; and I therefore cannot sustain any claim against the proceeds of the Allianca for the share of the general average paid by the cargo owners to the Brazil Company.

As respects the ship's share of the general average charge, viz., the sum of \$264.80, it is contended by the counsel for the trust company that the lien of the libelant has been lost by laches. But I do not think the circumstances are sufficient to sustain this contention. Although the jettison that gave rise to the lien happened before the mortgage was executed, the average was not adjusted, nor was any claim upon the ship capable of enforcement, until nearly a year and a half after the mortgage was given. Up to that time the lien was inchoate only, and there were no laches.

In the several cases cited on behalf of the mortgagee, the lien was perfected and capable of enforcement before the mortgage was given, which was not the case here. See *The Bristol*, 11 Fed. 156, and cases there cited; *The C. N. Johnson*, 19 Fed. 782; *The Theodore Perry*, Fed. Cas. No. 13,879. From the time the average adjustment was perfected until the failure of the company in February, 1893, was a year and about nine months. As regards this delay it is to be observed, that the final adjustment was in a distant port; that there had been great delay by the steamship company, first in preparing the adjustment in New York, and afterwards in Brazil in changing and completing it; that the libelant's claim had originally been forwarded to Brazil and presented with great promptness, and the bill of lading, as the proper voucher, sent there to substantiate the libelant's right; and the loss of the bill of lading seems ascribable in part to the great lapse of time before the average adjustment was completed; that there is no evidence of any notice to the libelant that the average adjustment had been completed until about May, 1892; and that the subsequent delay of nine months only, after the matter was resumed, is reasonably accounted for by the difficulty of dealing through agents at a distant point, and by the search for missing papers. There was not, in truth, any real delay, but rather a slow progress in the procurement of necessary vouchers.

Besides this, however, it does not appear that the trust company, mortgagee, can have been in the least prejudiced by the lapse of time. The general rule is that mere delay in the enforcement of a claim by a creditor gives no equity as respects other claimants, arising from subsequent insolvency or bankruptcy, provided the creditor has not himself done anything to mislead others. *Davison v. Donaldson*, 9 Q. B. Div. 623; *Irvine v. Watson*, 5 Q. B. Div. 414, 420; and see *The Suliste*, 23 Fed. 924, affirmed on appeal. There is no suggestion here that the mortgagee or bondholders have ever been misled; much less, that the libelant or the assured had done anything to mislead them. The defense here is that of mere delay in prosecution of a lien which could not be enforced until long after the mortgage was given. The

lapse of time is, I think, reasonably accounted for under all the circumstances of the case. The situation of the mortgagee cannot thereby have been changed or prejudiced in the least; nor is it conceivable that any different action would or could have been taken by the mortgagee or the bondholders, had they possessed perfect knowledge of this small lien and of its nonpayment; since the default by the steamship company in the payment of interest on the mortgage bonds on the 1st of January, 1892, some months anterior to the libellant's notice of the average adjustment, though the interest then due was a very large amount, led to no steps whatever by the bondholders or the mortgagee to enforce the mortgage, until after the company's failure. No case has been cited in which the delay under such circumstances has been held to discharge the lien.

Decree for the libellant for \$264.80, with interest and costs.

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CALDERON v. ATLAS STEAMSHIP CO., Limited.

(District Court, S. D. New York. December 3, 1894.)

CARRIAGE OF GOODS—OVERCARRIAGE—DEVIATION—RESHIPMENT AND LOSS—“PROPER DELIVERY”—HARTER ACT—BILL OF LADING—STIPULATION DOES NOT EXCUSE NEGLIGENCE—LIMITATION \$100 PER PACKAGE VALID.

The defendant's steamer A., which was accustomed to touch at several ports of call in South America, received on board, a few hours before sailing from New York, 29 packages for Savanilla, the second port of call, and they were placed in the bottom of the last hatch filled. On arrival at S. other goods were discharged there, but not the libellant's goods, which were inadvertently omitted, as found on the following day, after the vessel had left S. It not being convenient to return, or possible to forward the goods from the subsequent ports, they were brought back by the same vessel to New York, and there immediately reshipped for Savanilla by another steamer, which was totally lost on her way out. The bill of lading, by stipulations on the back, referred to in the body, provided that if goods “cannot be found” during the steamer's stay, they are to be forwarded when found, at company's expense; also, carrier not liable for “goods of any description which are above the value of \$100 per package, unless value expressed in agreement made.” *Held*: (1) That the stipulations indorsed, so far as reasonable and valid, were binding on the libellant; (2) that “proper delivery” of the goods included timely delivery; (3) that the provisions of the Harter act (2 Supp. Rev. St. 81) prohibit the insertion in the bill of lading of any exemption from liability for failure in the “proper delivery” of goods; (4) that the parties cannot evade this act by inserting stipulations determining what shall constitute a “proper delivery,” any further than shall appear reasonable under the circumstances proved, and no stipulation that shall cover negligence either in receiving and stowing the goods, or in making a proper search for them at the port of delivery; (5) that the overcarriage in this case was not justified by anything in the circumstances, or in the bill of lading, but amounted to a deviation in the maritime law, which made the carrier liable as insurer, and hence liable for a subsequent loss, even though by sea perils; (6) that the reasonable construction of the limitation clause in the bill of lading was against liability above \$100 per package, and as thus construed, it was a valid limitation.

This was a libel by Climace Calderon against the Atlas Steamship Company, Limited, to recover damages for the nondelivery of a cargo.

North, Ward & Wagstaff, for libellant.  
Wheeler & Cortis, for respondent.

BROWN, District Judge. On the 19th of July, 1893, the libellant delivered to the respondent, the owner of the steamships Ailsa and Alvo, in the city of New York, 26 bales and 3 crates of duck uniforms, to be transported to Baranquilla by way of Savanilla. The goods were taken to the wharf and delivered to the steamer Ailsa a few hours before she sailed. The steamers above named belonged to the Atlas Line, and were accustomed to touch at Southern ports in the following order: Kingston, Savanilla, Carthagena, Port Lemon, and thence back direct to New York. The Ailsa arrived in due course at Savanilla, where she discharged other cargo; but the libellant's goods were overlooked, and the failure to discharge them was not discovered until she was well on her way towards Carthagena, the next port, 76 miles distant. Having to take on bananas—perishable cargo—at Port Lemon, the last port, which were in waiting for her regular sailing days, and there being no other means of sending back the goods to Savanilla after the nondelivery was discovered, they were brought back to New York, where the Ailsa arrived on the 16th of August, and immediately reshipped them on board the Alvo, which sailed on the same afternoon, and on her way out foundered at sea in a hurricane, in which ship and cargo were a total loss. The above libel was filed to recover the value of the 29 packages above named, amounting to about \$5,600.

In the body of the bill of lading was the provision, that the steamer had liberty to call at any other port or ports in any order of rotation, etc., and that the owner and consignee agreed to be bound by "all the stipulations, exceptions and conditions as printed on the back thereof, whether written or printed, as fully as if they were all signed by the owner, consignee, or holder." On the back were indorsed numerous exceptions, among others, that of perils of the seas, followed by nine numbered clauses, three of which only are material here:

(1) That the "carrier should not be liable \* \* \* for goods of any description which are above the value of \$100 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made." (9) "Also in case any part of the goods cannot be found for delivery during the steamer's stay at the port of destination, they are to be forwarded by first opportunity when found, at the company's expense; the steamer not to be held liable for any claim for delay or otherwise." Last: "This agreement is made with reference to and subject to the provisions of the U. S. carriers' act, passed February 13, 1893.

["Signed]

Prim, Forward & Co., Agents."

The libellant had been accustomed to ship goods previously by the same line in numerous instances, upon bills of lading of the same character. Having delivered the goods to the Ailsa only a few hours before sailing, he did not receive the present bill of lading until after she sailed; but at the time of delivery he received a shipping receipt for the goods stating that they were subject to the conditions expressed in the company's form of bill of lading; and the bill of lading in the usual form as above expressed was afterwards delivered to him. Under such circumstances, he must be deemed to have had full knowl-

edge of the conditions indorsed on the back of the bill of lading, and referred to in the body of it, and to have acquiesced in and agreed to those conditions, so far as they were lawfully inserted and were legally valid. *Potter v. The Majestic*, 9 C. C. A. 161, 60 Fed. 624. The provisions of the act of congress of February 13, 1893, known as the "Harter Act," which is the last of the stipulations indorsed, supersede all the other provisions that are inconsistent with it, either in the body of the bill of lading or indorsed upon it.

The provisions of the act last cited (2 Supp. Rev. St. c. 105, p. 81) provide that it "shall not be lawful to insert in any bill of lading any agreement whereby the owner shall be relieved from liability for loss or damage arising from negligence, fault or failure in the proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge; any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect." If, therefore, the respondents are chargeable with negligence or failure in the proper loading, stowage, or proper delivery of these goods, they are liable for the damages arising therefrom, anything else in the bill of lading, or in the provisions indorsed thereon, to the contrary.

It is plain that independently of the ninth clause indorsed on the bill of lading as above quoted, there was "a failure in the proper delivery" of these goods. "Proper delivery" includes a timely delivery. It does not permit goods to be carried voluntarily away from the port of destination upon another voyage. The defense must, therefore, rest on the stipulation of the bill of lading. But the Harter act prohibits the insertion of any stipulation excusing a "failure in proper delivery." The words "proper delivery" as used in the act cannot mean any kind of a delivery that may be stipulated for, however unreasonable the stipulation may be; since that would thwart the very purpose of the first section of the statute, which was designed to protect shippers against the imposition of unreasonable stipulations in bills of lading to the prejudice of their interests. It is, perhaps, competent for the parties to make special provisions as to the mode of delivery, having reference to the usual ways of business, and the conveniences or necessities of vessels in touching at various ports; and insofar as these stipulations are shown by the circumstances to be reasonable, they may be upheld, as defining what a "proper delivery" shall be, and may thus justify what might not otherwise be held to be a proper delivery. Further than this, such stipulations cannot go without subverting the purpose of the act.

It is contended for the respondent that the ninth clause is a reasonable one, inasmuch as the necessities of proper stowage and distribution of a mixed cargo for the safety of the ship, and the frequent receipt of goods on the last day of sailing, cause goods to be sometimes necessarily so stowed as to be naturally overlooked or missed at the different ports of call, because they cannot be found at the time when they ought to be discharged; and that the ship, being under the necessity of making trips at regular dates, without delays that would be injurious to perishable cargo waiting for it, should not always be bound to wait for a general overhauling of

cargo not destined for the port of call, but should have the privilege in such cases of forwarding the goods afterwards when found, at its own expense.

Conceding the reasonableness and validity of the stipulation in the present case, it manifestly must be applied with strictness as against the carrier. It cannot be sustained as a defense where the failure to find and deliver the goods has resulted from any negligence in the stowage or care of the goods with reference to the convenient finding and delivery of them at the port of call; or where there has been any remissness in such search for the goods as is practicable at the time; and the burden of showing diligence in these respects is upon the carrier.

The respondent's evidence in the present case, wholly fails to meet these requirements. If, as one witness states, the goods were placed at the bottom of No. 3 hold, with goods for Carthagena stowed above them, that was negligence in stowage of Savanilla cargo, unless it was designed to discharge all the goods in No. 3 hold at that port. There is, moreover, no evidence of any endeavor whatsoever to find the goods at Savanilla. The limitation of the ninth clause, viz. "if the goods cannot be found," is certainly not a meaningless provision. It is of the very essence of any reasonableness in that stipulation, that all reasonable efforts shall be made to find the goods, as well as to avoid burying them at the port of shipment in places where they cannot, or are not likely, to be found. Here there is no evidence of care in either respect. The failure to deliver the goods does not seem to have been even noticed until the vessel had left Savanilla and was well on her way to Carthagena. The inference, therefore, is that the cause of the overcarriage was mere inattention in stowing or in discharging. I must find, therefore, that there was a "failure in the proper delivery" of the goods at Savanilla, not excused by anything in the testimony, or in the bill of lading.

As the respondent fails to justify its carriage of the goods beyond their destination, the case as respects these goods becomes one of deviation. The vessel, it is true, did not herself depart from her course, or delay her contemplated voyage; but she continued the carriage of these particular goods upon the high seas long beyond what the contract allowed, exposing them to three times the sea perils contemplated, and in the end shipped them upon another vessel from the original port of departure, whereby they were lost through sea perils.

It is urged that the final loss of the goods was by a hurricane, an extraordinary sea peril, which was an accidental result, and not a proximate or natural result, of the overcarriage. The cases of *Railroad Co. v. Reeves*, 10 Wall. 176; *The R. D. Bibber*, 8 U. S. App. 42, 2 C. C. A. 50, and 50 Fed. 841; *Denny v. Railroad Co.*, 13 Gray, 481; *Hoadley v. Transit Co.*, 115 Mass. 304; *Railroad Co. v. Burrows*, 33 Mich. 6,—are cited in support of this contention. None of these cases, however, are cases of voluntary or negligent deviation in the carriage of goods by sea. In marine transportation it is well settled that any unauthorized overcarriage of goods, or a shipment

of them by another vessel than that contracted for, renders the carrier liable as insurer; both for violation of the contract, and because the shipper's insurance is thereby avoided, and he has no opportunity to protect himself by the ordinary security of marine insurance. These reasons apply more emphatically in this case than in ordinary cases of deviation. For these goods were brought back to the very point of starting; no notice was given to the shipper; he was ignorant of the facts, and the opportunity was not given him to insure that might have been given. The cases above cited have never been applied, so far as I know, to cases of maritime deviation. I must, therefore, hold the respondent liable as insurer. 1 Pars. Shipp. & Adm. 171, note, and many cases there cited; Ellis v. Turner, 8 Term R. 531; Trott v. Wood, 1 Gall. 443, Fed. Cas. No. 14,190; Bazin v. Steamship Co., 3 Wall. Jr. 229, Fed. Cas. No. 1,152; The Bordentown, 40 Fed. 682, 689.

It is further contended that under the first clause of the bill of lading, the libellant's recovery cannot exceed \$100 per package, as the value was not made known, nor any agreement made for the payment of freight at an extra rate. The validity of stipulations of this character has been repeatedly upheld by the supreme court (Railroad Co. v. Fraloff, 100 U. S. 24, 27; Hart v. Railroad Co., 112 U. S. 331, 5 Sup. Ct. 151; Magnin v. Dinsmore, 70 N. Y. 410; Baldwin v. Liverpool, 74 N. Y. 125); and recently in the court of appeals of this circuit in Potter v. The Majestic, 9 C. C. A. 161, 60 Fed. 624, 630.

It is urged that effect ought not to be given to this stipulation, because literally read it provides that the carrier shall not be liable for anything in this case; and that this is so unreasonable that the stipulation should be allowed no effect at all. I do not think that construction was the intention of the stipulation, or that it is a reasonable construction of it. Literally, the goods which are above \$100 in the package may be excluded from consideration, and only those which amount to \$100 be regarded. That, I think, is the fair intention of the clause in question; and as the decisions cited sustain it as thus construed, I must hold accordingly, and allow a decree for the libellant for \$2,900, for the 29 packages, with interest and costs.

#### THE G. R. BOOTH.

#### AMERICAN SUGAR-REFINING CO. v. THE G. R. BOOTH.

(District Court, S. D. New York. November 23, 1894.)

#### CARRIAGE OF GOODS—EXPLOSION—DETONATORS—CUSTOMARY STOWAGE SUFFICIENT.

While the steamship G. R. B. was discharging, an explosion of detonators caused a hole in the ship which let in water which extended to plaintiff's goods in the next compartment, by which they were damaged. The detonators were in cases, so packed as to be customarily stowed and handled like ordinary merchandise, and believed to be harmless. *Held*: (1) That the damage having arisen primarily from sea water, the burden of proof was on the libellant to show negligence in the defendant; (2) that stowage of detonators as ordinary merchandise being proved to be



in accordance with the custom of the country, and without knowledge of their dangerous character, was justifiable and was not negligence, and the libel was dismissed, without costs.

This was a suit in admiralty by the American Sugar-Refining Company against the steamship G. R. Booth for damages by an explosion, whereby sea water was let into the hold, causing injury to libellant's sugar.

Wing, Shoudy & Putnam, for libellant.

Convers & Kirlin, for respondent.

BROWN, District Judge. On the 14th of July, 1891, while the steamship G. R. Booth was discharging her cargo at East Central pier, Atlantic dock, Brooklyn, an explosion occurred in the after-hold when the cargo was nearly all discharged, by which the steamer's iron plates on the starboard side were burst through below the water line, in consequence of which the after-hold was flooded with water. The water made its way thence through the bulkhead into the compartment next forward, where the libellant's sugar was thereby wet, damaged and melted, for which damages the above libel was filed.

Although, upon the contradictory evidence, it is not altogether certain what it was that exploded, it was probably certain cases of "detonators," boxes of which had been stowed in the after-hold, and most if not all of which had been already removed to the dock.

The libellant contends that these boxes of detonators were highly dangerous, and that the ship in stowing them in the lower hold took all risks of explosion and the damages that might be caused thereby. The officers of the ship, however, had no actual knowledge of the shipment of any dangerous explosives; or that these boxes were dangerous, if, indeed, they were so under the ordinary conditions of shipment. They had no mark upon them like "Mit vorsicht," such as is usually put upon goods at Hamburg, to indicate that they were to be carefully handled, although they were marked "Capsules" and "Spring-Capseln," and were specified as "Detonators" in the bill of lading; terms not appreciated by the officers.

I do not think that the liability of the vessel in this case is made out. The explosion did no direct damage to the sugar, nor in any manner directly affected it. By bursting a hole in the side of the ship, sea water was let into the hold, which subsequently made its way among the sugar and damaged it. Such damage is a sea peril. *The Xantho*, 12 App. Cas. 503, 508. The burden of proof is upon the libellant to show that it might have been avoided by the ship by reasonable care. *Clark v. Barnwell*, 12 How. 272, 280, 282; *Transportation Co. v. Downer*, 11 Wall. 129; *The New Orleans*, 26 Fed. 44. In other words, the question is one of negligence; and in this case, a question of negligence in the reception and stowage of cargo.

But the evidence is not sufficient to show, or to warrant the inference of, any negligence or lack of customary care on the part

of the ship in receiving these boxes, or in stowing them as was done with other cargo in the hold or in the subsequent handling of the cases. The small capsules are so packed in cases, and with such care, as to make it difficult or impossible to produce any explosion by any mode of handling, or by dropping, knocking or pounding. See Mackenzie's Report. They had been long accustomed to be handled by sea and land as ordinary merchandise is handled, and carried in the same manner. They were not known, or considered, or treated, as dangerous cargo. No previous explosion in transit is shown. Prior to this accident, it was usual to carry them indiscriminately with other cargo. Since this accident, it has become customary for steamers to carry them either in the hatches or on the deck; while sailing vessels still stow them below deck.

In the absence of any proof of knowledge of danger, it is sufficient, on a question of stowage, to stow according to the knowledge and experience of the time, and to observe the usages of the time and place. See *Baxter v. Leland*, 1 Blatchf, 526, Fed. Cas. No. 1,125; *Lamb v. Parkman*, 1 Spr. 343, Fed. Cas. No. 8,020; *The Titania*, 19 Fed. 107, 108; *The Dan*, 40 Fed. 691, 692; *The Dunbritton*, 61 Fed. 764, 766; *Carv. Carr. by Sea*, § 96. This was done by the steamship in this case. Why the explosion occurred in this instance can only be conjectured, viz., from some possible detachment of a portion of the fulminate within the capsules, an occurrence previously unknown in transportation, and arising, probably, in the manufacture and packing; certainly not from any fault of the ship. To charge the ship in this case with negligence in care or stowage, would be to make her responsible for what was essentially accidental, and altogether contrary to previous experience and usage, which justified the carriage of these boxes in the same manner in which they were carried, even had the officers fully understood their contents.

The libel must be dismissed, with costs.

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#### THE ETONA.

#### DOHERR v. THE ETONA.

(District Court, S. D. New York. November 24, 1894.)

CARRIAGE BY SEA—DAMAGE TO HIDES—SUGAR DRAINAGE—FOREIGN SHIPS—STRANDING—PILOT'S MISTAKE—INVALID STIPULATIONS—HARTER ACT.

The British ship *E.* being anchored by a local pilot in the Amazon at Para, while unloading part of her cargo dragged her anchor from the great force of the current and grounded upon a sand bank which caused her to take a strong list, in consequence of which the drainage from some Perriambuco sugar in the between decks ran over the coamings upon some hides in the hold beneath: *Held* (1) that the stowage of hides beneath sugar stowed on perfectly tight iron between decks was not negligent stowing; (2) that the possibility of the escape of drainage into the hold over coamings a foot high, in consequence of a strong list from stranding, was not such a contingency as was to be foreseen and guarded against, or evidence of the ship's negligence; (3) that the selection of a place for anchoring, from which the stranding resulted, was a part of "the navigation and management of the ship," within the third section of the Harter

act of February 13, 1893 (2 Supp. Rev. St. 81); (4) that the provisions of that section include foreign ships; (5) that the provisions of the bill of lading that "all damage claims shall be settled direct with the owners according to English law, to the exclusion of proceedings in the courts of any other country," were invalid, as respects transportation between Brazil and New York.

This was libel in rem by John B. Doherr against the steamship Etona for damages to a load of hides stowed in her hold.

Wing, Shoudy & Putnam, for libellant.  
Convers & Kirlin, for claimant.

BROWN, District Judge. The above libel was for damage to hides shipped at Buenos Ayres on board the British ship Etona in the lower hold, No. 2 hatch, above which was stowed a quantity of Pernambuco sugar, the drainage from which was found on arrival of the ship at New York, to have injured the hides beneath.

The evidence shows that the deck where the sugar was stowed, was a perfectly tight iron deck; that the shipment of hides in January, 1894, was under a bill of lading, which permitted the taking of cargo at other ports, excepted damages arising from negligence, provided that in no case should the steamer be liable for any damage to the goods, and that all damage claims should be "settled direct with the owners according to English law to the exclusion of proceedings in the courts of any other country"; an evidently invalid stipulation as against these consignees, and as to transportation between Brazil and New York. *Slocum v. Western Assur. Co.*, 42 Fed. 236; *The Guildhall*, 58 Fed. 796, and cases there cited. The drainage in question arose under the following extraordinary circumstances:

After the loading of the hides at Buenos Ayres in the lower hold, the ship proceeded to Rio, and thence to Pernambuco, where she took in sugar between decks. Thence, by a passage of about 7 days, she went to Para, a port about 100 miles up the river Amazon, where she was taken to an anchorage by a local pilot, and anchored by him near other shipping with first 45 fathoms of chain out, and afterwards 60 fathoms, and proceeded to unload certain cargo shipped for that port. On the fourth day after anchoring, and while unloading, the anchor dragged, probably from the great force of the current on the flood tide, which there rises about 12 feet, and from being somewhat outside of the ordinary anchorage ground. Before she could be brought to a stand, by the second anchor, which was then thrown over, the ship grounded upon a sand bank, which caused her to take a strong list, and some of the drainage of the sugar in consequence of this list ran down over the coamings of the hatch upon the hides beneath, notwithstanding all efforts to prevent it.

It is evident that the efficient cause of this damage was the stranding on going adrift. This was wholly unexpected, and could not have been anticipated. It was a sea-peril within the exception of the bill of lading. *Montoya v. Assurance Co.*, 6 Exch. 451. The burden of  
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showing negligence in the ship was on the libellant. *Transportation Co. v. Downer*, 11 Wall. 129; *The Glendarrock* [1894] Prob. 226; *The Neptune*, 6 Blatchf. 193, Fed. Cas. No. 10,118. Other vessels in that vicinity did not drag. If negligence is to be imputed to any one, it would seem to be against the local pilot in respect to the position assigned by him to the ship, and in not ordering over both anchors instead of one only.

I cannot find it to be negligence in the ship to stow sugar in the between decks over hides, in a ship with a perfectly tight iron deck and coamings a foot high, and with scuppers sufficient for all drainage that could be anticipated. I do not think the mere possibility of stranding and of the escape of drainage over coamings a foot high, through a strong list arising from stranding, are such contingencies as are required to be foreseen and guarded against in the exercise of reasonable and ordinary care; and in all other respects the evidence acquits the ship of negligence. There is no proof that the patent anchors were inferior or deficient.

If, however, under the above circumstances the ship could formerly have been held liable for negligence of the local pilot in consequence of which she went adrift, the evidence in her behalf shows the exercise of "due diligence by the owners to make her in all respects seaworthy and properly manned, equipped, and supplied," so as to bring both the vessel and her owners within the protection of the third section of the act of congress passed February 13, 1893 (27 Stat. c. 105, p. 445; 2 Supp. Rev. St. c. 105, p. 81). See the recent case of *The Silvia*, 64 Fed. 887.

If that section extends to foreign vessels bringing cargoes to ports of the United States, the case must be decided in favor of the defendant, whether the clauses of the bill of lading with reference to negligence, and adopting the law of England, be deemed valid and operative or not. If they are valid and operative, then under the stipulation as to the effect of the British law, the defense is sustained; while if the clause adopting the law of England be held invalid or inoperative as an attempt to oust the jurisdiction of all other countries than that of England, or as attempting to introduce wholesale the law of a forum wholly foreign to the transaction, then our law, in the absence of any reference to the law of Brazil, remains as the only law possibly applicable to the case.

Under the explicit language of the third section of the act of February 13, 1893, which extends its provisions to "any vessel transporting merchandise or property to or from any port in the United States," I do not feel authorized to limit its application to vessels of the United States alone. The construction given to our statute, limiting shipowners' liabilities to the value of the vessel and freight, seems to me analogous. *The Scotland*, 105 U. S. 24, 30. Although foreign carriers will thereby enjoy some immunities under this act that are not accorded to our vessels in foreign ports, that is a matter for which congress is responsible under the explicit terms of the act, and not the courts.

The libel is, therefore, dismissed; but without costs.

## THE MILLIE R. BOHANNON.

HEWLETT et al v. THE MILLIE R. BOHANNON.

(District Court, S. D. New York. December 20, 1894.)

**SEA CARRIAGE — WORKING — CALM — LEAKS AROUND CENTERBOARD — UNSEAWORTHINESS — LACK OF DUE DILIGENCE — HARTER ACT.**

The three-masted centerboard schooner *M. R. B.*, on a voyage from Cardenas to New York, when five days out, met a dead calm in a heavy swell of sea, during which she rolled considerably, and during two hours—from 12 to 2 p. m.—sprang a leak, taking in three feet of water, which was with difficulty got under control at 6 p. m., when a breeze sprang up, after which there were no more leaks. The evidence left no doubt that the leak was in the centerboard seams, along the keelson and grub beam, in the bottom of the schooner. *Held*, that so heavy a leak, so soon after leaving port, due to mere rolling in a calm, was inconsistent with reasonable fitness for the voyage, or with that necessary careful inspection of the seams about the centerboard which “due diligence” under the Harter act required; and that the vessel was liable for the damage to sugar cargo caused by the leak.

This was a libel by George Hewlett and others against the schooner *Millie R. Bohannon* to recover for damages caused by leakage to a quantity of sugar.

George A. Black, for libelants.

Wing, Shoudy & Putnam and C. C. Burlingham, for claimants.

**BROWN**, District Judge. On a voyage of the three-masted schooner *Millie R. Bohannon* from Cardenas to New York, where she arrived on May 25, 1894, the libelants' consignment of 3,400 bags of sugar, stowed on top of mahogany in the bottom of the hold, was damaged by sea water, some bags on discharge being empty, and some partly empty. The evidence leaves no doubt that there was no extraordinary weather upon the voyage; that the ship, nevertheless, sprang a leak on the 14th of May, during a calm, in which she was unmanageable and lay rolling in a heavy swell; and that the leak which began between 12 and 2 o'clock p. m. was so heavy as to show by the pump soundings from two to three feet of water in the hold, though the rod may have shown more depth than was actually present, from the effects of heavy rolling. Only the lower tier of bags was damaged.

When the vessel was docked in New York, after discharge, the only place seen upon her hull in which water might enter, was a fracture in one of the plank streaks of the bow below the water line, believed by experts to have arisen while the vessel was building. All the witnesses agree, however, that this would not naturally account for the great amount of water that appeared in the hold so suddenly between 12 and 2 o'clock of the 14th of May. By means of four hand pumps, and a small donkey engine attached to a fifth pump in addition, the hold was not cleared of water till about 6 p. m.; whereas, before that, ten minutes at a single pump every two hours was sufficient to keep her clear. After 6 p. m. some wind sprang up, and the vessel then proceeded upon her course, and thereafter leaked no more than before the calm. The opinion of the master is that the working of the vessel caused the seams along the keelson and the grub beam—the schooner being a centerboard boat

—to open in the heavy rolling. The claimant pleads the third section of the Harter act as an exemption of liability in this case, contending that he has shown "due diligence to make the said vessel in all respects seaworthy." Act Feb. 13, 1893 (2 Supp. Rev. St. 81 § 3).

I must certainly hold that this schooner was not in fact seaworthy for the voyage undertaken. The weather was not extraordinary. The rolling in calm weather was no more than the vessel was liable to meet. She was but five days out from Cardenas; and she soon began to leak heavily. Such circumstances are wholly inconsistent with a seaworthy condition at the time of sailing. The *Edwin I. Morrison*, 153 U. S. 199, 212, 14 Sup. Ct. 823; *Cort v. Insurance Co.*, 2 Wash. C. C. 375, Fed. Cas. No. 3,257; *The Gulnare*, 42 Fed. 861; *Andeson v. Morice*, L. R. 10 C. P. 58, 68; *Pickup v. Insurance Co.*, 3 Q. B. Div. 594, 598, 600; 2 Arn. Ins. (6th Ed.) 670, 678. The circumstances are wholly different from those of *The Sintram*, recently decided, where leaks in the waterways after 20 days of heavy rolling were held not inconsistent with both seaworthiness and due diligence in the owners.

The provisions of the Harter act exempting the vessel and owners from liability to damage to cargo where they have used "due diligence" to make her seaworthy, is not to be loosely construed. The construction of this boat with a centerboard made her specially liable to weakness in the seams along the keelson and grub beam; and leaks there were specially perilous. "Due diligence" requires a carefulness of inspection and repair proportionate to the danger. *The Edwin I. Morrison*, 153 U. S. 199, 14 Sup. Ct. 823, affirming 27 Fed. 136. The sudden and heavy leaks, when a few days out of port, on mere rolling in a calm, are as inconsistent with "due diligence" to make the centerboard seam tight, as they are inconsistent with seaworthiness, i. e., reasonable fitness for the voyage. "*Res ipsa loquitur*."

The design of the Harter act was, I have no doubt, to relieve the carrying vessel from her previous responsibility as insurer against latent defects; and to limit her liability as respects seaworthiness to the obligations of "due diligence" to make the ship seaworthy. From the facts respecting this leak and the circumstances, it is impossible for me to believe that such a careful, diligent examination as the construction of this vessel made necessary, would not have disclosed the defects in the seams about the centerboard; or that the inspection, by which the vessel is now sought to be justified, was other than casual, and superficial.

Decree for libelants, with costs, with a reference to ascertain the amount of the damages, if not agreed upon.

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#### THE SINTRAM.

#### MOSLE v. THE SINTRAM.

(District Court, S. D. New York. December 18, 1894.)

CARRIAGE OF GOODS—DAMAGE TO CARGO—LEAKS IN WATERWAYS—SEAWORTHINESS—SEA PERILS—HARTER ACT.

The ship *S.*, upon a voyage from Hong Kong to New York around Cape Horn, had for 20 days rough seas, aft gales, and much rolling and shipping

of water, during which the seams of her water ways began working and took in some water, causing a comparatively small amount of damage to a cargo of tea stowed in the between decks. Upon evidence of careful inspection before the voyage was commenced, both by the owners and by the insurers of cargo at Hong Kong, and of the high rating and general staunchness of the ship, *held* (1) that the sea perils shown were an adequate cause for the leaks in the water ways, consistent with seaworthiness at the beginning of the voyage, and that the tea damage was, therefore, to be ascribed to sea perils within the exception of the bill of lading; (2) that the evidence showed "due diligence" in the carrier, within the third section of the Harter act (2 Supp. Rev. St. 81).

This was a libel by George W. Mosle and others against the ship *Sintram* to recover for loss of a cargo.

Wing, Shoudy & Putnam and C. C. Burlingham, for claimants.  
George A. Black, for libellant.

BROWN, District Judge. On the arrival of the ship *Sintram* at this port on the 8th of January, 1894, with a cargo of nearly 28,000 boxes of tea from Hong Kong, some 300 or 400 were found to be water-stained on the outside so as to require reconditioning, and about as many more had the contents also somewhat damaged by sea water, and were sold as damaged. The claimant pleads sea perils, and the Harter act (Act Feb. 13, 1893; 2 Supp. Rev. St. 81), in defense.

The tea was stowed in the between decks. The damage was to the boxes along the sides of the ship, and is shown to have come from sea water taken in through the water ways. No claim was made until several months after the arrival of the vessel, and after all the witnesses on the ship had been scattered except the master. From his deposition, as well as from the log, it appears that the ship, having a light cargo, was four feet higher in the water than with an ordinary heavy cargo; that in coming around Cape Horn, and previous thereto, the ship had for 20 days very heavy seas, shipping considerable water, and with aft gales, which caused a good deal of rolling and straining, so as to set the water ways to working, which resulted in taking in some water. The master endeavored to correct this so far as possible by caulking in the water ways twice.

Even under the law as it existed previous to the Harter act, I think the explanation of this damage properly brings it under sea perils, within the exceptions of the bill of lading. And the evidence also justifies the conclusion not merely that the owners used all "due diligence to make the ship seaworthy" within the terms of the Harter act, but that the ship was seaworthy at the time of sailing, having reference to the cargo and the contemplated voyage.

Though the owner formerly warranted the absolute seaworthiness of the vessel (*The Edwin I. Morrison*, 153 U. S. 210, 14 Sup. Ct. 823), this absolute warranty of seaworthiness does not mean a warranty that neither ship or cargo shall suffer damage on the voyage; nor exclude sea perils, and the damage that may arise therefrom. It means only that the ship is in all respects reasonably fit for the voyage, i. e. "competent to resist all ordinary action of the sea" (per

Mr. Justice Curtis, *Dupont de Nemours & Co. v. Vance*, 19 How. 162. See, also, *The Titania*, 19 Fed. 105-108, where this subject is considered at length; *The Rover*, 33 Fed. 515, affirmed 41 Fed. 58; *The Exe*, 52 Fed. 155; and see *The Allie & Evie*, 24 Fed. 749.

The evidence shows all reasonable and customary care and diligence to make the ship sufficient, so far as human foresight could perceive before sailing; that the regulations in that regard at Hong Kong are among the most stringent; and that the surveyors of the insurers of cargo inspected the vessel and suggested nothing further to be done; and that she rated in the highest class. The water ways and the break of the poop are places peculiarly liable to sustain injury by straining in heavy weather, and are always the first to show signs of working and liability to take in water. Leaks soon happening in ordinary weather are presumptive evidence of unseaworthiness at the time of sailing. *Cort v. Insurance Co.*, 2 Wash. C. C. 375, Fed. Cas. No. 3,257; *Higgie v. American Lloyds*, 14 Fed. 143; *The Gulnare*, 42 Fed. 861; *Hewlett v. The Millie R. Bohannon*, 64 Fed. 883. But where the evidence shows that reasonable care had been exercised to make those seams tight, and that the ship is in other respects tight and staunch, and shows general efforts to make her in all respects seaworthy, comparatively small damage arising from some leaks in the water ways first appearing after continued heavy seas and rolling, and shipping water, is insufficient to overcome general evidence of seaworthiness at the commencement of the voyage, and is ascribed to sea perils; because a specific and adequate cause is shown consistent with seaworthiness at the beginning of the voyage (*Watson v. Insurance Co.*, 2 Wash. C. C. 480, Fed. Cas. No. 17,285; *Lawrence v. Minturn*, 17 How. 100; *Pyman v. Von Singen*, 3 Fed. 802; *The Orient*, 16 Fed. 916; *The Titania* and *The Rover*, ut supra, and cases therein cited; *The Thomas Melville*, 31 Fed. 486, affirmed 36 Fed. 709; 2 Arn. Ins. [6th Ed.] 679;) and such I find to be the fact here, despite the opinions of some of the witnesses to the contrary.

The libel is dismissed, with costs.

#### On Motion for Reargument.

(Dec. 31, 1894.)

On the motion for reargument of the above case, nothing is pointed out that I have previously overlooked, either as to matters of fact, or of law.

The question of seaworthiness at the time of sailing was in this case wholly a question of fact, as it is in most cases. The decision of that question must depend upon the appreciation by the court of all the facts bearing upon it. In this case I have found as a fact that there was no latent defect, but that the ship was seaworthy when she sailed, both as respects her water ways and about the break of the poop; because the proof showed that she was a sound and staunch ship; and that as respects these water ways and the break of the poop, she was carefully inspected and recaulked and tightened up just before sailing, in a way to make her "suitable."



and "reasonably sufficient" for the voyage, which is all that seaworthiness means. It is not a warranty against strains, or sea perils. There is no question, therefore, of "latent defects" in the case, as a question of law, or as respects the "warranty" of a common carrier, where sea perils are not excepted; and hence many of the cases cited by counsel are inapplicable. Here sea perils were excepted; and the main question considered by me, aside from the Harter act, was one of fact, viz., whether the subsequent leaks were sufficiently accounted for by the weather and tempestuous seas, so as to be properly ascribed to sea perils, rather than to unseaworthiness on sailing. I have found that they were; and I see nothing in the points submitted to change that opinion. The log and the master's deposition seem to me to require that conclusion; and there is no proof of any facts to the contrary.

In the case of *Hewlett v. The Millie R. Bohannon*, 64 Fed. 883, decided about the same time as *The Sintram*, I held that the leaks, under circumstances altogether different, were evidence of unseaworthiness at the time the vessel sailed, five days before. There is not the least difference in the rules of law applicable to these cases; nor are they in any degree incompatible with the cases cited from the supreme court, or the former decisions of this court.

Motion denied.

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ALEXANDER et al. v. CAR FLOATS NOS. 1, 3, 4, AND 5.

(District Court, S. D. New York. November 9, 1894.)

SALVAGE—CAR FLOATS—FIRE IN SLIP—TOWING OUT—SHAM SERVICE.

Where a fire broke out on the wharf and the shore adjoining a slip in which were four car floats loaded with cars of the value of \$39,000, one of which caught fire, and the services of numerous tugs were accepted in hauling all the car floats out of the slip, and in pumping on the floats afire, the sum of \$2,000 salvage was allowed, and apportioned among the different tugs according to the service rendered by each; nothing being allowed to one of the tugs which left before any valuable service was completed; and the amount allowed to another tug being reduced as marking the disapproval of the court of her sham exhibition of work, by the long continuance of unnecessary pumping.

These were libels for salvage by Malcolm Alexander and other owners of tugs against car floats Nos. 1, 3, 4, and 5.

Benedict & Benedict, for the James Roy, the Sparks, and the Charm.

Wilcox, Adams & Green, for the Adelaide and the America.

Alexander & Ash, for the Rambler.

McCarthy & Berrier, for the Nellie.

Wing, Shoudy & Putnam, for the Indian, the Atwood, and the Runyon.

• Peter S. Carter, for the Hohne and the Lee.

Stewart & Macklin, for claimant.

BROWN, District Judge. The above are salvage claims by the owners of 12 different tugs, for services rendered in the afternoon of May 9, 1894, in hauling from the slip between piers 32 and 33,

East river, car floats 1, 3, 4, and 5, and putting out fire on float No. 3.

A destructive fire broke out about 1 o'clock p. m. near the bulkhead between piers 33 and 34. The covered wooden shed, with the goods inclosed, running down pier 33 to within about 50 or 60 feet of the outer end of the pier, was destroyed. The four car floats entirely filled the slip between piers 32 and 33, being moored to the bulkhead, and all tied together. No. 3, with ten cars on board, containing merchandise, was next to pier 33. The rail of No. 3, near the bulkhead and next to the pier, caught fire, and to some extent, also, the three end cars on that side nearest to the bulkhead. In the second car from the shore end, the fire reached the goods inside of the car, where it was smoldering for some time before it could be extinguished by the several lines of hose that were played on it. Six tugs were more or less engaged in hauling No. 3 out of the slip, and putting out the fire. The other tugs were engaged in hauling out and taking care of the other three floats. The value of the four floats, with cars and merchandise, was about \$39,000. The excessive number of tugs present, ready and able to perform the necessary service, does not increase the amount to be awarded altogether, but rather diminishes it, as showing the abundant and ready means of relief.

Taking all the circumstances into account, I think \$2,000 will be a suitable award for this whole service, which sum will be apportioned according to the special facts relating to each float and the tugs assisting.

The six tugs engaged with No. 3 arrived upon the ground in the following order: The John Lee, the Sparks, the Charm, the Rambler, the James Roy, the Nellie. The Lee was a small tug. She had no fire pump. Upon conflicting evidence, I am constrained to find that she rendered no beneficial service, having left the scene before the float was pulled out of the slip, and away from the burning shed enough to be of any use. The other five tugs all rendered some assistance to No. 3, and all played upon the fire, except the Sparks. which, though first on the ground after the Lee, had no fire pump. Her work was pulling alone, and for that even she was not alone sufficient to move the float, so that her priority was of little value. The Rambler went along the upper side of No. 3, and commenced pulling, and playing her pump, as soon as the float had been hauled out in the stream, by the Sparks and the Charm, far enough to admit of her going alongside No. 3 ahead of the Charm. The Roy and the Nellie came alongside the lower side of No. 3, and pumped about the time that the float had got hauled out of the slip. There was but little fire on the float itself, or on the outside of the cars, and it was quickly extinguished, excepting where it had penetrated inside of the second car. Besides playing inside through the doorway, a hole was cut nearer to the end, through which streams were poured. The Charm alone, or at least with either one of the other boats having a pump, was sufficient to put out the fire. But the others assisted in the work, and although not absolutely necessary, their services were accepted by the persons in charge of the floats.

The Charm, being the first on the ground with a pump, is entitled to the largest award, both for first pumping, and for the first effectual

hauling out in conjunction with the Sparks, a smaller tug. There was no danger from the fire to any of the tugs, and it was not over two or three hours before the boats were again returned to the slip. The service to float No. 3 was essential to her safety. Except for the speedy presence of tugs able to remove her from the slip, and to put out the fire at once, she must have been destroyed or very greatly damaged, besides injuring the adjacent floats. Float No. 3, and the ten cars with the merchandise on board, were worth about \$10,000. The immediate removal of the float from the slip was of prime importance, and was accomplished practically by the Charm and the Sparks alone. For the service to No. 3, I allow \$1,600, divided among the tugs as follows:

To the Charm,	\$600.
Sparks,	150.
Rambler,	175.
Roy,	175.
Nellie,	150.

Alongside No. 3 was float No. 4, with ten cars on board, worth altogether about \$10,000. Next below No. 4 was No. 1, a small float, worth, with cars and contents, about \$5,700. Next below, and alongside of pier 32, was float No. 5, which, with cars and contents, was worth about \$13,000. None of these three floats were touched by the fire. They were, however, in some danger. The wind at the beginning of the fire was towards these floats, though it soon after changed, so as to carry the fire away from them. As it turned out, probably Nos. 1 and 5 would not have suffered had they remained in the slip. The city fire boats, which soon appeared, though largely occupied with other parts of the fire, would probably have been able to prevent damage to them from the burning shed 50 feet away. It was probably necessary to remove No. 4, both to avoid the fire, and to permit the fire boats to work in the slip. At the time when all three were removed, however, it could not be foreseen how extensive or destructive the fire would become; and reasonable prudence undoubtedly demanded the removal of all the floats from the slip; and the persons in charge of the floats deemed it necessary, and desired their removal. The services to all were accepted, and should, therefore, be treated as a salvage service, though of a grade inferior to that rendered to No. 3. The John Swan, 50 Fed. 447.

Float No. 4 was next to No. 3 in the most apparent danger, and required removal. The tugs Indian, Atwood and Runyon towed her from the slip, and back again after a couple of hours, for which I allow \$450, viz. \$150 to each tug.

The other two floats, Nos. 1 and 5, being in much less danger, \$300 will, I think, be a sufficient allowance for the services to both. They were removed by three tugs, the America, the Adelaide, and the Harry Hohne. To the two first, I allow \$120 each; to the Hohne, \$60, a less amount, as marking my condemnation of the long-continued and needless playing of her hose pump, as a sham exhibition of work.

Of the amounts above awarded, two-fifths will go to the officers and crew of each tug, in proportion to their wages, and three-fifths to the owners, with costs; except as respects the Hohne, whose owners should receive three-fourths, and the officers and crew one-fourth, with costs.

## THE KENILWORTH.

KALT vs. THE KENILWORTH.

(District Court, S. D. New York. November 30, 1894.)

COLLISION—FOG—NEGLIGENT SOUNDING OF FOG HORNS—INATTENTION—DESERTING INJURED VESSEL—ACT SEPT. 4, 1890.

The large four-masted steel ship Kenilworth, sailing north, came in collision off Barnegat, at night, in a thick fog, with the small schooner Sawyer, which was beating to the south against a very light southerly wind. The ship's yards raked and carried away the schooner's masts and rigging. As they passed, the ship was hailed; but the master made no answer, and sailed away without stopping. The fog horns were not heard on either vessel until within about three minutes of the collision. The report of the lookout on the ship could not be understood; and she had no aft-sails set to enable her to maneuver easily. The mechanical fog horn of the schooner had not been previously tried, nor used in the fog of the previous day; it was claimed to have been brought out only an hour before this collision. The schooner, after collision, was burnt and sunk by the master. *Held*, (1) that the collision was presumptively caused by the ship's fault, under the act of September 4, 1890 (1 Supp. Rev. St. p. 800), and that she had not proved the contrary; (2) that the primary cause of the collision was the failure to hear timely fog signals, either because they were not properly given, or not properly attended to, on either side. The damages were divided.

This was a libel by Hyron Kalt, owner of the schooner Flora A. Sawyer, against the ship Kenilworth, for damages caused by collision.

Wing, Shoudy & Putnam, for libellant.  
Benedict & Benedict, for claimant.

BROWN, District Judge. At about 3 o'clock a. m. of Saturday, May 19, 1894, during thick fog, a collision occurred at sea about 55 miles southeast of Barnegat light, between the libellant's small schooner Flora A. Sawyer, bound south, and the ship Kenilworth, inward bound for New York.

The Kenilworth was a four-masted steel ship of 2,178 tons net register, 320 feet long by 40 feet beam, carrying a light cargo of tea, and well out of the water. The Sawyer was but 84 feet long and of 93 tons net register, light laden, with 30 tons sand ballast, about 4,000 feet of lumber, provisions and tools. The wind was about south by west. The ship had been previously heading about north; the schooner being on her starboard tack and closehauled, headed about southeast. Each heard but two fog signals given by the other before the vessels came within sight of each other, when very near together. Just before the collision each luffed; the schooner, about a point and a half; and the ship, probably, about half a point. The port bow of the ship struck the schooner's jibboom, and broke it off. The vessels passed port to port, and the ship's main yard, raking across the schooner, carried away both her masts and everything standing. The ship was unharmed, but showed a broad horizontal mark along her port bow, from contact with the jibboom or bowsprit. The schooner was so injured that she soon began to leak rapidly, and not long after was abandoned by her officers and crew, who took to the small boats and were afterwards, on the same day,

picked up by another vessel. Before leaving the schooner, the master, considering her worthless, and a dangerous obstruction, set fire to her, to prevent damage to other vessels. Each claims that the collision was by no fault of its own; the claimant contending that the accident was inevitable, inasmuch as from the time when the horns were heard, the ship did everything possible to avoid collision.

1. An important circumstance in the present case, however, is, that the master of the ship, who came on deck as the ship was passing the schooner but a few feet distant, made no answer to the hails that were heard from the schooner, inquiring what ship it was; nor did he stand by her, or endeavor to do so in the least, but proceeded on his course, as though nothing had happened. By the act of September 4, 1890 (1 Supp. Rev. St. c. 875, p. 800), it is enacted:

"That in every case of collision between two vessels it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without serious danger to his own vessel, crew and passengers (if any), to stay by the other vessel until he has ascertained that she has no need of further assistance, and to render to the other vessel, her master, crew, and passengers (if any) such assistance as may be practicable and as may be necessary in order to save them from any danger caused by the collision, and also to give to the master, or person in charge of the other vessel, the name of his own vessel and her port of registry, or the port or place to which she belongs, and also the name of the ports and places from which and to which she is bound.

"If he fails so to do, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default."

I find nothing in the evidence in this case to make this act inapplicable, or to absolve the ship from the consequences declared by the act, viz., that the collision "shall be deemed to have been caused by the master's wrongful act, neglect, or default." The master saw that the schooner was dismasted and seriously damaged. He did not ascertain, or attempt to ascertain, that "she had no need of further assistance"; nor did he stay by her in the least. The only excuse offered is, that he had to ascertain the possible damage and condition of his own vessel. But to do this did not prevent his lying by at once, nor did it require or excuse his sailing away. The excuse given seems to me wholly frivolous. A few moments was sufficient to ascertain that no serious harm had been inflicted on his vessel. The hulls did not come in contact; and there was nothing whatever to prevent his answering the schooner's inquiries or taking immediate steps to stay by the schooner, "without serious danger to his own vessel."

For this infringement of a statute passed in the interest of humanity, I am bound to "deem the collision caused by the wrongful act of the master," unless, according to the statute, "proof to the contrary" appears; and I find no such proof appearing.

The lookout on the ship was a Manilla man, whose first report of the schooner could not be understood, and another lookout was sent forward. The ship, moreover, had not sufficient aft-sails set to enable her to luff readily, as might be needed in such an emergency in fog. An order to luff was first given, and then the order to set the spanker; but the collision came before the order could be executed. The defense of the ship is, in fact, that she was so large

that she could do nothing effectual to get out of the way. She should have had her canvas distributed in such a manner as to make her reasonably manageable; and a lookout whose reports cannot be understood, is insufficient. For reasons given below, it also seems to me probable that the fog horn was negligently sounded.

2. A striking circumstance in this case, is the evidently short time that elapsed, according to the testimony on both sides, between the hearing of the fog signals and the collision. The Sawyer was going not over one and a half knots, at the most; and the Kenilworth, as her witnesses say, not over two and one-half knots; so that they were approaching each other at the rate of about four knots only. As the signals were given at less intervals than two minutes apart, and as horns properly sounded ought to be heard from a half mile to a mile distant, it follows that from four to eight different fog signals ought to have been heard by each vessel during an interval of eight to fifteen minutes before collision; whereas only two signals were heard by either before the vessels were visible through the thick fog, very near together. They were then probably less than 400 feet apart, since neither was able to luff much before collision; so that the vessels must have been within 1,000 to 1,200 feet of each other when the signals were first heard by each. It is not credible that this could have happened had a proper lookout and proper signals been given by either. The City of New York, 1 C. C. A. 483, 49 Fed. 956, 957. And this, I am satisfied, was the primary cause of this collision.

The surrounding conditions in this case were wholly different from those in the case of steamers that fail to hear fog signals till near, when going at high speed, at the rate of 10 or 15 knots, with the attendant noises of steamship navigation, the dashing against waves, and the swash of waters from stem to stern. The Fulda, 52 Fed. 400, 402; The Saale, 59 Fed. 717. Here were very slow speed, a light wind, a noiseless sea, and a universal quiet that should have permitted fog signals to be heard a mile away. They were not heard one-quarter of that distance. If certain extraordinary conditions of fog might possibly account for the failure to hear on the one side (The Lepanto, 21 Fed. 651, 656) it cannot explain the failure on both sides. The only reasonable conclusion is, that there was lack of a proper watch and of proper sounding of the fog horns on both vessels. The testimony confirms this inference.

Considerable question has been made by the claimant's counsel whether the schooner's mechanical fog horn was used at all. The proof on that point is so specific that I do not feel justified in discrediting it, although that horn was not brought into use until an hour before collision. It was, however, an old horn, bought and put aboard the schooner for this voyage without being tried. There is no evidence as to its condition or sufficiency; and as it was destroyed with the vessel by the master, its sufficiency cannot now be tested. It is not a reassuring circumstance, nor does it add to the credit due to the master, or indicate any disposition on his part towards a diligent performance of the duties of navigation, that in the preceding fog of this night, and on the day previous, the master had not made use of this mechanical fog horn, but contrary to the requirements of

the law, had used the old tin horns instead; and that on the night of collision he did not at first use it, but brought it on deck out of his cabin at two o'clock in the morning, only an hour before collision.

Decree for the libelant for one-half the damages.

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THE WHITEASH and THE WINNIE.

O'BRIEN v. THE WHITEASH and THE WINNIE.

(District Court, S. D. New York. November 26, 1894.)

**COLLISION—OVERTAKING VESSEL — MUST CONFORM TO LEADING VESSEL—UNLICENSED DECKHAND IN CHARGE.**

The tug Whiteash was rapidly overtaking the tug Winnie in going up the East River a little above the bridge, both having tows alongside. The Winnie changed her course to port, in order to pass to the left a large steamer coming down, under proper signals. The tow of the Whiteash, while the latter was overtaking and passing the Winnie to the left, came in collision with the latter's tow: *Held*, that it was not a fault in the Winnie to change her course to the left under appropriate signals, in order to meet and pass the steamer coming down, and that the Whiteash, being then behind and duly warned by the Winnie's signals of her intended movements, was bound to conform her own movements to those of the Winnie, and was therefore wholly in fault for the collision; that probably the collision would not have occurred had not the navigation been in charge of an unlicensed deckhand, while the master was at dinner.

This was a libel by Patrick O'Brien against the steam tugs Whiteash and Winnie for damages by collision.

Stewart & Macklin, for libelant.

Butler, Stillman & Hubbard and George Cromwell, for the Whiteash.

Robinson, Biddle & Ward, for the Winnie.

BROWN, District Judge. On the 15th of May, 1894, at about 11 o'clock in the forenoon, the libelant's canal boat J. C. De Freest, in tow of the tug Winnie, and on her port side, in going up the East river, when a little above the bridge, came in collision with a railroad float on the starboard side of the steamtug Whiteash, which was also bound up the East river. The De Freest sustained some damages, to recover which the above libel was filed against the Whiteash. The Winnie was brought in as a party defendant on the petition of the owners of the Whiteash, under the fifty-ninth rule of the supreme court in admiralty.

The evidence leaves no doubt that the Whiteash was the overtaking tug, and that she was going up the East river from two to three times as fast as the Winnie with her tow. There is considerable difference in the testimony in regard to the position of the Winnie, whether nearly in mid river, or considerably on the Brooklyn side; and also as to the distance between the lines of their two courses a few minutes before collision. The large steamer Whitney was coming down the East river, and after rounding Corlear's Hook and getting straightened down river, she was nearly ahead of the Winnie, and was at first intending, as her master states, to come down between the Winnie and the Whiteash. This indicates considerable breadth of water between their courses. The Winnie, however, when some distance below the Whitney, gave her a signal

of two whistles twice, to the last of which the Whitney replied with two, slowed down, starboarded and went to the left, while the Winnie by starboarding her wheel also turned to her left, so as to head somewhat across the river and approach the line of the Whiteash's course. The owners of the Whiteash contend that the collision was brought about through the Winnie's turn towards the New York shore, and through the failure of the Winnie afterwards to break this sheer in time to avoid the Whitney.

The obligation to "keep out of the way," however, was not upon the Winnie, but upon the Whiteash, as the overtaking vessel. As the Winnie was meeting the Whitney, which was coming down in the opposite direction, and nearly straight ahead, the Winnie, in order to avoid the Whitney had the right upon assenting signals from her to turn to the left in order to seek a more favoring tide. At the time when those signals were exchanged with the Whitney, the Whiteash was considerably astern of the Winnie. There was plenty of water to the left for both of the tugs and tows; and the Winnie's turning to the left in order to pass the Whitney on that side, was no obstruction or embarrassment to the Whiteash. The whistles exchanged were timely and abundant notice to the Whiteash of the intention of the Winnie to go to the left. The latter could easily have conformed her movements to those of the Winnie, and she was, therefore, bound to do so. The collision occurred, primarily, at least, because the Whiteash wholly failed in this duty. Notwithstanding the signals, and the Winnie's change to the left, the Whiteash continued substantially upon the same course as before, apparently expecting the Winnie to haul under her stern, or to get straightened up river again in time. But owing to the heavy tow on the port side of the Winnie, she was slow in coming round again, though her wheel was hard-a-port.

The accident would probably not have happened had the master been in the pilot house; but he was at dinner, and the navigation was in charge of an unlicensed deckhand, who, if he understood the duty of an overtaking vessel to keep out of the way, took no timely steps to perform it. *Killien v. Hyde*, 63 Fed. 172; *The Medea*, Id. 1014.

I do not perceive any fault in the Winnie. She was heavily incumbered; she was proceeding very slowly, and after having passed sufficiently to port for the Whitney to go down on her starboard side, she put her wheel hard-a-port in order to straighten up the river, and kept it so till collision. The pilot of the Winnie claims that the collision would have been just barely avoided had the Whiteash, notwithstanding her failure to conform her movements to those of the Winnie, not starboarded her helm a few seconds before collision. The effect of this, he says, was to throw the starboard quarter of her float against the libellant's boat. I place no stress upon this circumstance, however, whether true or not. The duties and the faults of vessels are fixed before they arrive in such close proximity and under conditions in extremis. *The Quaker City*, 38 Fed. 153, 154.

Decree for the libellant against the Whiteash, and for the discharge of the Winnie.



DICKINSON v. UNION MORTGAGE, BANKING & TRUST CO., Limited,  
et al.

(Circuit Court, D. South Carolina. December 21, 1894.)

## REMOVAL OF CAUSES—AMOUNT IN DISPUTE.

Plaintiff brought his action in a state court against defendant, alleging usury in a note and mortgage given by him to defendant, and asking for an injunction to restrain defendant from selling the mortgaged property under a power contained in the mortgage, and for judgment against defendant for \$1,696.74. Defendant removed the case to the United States circuit court. *Held*, upon motion to remand, that the matter in dispute exceeded \$2,000, besides interest and costs, the principal controversy being over the exercise of the power given to defendant by the mortgage, the value of which to defendant was measured by the sum to secure which it was given.

This was a suit by Frank H. Dickinson against the Union Mortgage, Banking & Trust Company, Limited, and others, to restrain a sale under a mortgage. The suit was brought in a court of the state of South Carolina, and was removed by the defendant the Union Mortgage, Banking & Trust Company to the United States circuit court. Plaintiff moves to remand to the state court.

J. J. Brown, for complainant.

Halcott P. Green, for defendants.

SIMONTON, Circuit Judge. This is a motion to remand a cause removed from the court of common pleas for Barnwell county, of this state. In order to determine the questions involved in it, we examine the whole record, including the petition for removal. The plaintiff, a citizen of the state of South Carolina, filed his summons and complaint against the defendant, a foreign corporation, alleging that on 7th May, 1889, he had borrowed from defendant the sum of \$3,500, giving his promissory note therefor, payable five years after date, with interest at 8 per cent. per annum, and that he secured said note by a mortgage of certain realty situate in Barnwell county; that out of the sum for which he gave this note he only received \$2,771.50, the rest having been reserved for commissions by the agent of the defendant and sundry small expenses; that for three years he has paid the annual interest on said note, contrary to the usury law of the state of South Carolina, and that under said law, as a consequence of such usurious payment, an action has accrued to him against the defendant for the amount usuriously charged and received by it, in the sum of \$1,696.74; that, under a power contained in said mortgage, the defendant, by its agents and attorneys, John T. Sloan, Jr., Allen J. Green, and Halcott P. Green, have advertised the mortgaged land for sale at auction on the next sales day to satisfy said mortgage, and that a sale will take place of said land, and a cloud fixed on plaintiff's title, and great and irremediable injury inflicted on plaintiff by foreign parties against whom he will have no redress, unless the court will interfere by injunction restraining said sale until the rights of the parties can be adjudicated. The prayer is

for an injunction against the sale of the lands, and a judgment for the sum of \$1,696.74 and costs. The defendant filed its petition for removal before the time for answering had expired, presented it and its bond to the state court, and obtained the proper order from that court. Messrs. Sloan and Green are the attorneys of the defendant. It is admitted that they are only nominal parties, and their presence in the cause does not affect the right of removal, although they are citizens of South Carolina. The motion to remand is based upon the ground that the matter in dispute does not exceed \$2,000, besides interest and costs.

It is impossible to read the complaint without coming to the conclusion that its main purpose and object is to enjoin the sale of the land under the power of sale in the mortgage. All that precedes the statement of claim for the injunction only leads up to this ground for relief, and the right of defendant to enforce the power of sale in the mortgage is to this extent challenged and frustrated. "The proper criterion of the value of the matters involved in the controversy is to be found in the value of the property, the possession or enjoyment of which will be affected by the result of the litigation." *Lehigh, etc., Co. v. New Jersey, etc., Co.*, 43 Fed. 547. The language of the court in *Stinson v. Dousman*, 20 How. 466, has application here:

"The defendant in error objected that the matter in dispute was not of the value of \$1,000, and therefore this court had no jurisdiction of the cause. The objection might be well founded if this was regarded merely as an action at common law; but the equitable as well as the legal considerations involved in the cause are to be considered. The effect of the judgment is to adjust the legal and equitable claims of the parties to the suit."

It will be observed that, although the complaint states the loan of \$3,500 and the execution of the note and the mortgage, it nowhere offers to pay any sum admitted to be due, but prays an injunction against the exercise by the defendant of its powers under the mortgage deed. It is plain, therefore, that the controversy between the plaintiff and the defendant is in great part over the exercise of this power, the value of which to the defendant is measured by the sum to secure which this power is given to it. The motion to remand is refused.

## In re CITY OF CHICAGO.

(Circuit Court, N. D. Illinois. May 17, 1894.)

**1. REMOVAL OF CAUSES—SUITS—ASSESSMENT PROCEEDINGS.**

Assessment proceedings for municipal improvement, being an exercise of the taxing power and an administrative act, do not constitute a "suit," within the provisions for removal of suits to federal courts, though they are conducted under judicial forms by a court of general judicial powers.

**2. SAME—SEPARABLE CONTROVERSY.**

There is not a separable controversy, as required by the removal statute, in an assessment proceeding for municipal improvements, where the court which conducts it determines the district on which the assessment shall be laid, and therefore who shall be parties, and in a single judgment each piece of property is assessed for an amount bearing the same proportion to the full amount to be collected that its benefits bear to the full amount of benefits.

Special assessment proceedings by the city of Chicago, removed to the federal court. The city moves to remand.

The city of Chicago moves to remand to the county court of Cook county a special assessment proceeding for putting a sewer in Montrose Boulevard, which case was removed to this court on petition of the Fidelity Insurance, Trust & Safe-Deposit Company, as a nonresident lot owner, claiming separable controversy. Proceedings were instituted by the city for making this improvement, pursuant to article 9 of the act of the Revised Statutes of Illinois relating to cities and villages. This act provides that the council shall order a petition filed in the county court to assess the cost, after an improvement has been ordered, and estimates of the cost have been made and approved. Thereupon the county court appoints three commissioners, who are to ascertain and report (1) the amount of benefits to the city, and (2) an assessment of the balance of cost against such parcels of land as they shall find benefited in the proportion in which they will be severally benefited. They are to give to owners affected notice by mail and publication, and any person interested may file objections. All owners who do not object are defaulted, and assessments confirmed against the lots. When the report comes up for hearing, evidence may be introduced by objectors and by the city, and the hearing must be "conducted as in other cases at law"; and a jury determines whether the premises of objectors are assessed more or less than their proportionate share of the cost, and what amount they should be assessed. The court may at any time before final judgment modify, alter, change, annul, or confirm any assessment returned, or cause any such assessment to be recast by the same commissioners, or may appoint other commissioners for the purpose, and may take any proceedings which may be necessary to make a true and just assessment. One judgment is entered for all assessments (*People v. Gary*, 105 Ill. 332); but it has the effect of a several judgment as to each parcel assessed; and in case of appeal or writ of error by an objector, the judgment is not invalidated, and is not delayed, except as to his assessment. The judgment is certified to the collector of taxes, and constitutes his warrant. Subsequently, application is made to the county court, in the case of delinquents, for judgment of sale against lands unpaid. The petition for removal to this court was presented when the matter was before the county court on the commissioners' report, assessing benefits against a great number of parcels, with numerous owners (including this objector's land), and covering such area as the commissioners deemed subject to benefits, and not being confined to abutting property. The order thereupon names only the objector and his parcel of land, evidently intending to retain in the county court the other assessments.

Lockwood Honore, for city of Chicago.  
 Isham, Lincoln & Beale, for objector.  
 v.64f.no.8—57

**SEAMAN**, District Judge (after stating the facts). This motion to remand presents two important questions, namely: (1) Can the proceedings for this special assessment be held to constitute a "suit," within the meaning of the federal judiciary laws? (2) If so taken, is there a separable controversy, as required by the removal statute?

1. There have been frequent definitions by the supreme court of a "suit" in the sense of these removal acts, applying it to all proceedings which are strictly judicial, and in which parties are litigating their rights. In *Weston v. City of Charleston*, 2 Pet. 449, the opinion, by Chief Justice Marshall, holds it applicable to a writ of prohibition, and says:

"The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but, if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit."

This definition has been frequently readopted, and made to reach writs of mandamus (*Kendall v. U. S.*, 12 Pet. 524); habeas corpus (*Holmes v. Jannison*, 14 Pet. 540; *Ex parte Milligan*, 4 Wall. 2); proceedings for assessment of the value of land taken under the power of eminent domain (*Kohl v. U. S.*, 91 U. S. 367; *Boom Co. v. Patterson*, 98 U. S. 403; *Searl v. School Dist.*, 124 U. S. 197, 8 Sup. Ct. 460); and like proceedings for condemnation, which include assessment for benefits against other premises (*Pacific Railroad Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113; *City of Chicago v. Hutchinson*, 11 Biss. 484, 15 Fed. 129).

In each of these cases the proceeding was judicial and adversary. Whether it was strictly judicial in the eminent domain cases was seriously considered, and finally so held, under the distinctions pointed out. In *Boom Co. v. Patterson* the view was urged before the court that the proceeding to take private property for public use is an exercise by the state of its sovereign right of eminent domain, with which the judiciary department, especially of the United States, had no right to interfere. The court answers:

"This position is undoubtedly a sound one so far as the act of appropriating the property is concerned. The right of eminent domain—that is, the right to take private property for public use—appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. The clause found in the constitutions of the several states providing for just compensation for property taken is a mere limitation upon the exercise of the right. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. \* \* \* But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the constitutions have been observed is a proper matter for judicial cognizance."

The ascertainment of the amount of compensation, therefore, becomes a judicial inquiry when carried to a state court by an appeal from the award of commissioners.

The proceeding here under consideration is of another and different character,—the machinery of taxation, also an attribute of sovereignty. It is an exercise by the city of Chicago of the power vested

in it to construct a system of sewers, and assess a portion of the expense as benefits to such lots or tracts of land as are deemed benefited. The statute clearly confers the power. Formerly there was much discussion as to the constitutionality of such legislation, and whether the special assessments were laid as taxes, or in exercise of the power of eminent domain; but the constitutional validity is now well settled, and "the courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it." 2 Dill. Mun. Corp. (3d Ed.) § 752; *Cooley, Tax'n* (2d Ed.) 623.

I take it, therefore, that this proceeding must be regarded as an exercise of the taxing power, and that any distinction between that and the exercise of the power of eminent domain may be important for answer to this first inquiry. It is stated in *Cooley on Taxation* (page 430) that the distinction is clear, and the text adopts the following definitions by Ruggles, J., in *People v. Brooklyn*, 4 N. Y. 419:

"Taxation exacts money or services from individuals as and for their respective shares of contribution to any public burden. Private property taken for any public use, by right of eminent domain, is taken, not as the owner's share of contribution to a public burden, but as so much beyond his share. Special compensation is therefore to be made in the latter case, because the government is a debtor for the property so taken; but not in the former, because the payment of taxes is a duty, and creates no obligation to repay otherwise than in the proper application of the tax. Taxation operates upon the community, or upon a class of persons in a community, and by some rule of apportionment. The exercise of the right of eminent domain operates upon an individual, and without reference to the amount or value exacted from any other individual or class of individuals."

The power of taxation is legislative, and not judicial. Its exercise is not a judicial act, in any ordinary sense, "and it cannot be exercised otherwise than under the authority of the legislature." *Meriweather v. Garrett*, 102 U. S. 472; *Rees v. Watertown*, 19 Wall. 107; *Heine v. Commissioners*, Id. 655; *Upshur Co. v. Rich*, 135 U. S. 467, 10 Sup. Ct. 651; *Cooley, Tax'n*, 43. The assessment of benefits is governed by the same rule, and is entirely legislative, both as to power and exercise. Some agency must be employed for the apportionment. It may be left to the judgment of assessors or other officers to fix upon view, or be fixed by a definite standard prescribed by the legislature, as to frontage and location. The district within which the tax shall be laid may be left to the judgment of the agency employed for assessment, or may be fixed by the legislature; and, where there is delegation to the agency, it possesses the legislative power for the purpose, and its act is legislative. *Cooley, Tax'n*, 640; *Upshur Co. v. Rich*, 135 U. S. 467, 10 Sup. Ct. 651.

The legislature of Illinois have, by the act in question, delegated this agency for the assessment to the county court, which, in turn, appoints commissioners to examine and report; but they act as its officers, and under its control and supervision. The county court is constituted the primary instrument for making the special assessment, and for hearing objections and making final determination, through a jury regularly impaneled. It is possessed of judicial powers, and hearings in these matters are conducted as in other

cases at law, and the final action takes the form of a judgment. Does this constitute a "suit," in the sense of the statute giving jurisdiction to the federal courts? Considering the source of power, and that its exercise is legislative or administrative, and not judicial in its nature, I am of the opinion that it is not a "suit," within the federal jurisdiction. It is true that in *People v. Gary*, 105 Ill. 332, the supreme court of Illinois places this proceeding under the head of a "suit," for application of the fee bill, but that view should not control to the extent of conferring jurisdiction upon a federal court over these special proceedings, beyond any possible intention of the legislature. To take jurisdiction in such case would be to assume the exercise of the delicate power of taxation, and (employing the language of Mr. Justice Miller in *Heine v. Commissioners*, *supra*) would constitute "an invasion by the judiciary of the federal government of the legislative functions of the state government."

Because the legislature saw fit to vest this power or duty in the county court, it does not follow that it would be thereby vested in any other court, and certainly not in a federal court, unless it is clearly a judicial power or duty. The language of Mr. Justice Field, in the concurring opinion in *Meriweather v. Garrett*, 19 Wall. 472, is well applicable here. After stating that taxes are not debts, but imposts levied for support of the government, or for special purposes authorized by it, and the consent of the taxpayer is not necessary to their enforcement, but they operate in invitum, and that the form of the procedure cannot change their character, it is there said:

"The levying of taxes is not a judicial act. It has no element of one. It is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity, and the public welfare. In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. \* \* \* Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom it shall be enforced."

In *Upshur Co. v. Rich*, 135 U. S. 467, 10 Sup. Ct. 651, it was held that an appeal from an assessment of taxes taken under a statute of West Virginia to a tribunal called the "county court" was not a suit, and not removable to the United States court. That case must rule this, unless there is vital distinction in the fact which is noted there,—that the so-called "county court" had no judicial powers except in matters of probate, while here the county court has, aside from this assessment function, full judicial powers. The opinion places stress upon this want of judicial power in the appellate tribunal, and suggests that the proceeding might become a suit if appeal were provided to a court having such powers; but the decision is based upon the conclusion that on appeal, as well as on the assessment, the performance was "an administrative act"; that, as the original assessment could not be called a "suit for removal," neither was its nature changed by the appeal. The case there was upon an appeal, under an act which admitted it as a single appeal. This course, if provided by the legislature to a court of complete jurisdiction, would bear strong resemblance to a suit or judicial proceeding,

and might raise the question for which the distinction was made in that opinion. But that question is not here, for this is the initial proceeding for the assessment, which is placed in the county court. Although conducted under judicial forms, and in a court having judicial powers, I am of opinion that it is exclusively an administrative proceeding, and not cognizable by the federal court,—a court not contemplated by the legislature for participation in the assessment, and which has uniformly denied any function of taxation. "The legislature makes, the executive executes, and the judiciary construes the law" (*Wayman v. Southard*, 10 Wheat. 1, 46); and it is only when the legislature or executive abuse their power that the judicial arm is extended for arrest of the abuse.

2. Thus far I have not referred to two important cases, which were strongly urged to maintain jurisdiction here, and should control if applicable to this proceeding, viz. *Pacific Railroad Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113, and *City of Chicago v. Hutchinson*, 11 Biss. 484, 15 Fed. 129. Their consideration comes under the inquiry of separable controversy, and has therefore been left to the second point. In *Pacific Railroad Removal Cases* there was involved in one of them a proceeding by the city of Kansas "for widening a street through the depot grounds of the company, and thereby taking a portion of its grounds and the property of many other persons." Under the statute, a jury had been summoned before the mayor, and assessed the value of the company's property taken, and benefits against certain other property of the company towards payment of the total damages. The statute gave an appeal to the circuit court of the state, and the company and other dissatisfied persons took separate appeals accordingly. The company obtained removal of its case to the United States court. The decision passes upon several cases for different causes of action so removed by the company, and concludes that the incorporation of the company under the laws of the United States entitles it to removal of each, upon the ground that they are suits "arising under the laws of the United States." The opinion then answers further objections made in the *City of Kansas Case* as follows: (1) That it was a suit at law under the rule in *Boom Co. v. Patterson*, 98 U. S. 403. (2) That the appeal of the company could be tried separately from the others as the issues were distinct, and involved only three points of inquiry: First, the value of the property taken; secondly, the amount of benefits to the remaining property not taken; and perhaps, thirdly, the right to open a street across the depot grounds. The only difficulty was found in reference to the assessment of benefits, and as to that it says:

"The balance of damages for property taken, after deducting the amount to be paid by the city, is to be divided and assessed pro rata upon those whose property is benefited, in proportion to the benefit to each. But each piece of property taken is valued by itself, without reference to the proposed improvement; and the amount of benefit to each piece of property benefited is ascertained separately, without reference to the other pieces benefited. It is only after this has been done that the aggregate amounts are ascertained, and the damages are assessed pro rata against the pieces of property benefited according to the benefits to each, which is the result of a mere arithmetical calculation. In the state court the jury ascertains and finds all these facts, and reports them in one general verdict."

Aside from the independent ground for removal, because the company was a federal corporation, there are important distinctions between the cases there presented and the one here, which I think place this outside that ruling, viz.: (1) There the proceeding was for condemnation of private property for public use, in which the value was to be assessed, marking a controversy, as well pointed out in the Boom Co. Case. The assessment of benefits against other property was, by legislative act, made an incident to the same proceeding, and governed by its rules. Its status was placed upon the eminent domain rights, within judicial cognizance, and not under the administrative rule of taxation, which applies here. (2) That case was regularly in a court of law, upon a separate and distinct appeal, allowed by the statute; while the matter here presented is an original assessment. (3) It is stated in the City of Kansas Case that "the amount of benefit to each piece of property benefited is ascertained separately, without reference to the other pieces benefited"; and, when the aggregate amounts of damages and benefits are ascertained, the pro rata assessments are "the result of a mere arithmetical calculation." The provisions of the statute under which that proceeding was taken are not sufficiently stated to show the method by which the assessment against each parcel could be worked out independently; but it is clear that the simple rule there stated cannot be made applicable for an independent assessment under this statute. There are factors for the result in each case which can only be supplied when the whole proceeding is before the court. In the first place, there is no defined district through which the assessment shall be spread. That is left to be determined by the tribunal making the assessment, according to its discretion of the territory which may be benefited by the improvement. Each individual assessment is dependent upon the number who shall be so brought in. Again, it is the theory of the statute that there shall be a valuation of benefit to each lot. It is not assessed for this whole benefit, but for the pro rata share of the expense to be assessed, which its valuation of benefits bears to the aggregate of such valuations. Each assessment requires for its ascertainment the aggregate of expense to be assessed and the aggregate valuation of benefits. It is therefore impossible to make a just assessment in an individual case without having as parties all other lot owners involved. The tribunal of assessment determines who shall be such parties, and all are equally entitled to hearing. This can only be accomplished in a court having jurisdiction over all, and in a single trial, or through a trial which shall be dominant (in case of appeal) for establishing these factors. This court cannot take a place either dominant or servient. (4) In the City of Kansas Case there was no decision by the state supreme court interpreting the statute there in question. 115 U. S. 21.<sup>1</sup> Here the supreme court of Illinois has directly passed upon this statute, in *People v. Gary*, 105 Ill. 332, and held that "it was clear beyond question that the proceeding on the part of the city was an indivisible suit;" that "there were no proper means by which the suit could have been di-

<sup>1</sup> 5 Sup. Ct. Rep. 1123.



vided so as to render it a several proceeding;" that "the trial was one as to all of the defendants," and one judgment; and that the declaration of the statute that the judgment should be considered several was only for the purpose of regulating the manner of obtaining satisfaction. This is an interpretation of a local statute by the highest tribunal of the state, and must be respected as such. The point suggested by counsel for the lot owner—that such construction would approve legislation to deprive the federal court of legitimate jurisdiction—is not well taken. The means for tax assessment are entirely within legislative control.

The case of *City of Chicago v. Hutchinson* was decided in this court prior to the *Pacific Railroad Removal Cases*. It was a similar condemnation proceeding, and entirely in the line of the later decision. It is equally distinguished from the present case.

I am satisfied that there cannot be independent separate proceedings for this assessment; that this court is without jurisdiction, in whole or in part; and it must remain with the county court, where placed by the statute. An order for remand will be entered accordingly.

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ALLEY et al v. EDWARD HINES LUMBER CO.

(Circuit Court, W. D. Michigan, S. D. December 27, 1894.)

**REMOVAL OF CAUSES—DIVERSE CITIZENSHIP.**

It is not necessary, to entitle a defendant, sued in a court of a state of which he is not a citizen, to remove the case to the United States circuit court on the ground of diverse citizenship, under the second clause of section 2, Act Cong. March 3, 1887, that all the plaintiffs should be citizens of the state in which the action is brought.

This was a suit by Charles G. Alley and others against Edward Hines Lumber Company. The suit was brought in a court of the state of Michigan, and was removed by the defendant to the United States circuit court. Plaintiffs move to remand.

Smith, Nims, Hoyt & Erwin, for plaintiffs.  
Bunker & Carpenter, for defendant.

SEVERENS, District Judge. Two of the plaintiffs are citizens of New York and one of Michigan. The defendant is a citizen of Illinois, and has removed the case. The ground on which the motion to remand is made is that the plaintiffs are not all citizens of Michigan, that being the state in which the suit is brought. The question turns on the construction of the act of March 3, 1887. Original jurisdiction is given by section 1. The second section provides for removals. The first and second clauses of that section require the same elements of jurisdiction to exist as in section 1. The present case is one comprehended in the second clause, and the conditions of removal must be ascertained by reference to those required by the first section for original suits. See *Tod v. Railway Co.* (C. C. A., 6th Circuit, Oct. Sess. 1894) 65 Fed. 145. The fourth clause of section 2, being the one which provides for removals on the ground of local prejudice, contains an additional requirement,

which is that the plaintiffs must be citizens of the state in which the suit is brought; and it was held by Fuller, C. J., in *Wilder v. Iron Co.*, 46 Fed. 676, and by Mr. Justice Lamar and Judge Newman in *Gann v. Railroad Co.*, 57 Fed. 417, that all the plaintiffs must be citizens of such state in order to entitle the defendant to remove the case. Indeed, there would seem to be no room for doubt, upon the clear language of the fourth clause, that this must be so. There is no such condition imposed, however, by the first and second clauses of the section; and it was held by Mr. Justice Brewer, in a carefully considered opinion in *Kansas City, etc., R. Co. v. Interstate Lumber Co.*, 37 Fed. 3, that it is not necessary to entitle the defendant to a removal, under the provisions of the second clause of section 2, that the plaintiff should be a citizen of the state in which the suit was brought; and it was held in that case that the right of removal existed, though neither of the parties was a citizen of that state. It was pointed out that the elements of jurisdiction did not include the place where suit should be brought; and that the latter, being given for the convenience of the party, might be waived by him; and it was added by Mr. Justice Brewer:

"If the suit had been commenced in this court, and process served personally upon the defendant, and it had raised no question other than upon the merits of the controversy, this court would have had undoubted jurisdiction, and the judgment, if rendered, would have been valid. If the jurisdiction of the court upon his failure to insist upon his personal privilege be conceded in the one case, why should there be doubt of the jurisdiction when he voluntarily seeks the court?"

In accord with that decision are the cases of *First Nat. Bank v. Merchants' Bank*, 37 Fed. 657; *Burck v. Taylor*, 39 Fed. 581; and *Uhl v. Burnham*, 42 Fed. 1. These cases furnish ample authority for holding that the motion to remand cannot be sustained; but I wish to add that the construction of the act adopted by them seems to me to be the right one. The cases of *Wilder v. Iron Co.* and *Gann v. Railroad Co.*, above referred to, are clearly distinguished from those last mentioned by the express language of the fourth clause of the section, limiting the kind of suits removable for local prejudice to those in which the plaintiffs are citizens of the state in which the suit is brought. The motion to remand must be overruled.

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JORDAN v. WARD et al.

(Circuit Court of Appeals, Ninth Circuit. October 10, 1894.)

No. 158.

1. RESULTING TRUST—PUBLIC LANDS—PRE-EMPTION — CANCELLATION—PATENT TO CONTESTANT.

W., a citizen duly qualified, settled on a certain 40 acres of unsurveyed public land, and resided on and cultivated it as his home 4 years and 10 months, when he died. Three weeks before W.'s death, and during his temporary absence on account of sickness, J. went upon such 40 acres, removed and appropriated the improvements, and entered in the local land office his homestead entry, falsely alleging settlement thereon 14 months before such entry. A few days afterwards, and 35 days after a

plat of the survey of the township was filed in such office, W. applied to enter the land as his homestead, but his application was refused because of J.'s previous filing. About 80 days afterwards, W.'s devisee filed a contest, and the land department canceled J.'s entry, and issued a patent to such devisee, the decision being affirmed by the secretary of the interior. *Held*, that a bill by J. against such devisee and his mortgagee to establish a trust in such land, and to compel a conveyance to him, was properly dismissed.

**2. SAME.**

The fact that the land department canceled J.'s entry because its officers erroneously construed Rev. St. § 2291, as conferring rights on such devisee, did not entitle J. to maintain such action, it appearing that J. had no right of entry.

Appeal from the Circuit Court of the United States for the District of Washington, Northern Division.

Bill by William L. Jordan against John C. Ward and the Lombard Investment Company to establish a trust in favor of complainant in certain land, and to compel a conveyance to him. From a judgment dismissing the bill, complainant appeals. *Affirmed*.

Chas. K. Jenner, for appellant.

J. T. Ronald, for appellee John C. Ward.

O. G. Ellis, for appellee Lombard Investment Co.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

McKENNA, Circuit Judge. This is an action in equity to decree respondents trustees for complainant for the N. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$ , section 30, township 21 N., R. 6 E., Willamette meridian. The case is brought here on the pleadings, the complainant contending that the answers are insufficient to constitute a defense. The bill alleges, in substance:

That the said land, on the 15th of May, 1883, was unsurveyed public lands of the United States, and subject to entry under the homestead laws. That on said day plaintiff was qualified to claim the benefits of said laws, and had, prior to said date, occupied, cultivated, and improved said lands, and was upon said date, and had been long prior thereto, in peaceable possession thereof, and residing with his family upon an adjoining legal subdivision, which was surveyed public land, and subject to entry under section 2289, Rev. St. That on said day plaintiff entered at the United States land office at Olympia, Washington territory, said land and adjoining legal subdivision, containing 159 45-100 acres, under the homestead laws, and the same was allowed and entered upon the records of said office, and the legal fees accepted by the register and receiver of said office, and a receipt delivered to him,—No. 5,114. That thereafter plaintiff, with his family, continuously resided on said claim, cultivating and improving the same. That on the 8th day of July, 1889, he, having given notice of his intention according to law, made final proof of his claim except the said N. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 30, and paid all fees and commissions, and a patent was duly issued to him. That he applied to make his proof on all his claim, and was able to do so, but was prevented by refusal by the officers of the land office to receive it, urging as a reason therefor a pretended cancellation of claim as to said land; and plaintiff alleges that the said officers, in so doing, erred in the interpretation of section 2291 of the Revised Statutes, and such interpretation was prejudicial to plaintiff, and against his protest. That on or about the 2d day of August, 1883, defendant Ward filed a contest affidavit in said land office, in which he alleged that he was the devisee of one John J. Winters, deceased, and prayed a hearing to determine the priority of settlement be-

tween plaintiff and said Winters to said N. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 30, aforesaid. That said affidavit showed that said Winters intended to enter said land as a homestead, but died before making it, and that upon such showing the officers granted a hearing, and duly cited plaintiff to appear; and that plaintiff appeared in person and by attorney, and protested against the same, but the officers permitted the same to proceed, and decided that plaintiff's claim should be canceled; and plaintiff thereupon appealed to the commissioner of the general land office, who affirmed the said decision. Plaintiff thereupon appealed to the secretary of the interior, but said decision of the commissioner became final through no fault of, and against the protest of, plaintiff, and said claim was canceled; and that the decisions were made, and cancellation ordered, by reason of misinterpretation of said section 2291; and that no question of disputed fact entered into the consideration or determination of said cause by any of said officers. That on the 2d day of December, 1884, defendant Ward was permitted by said register and receiver to make, and did make, filing No. 7,095 as a pretended homestead, as and by virtue of his being devisee of said Winters, deceased, on said land, in pursuance of which, and final proof, a patent was issued to him, by reason of which he pretended to mortgage the said land to the Lombard Investment Company, and the latter claims such mortgage as a valid and subsisting lien. That the patent and mortgage cast a cloud on plaintiff's title, and the respondents should be decreed to hold in trust for plaintiff, and to convey such title to him. That the value of the land exceeds \$2,000, and does not exceed \$10,000, and that plaintiff has no plain and adequate remedy at law.

The prayer is in the usual form, and requires answers under oath.

The answer of the Lombard Investment Company as to the allegations of the bill says:

That it does not know, and cannot set forth, as to its belief or otherwise, and has no knowledge to enable it to deny or affirm their truth, except that it admits the issuance of a patent to Ward, and alleges the execution of a mortgage by him to it, and that it claims them as valid liens, and except that Ward's title or said mortgages cast a cloud upon any title of plaintiff, and denies that the patent to Ward was wrongfully issued. It alleges that it is a corporation created under the laws of Missouri, and entitled to do business under the laws of Washington, and that it loaned Ward \$3,062.50 in good faith, and after having searched the records of the county of King in which said lands are situated; and that said Ward executed and delivered to it his written note and coupon bond, which are attached to the answer. No point being made upon them, they are omitted.

The answer of the defendant Ward alleges substantially the following facts:

The land in dispute is the northeast quarter of the southwest quarter of section thirty (30), township twenty-one (21), north of range six (6) east, in King county, Washington. August 1, 1878, John J. Winters, a citizen duly qualified, settled on the land, being unsurveyed, and continued to reside upon and cultivated it as his home up to his death, June 9, 1883. The survey of the township was made and approved March 16, 1883, and plat filed in district land office April 26, 1883. May 15, 1883, Winters had ten acres in cultivation, and had a dwelling house, barn, and other improvements, and was in open, notorious, exclusive, and peaceable possession. For a long time prior to May 15, 1883, Jordan had resided with his family upon adjoining land, and knew of the residence of Winters. On May 15, 1883, while Winters was temporarily absent, confined to his bed of last sickness in the hospital at Seattle, Jordan, with full knowledge of the facts, went upon the land, tore down Winters' house and barn, and appropriated to himself all Winters' improvements, and on said day entered in the local land office his homestead entry for the lands upon which he had resided, including in his filing the forty acres in question, falsely alleging settlement thereon January 1, 1882. On May 31, 1883, and within the time allowed by law after filing of the plat, Winters made application to enter the land as

his homestead, which was refused for the reason that Jordan had filed on the same a few days before. Nine days later, Winters died, leaving Ward, his sole devisee, all his interest in the land. August 22, 1883, Ward, as devisee, applied to contest Jordan's entry, alleging the facts of Winters' settlement, residence, devise, death, etc., and to have same canceled as to the forty acres in dispute. Hearing was had October 7, 1883, both parties being present in person and by attorney, and the register and receiver ordered that Jordan's entry as to this land be canceled, and that Ward, as devisee of Winters, be allowed to enter same. Jordan appealed, and on June 30, 1884, the general land office decided "that said Winters complied with all the requirements of the statute from the date of his settlement up to the day of his death, that he was qualified to make a homestead entry, that he applied in due time to make a homestead entry to the tract involved, and that he was a single man," and affirmed the decision of the local land office, and instructed that Ward be allowed to enter the land. Jordan again appealed to the secretary of the interior, but afterwards filed notice duly waiving said appeal and all rights thereunder. Said appeal was by the secretary of the interior dismissed. December 2, 1884, Ward, as devisee, accordingly entered the land as a homestead, and in due time proved up and received patent, dated July 18, 1889. Jordan never did reside upon the land, and never put any improvements upon the same. Since Winters' death, Ward has been in open, notorious, exclusive, peaceable, and undisturbed possession, continuously making it his home; and it is the only home he has had. He has greatly improved the same, clearing, grubbing, putting out a hopyard of eleven acres, and constructed hopkilns, a storehouse, barn, and other improvements, to the amount of five thousand dollars (\$5,000).

Appellant excepted to the answers of respondents, but the exceptions were overruled by the court, and, appellant refusing to plead further, judgment was entered dismissing his bill. The ruling of the court is assigned as error.

The ruling was correct. If the facts set forth in the answer are true, Winters had a right of entry (Act May 14, 1880, § 3; 21 Stat. 141; *Sturr v. Beck*, 133 U. S. 547, 10 Sup. Ct. 350), and Jordan imposed on the officers by a false affidavit. It was competent for the land office, when the imposition was brought to its notice, to cancel his entry. *Knight v. Association*, 142 U. S. 161, 12 Sup. Ct. 258; *Cornelius v. Kessel*, 128 U. S. 461, 9 Sup. Ct. 122; *Mill Co. v. Brown* (decided by this court Nov. 14, 1893) 7 C. C. A. 643, 59 Fed. 35. See, also, *Mortgage Co. v. Hopper* (decided at the present term) 64 Fed. 553, where this question is fully reviewed. Jordan was given a hearing, and appeared personally and by attorney, and successively appealed from decisions against him to the commissioner of the land office and to the secretary of the interior, who affirmed the decisions of the register and receiver and commissioner. It is alleged, however, by appellant, that his entry was canceled because the officers of the land office construed section 2291, Rev. St., as conferring rights on Ward as the devisee of Winters. If so, they necessarily decided that Winters had the right of entry, and that Jordan had not, which decision, as we have already said, was correct. If they went further, and gave Ward rights he was not entitled to (of which we express no opinion), it is no concern of appellants. He, at any rate, was not entitled to a patent, and has no cause of action against respondents. *Lee v. Johnson*, 116 U. S. 48, 6 Sup. Ct. 249; *Mill Co. v. Brown* and other cases supra. The judgment of the circuit court is therefore affirmed.

**McLAUGHLIN et al. v. NATIONAL MUTUAL BOND & INVESTMENT CO.**

(Circuit Court, E. D. Pennsylvania. December 13, 1894.)

No. 16.

**FRAUD—"INSTALLMENT BONDS."**

The N. Co. was organized for the purpose of "issuing and selling bonds upon monthly installments, and payable from the redemption and reserve fund," ostensibly intended to assist persons of moderate means to invest their savings to advantage. The system of investments which it devised and put in practice was such that an investor, receiving no special advantage, could never get back even all he had put in; but a chance was offered, by anticipated redemption of some of the bonds, to obtain an exorbitant premium at the expense of other investors. *Held*, that such a scheme was deceptive and fraudulent, and, in its nature, simply gambling; that a bondholder who had paid money into the treasury of the corporation was entitled to have a receiver of the assets of such corporation appointed, to prevent fraud, and preserve the subject of litigation, pending the determination of the rights of all bondholders.

This was a suit by George W. McLaughlin and others against the National Mutual Bond & Investment Company for an injunction and receiver. Hearing upon bill and answer.

Ernest L. Tustin, for complainants.

John J. Ridgway, for defendant.

DALLAS, Circuit Judge. Upon the filing of this bill, and before answer, a motion for injunction and for the appointment of a receiver was made, which was refused, because no necessity for making an order involving such serious consequences, in advance of the formal presentation of the defense, was perceived. The cause has, however, been since fully heard on bill and answer, and is now for decision; but two incidental matters will be first disposed of. Charles A. Chase has applied for leave to intervene as a party plaintiff. This application is supported by affidavit that he is one of the class on whose behalf the bill was filed. I do not recall that his right to intervene was disputed. At all events, it appears to be unquestionable, and he will be allowed to exercise it. The defendant has moved that certain affidavits which were filed on behalf of the plaintiff on November 8, 1894, be stricken from the record. These affidavits were filed without leave of court, and under the impression that they would be for consideration on final hearing. This was a mistake. I have not considered them, and the defendant's motion will be granted.

The defendant is a corporation created under the law of the state of West Virginia "for the purpose [as stated in its certificate of incorporation] of issuing and selling bonds upon monthly installments, and payable from the redemption and reserve fund, made up of the appropriation of a certain part of the installments paid in, according to tables which insure perfect equity to both large and small investors; the advantage of the association being to encourage and assist persons of moderate means to systematic saving, and by advantageous co-operation to realize larger profits than they could by investing in savings banks or building associations." In pursuance of this de-

clared purpose of its creation, the defendant issues what are designated as "Installment Bonds," and which are in form certificates of its agreement to pay \$1,000 to the person named in each of such bonds respectively. No definite time is specified for making this payment, but it is therein provided that the "bond shall become due and payable at the office of the said company on its surrender, when the monthly installments thereon, together with its proportionate share of the reserve fund, shall equal its face value." This undertaking to pay at a time not fixed, but made contingent upon the operations of the company, is subject to "the following express terms and conditions": There shall be paid to the company "monthly installments" of four dollars each, and "quarterly dues" of one dollar each; and any default in either of these shall wholly release the company from obligation to pay at any time,—“shall work a forfeiture of the bond.” The instrument further provides that upon forfeiture of the bond "all previous payments" made by its owner shall likewise be forfeited; that when forfeiture occurs "a new bond in the regular order of issue at the date of surrender" of the forfeited bond can be obtained; and that if the bond shall have been "kept in force by its terms and conditions for three years," "the monthly installments made thereon, together with interest at the rate of two per centum per annum," will be refunded upon its surrender. To this point the meaning of the agreement plainly is that the company, in consideration of the payment to it of four dollars per month and one dollar quarterly, will (subject to the terms and conditions which have been mentioned) pay \$1,000 to the owner of the bond when the monthly installments paid by him, together with his "proportionate share of the reserve fund," shall amount to \$1,000; or, in the alternative, will refund him the amount of his monthly installments, with interest at the rate of 2 per cent., at or after the expiration of three years, if all the prescribed monthly and quarterly payments shall have been duly made. If it had been proposed merely to return to the holders of these bonds the sum of their monthly installments when they should respectively amount to \$1,000, it is scarcely conceivable that any sane man could have been induced to part with his money. He would have no security for it; it would bear no interest; it would be withheld from him for 250 months, or about 20 years; and, to accomplish this, he would pay an additional sum of \$80. Of course, any misguided person who might be led into such a transaction would, on perceiving its character, hasten to withdraw from it, even at the sacrifice of payments already made, or would await only the expiration of the period of three years to claim the refund provided for. But nothing he could do would profit him. Even if the company should be able to, and should in fact, refund him his monthly installments with the interest stipulated, he would not be repaid in full. At the end of three years he would have paid as monthly installments \$144, and this, with 2 per cent. interest added, would make \$146.88, the amount to be refunded; but his "quarterly dues" for the same period would be \$12, which, being added to his monthly installments, \$144, would make a total of \$156; and hence the so-called "refunding" would consist in returning to him, after three years of waiting, \$10.88

less than he had actually paid in. Manifestly, there would be nothing in this "to encourage and assist persons of moderate means to systematic saving, and by advantageous co-operation to realize larger profits than they could by investing in savings banks or building associations." The enticing feature of the system—the real and only allurements it presents to induce contribution to it—is to be found in that provision of the fourth clause of the bond which appropriates to its possessor "its proportionate share of the reserve fund," and declares that "it is subject, however, to redemption by the company at any time before its maturity, after all bonds of a lower number of this series have been redeemed, canceled, or terminated.

If so redeemed during the 1st year, the holder shall receive.....	\$336 00
If so redeemed during the 2nd year, the holder shall receive.....	440 00
If so redeemed during the 3rd year, the holder shall receive.....	561 33
If so redeemed during the 4th year, the holder shall receive.....	702 88
If so redeemed during the 5th year, the holder shall receive.....	863 01
If so redeemed any time after the 5th year, the holder shall receive.....	1,000 00

What the reserve fund is, or how to be derived, the bond does not explain, but in the company's certificate of incorporation it is referred to as "the redemption and reserve fund made up of the appropriation of a certain part of the installments paid in." What part of the installments is to be so appropriated is nowhere stated, but that it must be a very large part is made apparent by the following statement:

To redeem a single bond during the first year, there would be required.....	\$336 00
At the end of that year its owner would have paid in monthly installments.....	\$48 00
Let interest be added on each installment.....	1 32
	<hr/>
	49 32
Excess.....	\$286 68

According to the plan, this excess of \$286.68 must be provided for from the forfeited or nonforfeited installments—either or both—paid in by others. If from forfeited installments, the one man wins what the others have, by misadventure, already lost, and if from nonforfeited installments, then the lucky individual gains extravagantly at the cost of later purchasers, for these must be additionally postponed in order that he may be immediately and excessively paid, and many of them must suffer a total loss through the ultimate exhaustion of the fund by the "redemption" of "bonds of a lower number" at an enormous and unconscionable premium. This might be deemed fair play by those who wittingly engage in games of chance, but as a method of "systematic saving" provided for unwary "persons of moderate means" it certainly does not "insure perfect equity" as equity is understood by courts of justice. It appeals to cupidity, not to thrift; and lures to hazard, not to providence. It is a contrivance for handing over to some of those who embark in the venture the money of the others who join in it; and "it is quite apparent that this can only continue so long as the treasury can be replenished by bringing in new members." Its inherent vice is substantially the same as was pointed out with respect to a similar concern in the Case



of the National Endowment Co., 142 Pa. St. 450, 21 Atl. 879, and of which the supreme court of Pennsylvania said:

"It manifestly belongs to that class of associations, by far too numerous, the practical effect of whose operations is to enrich a few at the expense of confiding and ignorant people. Such corporations are 'unlawful and injurious to the community.'"

It is evident that the attractiveness of the present project is due to the opportunity which it affords for acquiring money by chance, and not as the reward of industry, frugality, or sagacity. The interesting question to those who participate in it is one of fate, and nothing else. It is this: Which of them shall be forced to forfeit, and so "fall in fortune's strife"; and which of them, surviving that catastrophe, will have obtained redemption of their bonds before the final and inevitable collapse occurs? Upon these contingencies the monthly and quarterly payments are put in jeopardy, and according to the issue of the game, the company, the holder of these stakes, distributes them among the winners. All such schemes are inhibited. They are deceptive and fraudulent, and in their nature simply gambling. In *re National Endowment Co.*, supra; *Brua's Appeal*, 55 Pa. St. 294; *U. S. v. McDonald*, 59 Fed. 563; *Horner v. U. S.*, 147 U. S. 449, 13 Sup. Ct. 409.

These plaintiffs are owners of "bonds" of the defendant company, upon which they have paid the required installments and dues. The money in the treasury of the company, therefore, constitutes a fund to which they are entitled to resort for recovery of their contributions to it. The possession of that fund was, as has been shown, obtained through fraud, and is in danger of misapplication in pursuance of an unlawful purpose. I am therefore of opinion that, irrespective of any considerations of a general or public nature, the case made out is one which demands the appointment of a receiver, for the prevention of fraud and the preservation of the subject of litigation. Complainants' counsel has mentioned five cases in which, it is said, the Pennsylvania courts of common pleas for the county of Philadelphia have, through receivers, taken possession of the funds of associations like the one now before this court; but those cases have not been reported, or in any manner presented for my examination, and consequently I have not had the advantage of consulting them. If they have been rightly understood by counsel, they support the conclusion which I have reached in the present one.

It is objected that these complainants are not entitled to relief, because, under the terms of their bonds, they might surrender them, and receive a return of their monthly installments with interest; but I cannot assent to this. The reimbursement suggested—not tendered—would not be satisfaction. It would be less than the aggregate amount of all the payments (installments and dues) which the complainants have made; and the precise sum to which they may be actually entitled can be known only upon a full accounting, and an adjustment of the rights of all parties. There are other grounds upon which, perhaps, this objection should be overruled, but enough, I think, has been indicated to show that it is not well taken; and it would be unfortunate if this were otherwise, for the ends of justice

would not be subverted by maintaining any technical subtlety which would render this suit abortive.

The motion of Charles A. Chase for leave to intervene as party plaintiff is granted. The defendant's motion to strike off the affidavits filed on behalf of the complainants on November 8, 1894, is granted. Counsel for the plaintiffs may prepare a decree for a receiver and injunction, and submit the same for settlement upon 48 hours' notice (with copy of the decree proposed) to defendant's counsel.

### NATIONAL PARK BANK v. PEAVEY.

(Circuit Court, S. D. Iowa, C. D. December 13, 1894.)

No. 3,567.

#### 1. LIABILITY OF STOCKHOLDERS—PLEADING—ACTION AT LAW OR IN EQUITY—IOWA STATUTE.

Plaintiff recovered a judgment against the S. C. Street-Ry. Co., an Iowa corporation, upon which execution was issued and returned unsatisfied. He then sued defendant, a stockholder in the railway company, alleging these facts, and that nothing had ever been paid in on defendant's stock, and also, in a separate paragraph, that defendant's stock purported to be full-paid stock, that in consequence of defendant's receiving and holding it as such, the railway company appeared to be possessed of money that it did not in fact possess, which was a fraud upon plaintiff, and entitled him to recover the amount of his judgment from defendant. The statutes of Iowa (McClain's Code, §§ 1632-1635) provide that stockholders shall not be exempted from individual liability to the amount of the unpaid installments on the stock owned by them, and execution against the corporation may be levied upon the private property of individual stockholders to that extent; that before such property is taken an execution against the corporation shall be issued and returned unsatisfied; that, before a stockholder can be charged with the payment of a judgment for a corporate debt, an action shall be brought against him, in which judgment may be rendered for any balance remaining after disposing of the corporate property; and that, when the private property of a stockholder has been so taken, he may maintain an action against the corporation for indemnity, or against any other stockholder for contribution. Such statutes also provide (Id. § 1621) that intentional fraud, in failing to comply with the articles of incorporation, or deceiving the public as to their means, shall subject the guilty parties to punishment, and any person injured by such fraud may recover damages against the parties participating in it. *Held*, that the pleading, framed as aforesaid, set up two causes of action at law, based upon the two statutory provisions.

#### 2. SAME—PROCEDURE IN FEDERAL COURTS.

*Held*, further, that as the statute imposed a new liability on the stockholder, which was fixed, and did not depend on the liability of other stockholders, and a remedy for its enforcement had been provided by the same statute under which the state courts had recognized and approved an action at law as the correct method of procedure, the federal courts should also enforce such liability by action at law, and were not confined to a suit in equity for the adjustment of the rights and liabilities of all stockholders and creditors.

#### 3. SAME—NECESSITY OF ASSESSMENT.

*Held*, further, that the fact that no formal assessment or call for the subscription to the stock had been made would not protect the stockholder from liability to a creditor of the corporation, who was entitled to regard the stock subscriptions as a fund for his benefit.

This was an action at law by the National Park Bank against Frank H. Peavey to recover the amount of a judgment held by the bank against the Sioux City Street-Railway Company, in which defendant was a stockholder. Defendant demurred to the petition.

Chas. A. Clark, for plaintiff.

Cummins & Wright, for defendant.

WOOLSON, District Judge. The petition alleges that in September, 1893, plaintiff recovered judgment in the district court of Woodbury county, Iowa, against the Sioux City Street-Railway Company (a corporation for pecuniary profit, organized under the laws of the state of Iowa), for \$40,611.02; that said judgment was based upon certain promissory notes executed by said company, which had been purchased and discounted by plaintiff; that general execution was issued upon said judgment, and duly placed for service in the hands of the sheriff of said Woodbury county, within which county said company had its principal place of business, and has been by said sheriff returned, indorsed "No property found"; that said company is in fact insolvent, and has no property or assets whatever from which said judgment can be collected on execution; that defendant, at the time of the execution of said promissory notes and the rendition of said judgment, owned and held, and still owns and holds, 2,744 shares, of the par value of \$100 each, of the capital stock of said company, upon which neither defendant nor any other person ever paid into the treasury of said company any sum or sums of money whatever, and no part of said shares have been paid up, and there remains unpaid on said shares an amount in excess of plaintiff's said judgment. The last paragraph of the petition is as follows:

That all of said shares of stock of the Sioux City Street-Railway Company, so as aforesaid issued to the defendant, and so as aforesaid owned and held by him, purported to be full-paid capital stock of said railway company, and thus and thereby, by reason of the action of defendant in receiving and holding said shares of capital stock as aforesaid, the Sioux City Street-Railway Company, apparently and in semblance, possessed money or property to the amount and value of two hundred and seventy-four thousand dollars, by reason of said shares of capital stock issued to the defendant, and owned and held by him, all of which apparent capital in money or property of said company was false, nonexistent, fictitious, and fraudulent, by reason of the fact that the said defendant never paid in any sum, amount, or value whatever for his said shares of capital stock in the said corporation, and was a fraud upon this plaintiff; that, by means of the premises, plaintiff is entitled to recover from the defendant the amount of its said judgment against the said company, together with interest and costs and the costs of this suit.

To the petition, defendant assigns as grounds of demurrer: (1) The relief herein prayed can only be granted in equity; (2) this court has no common-law jurisdiction to render a judgment at suit of one creditor against a stockholder for alleged balances due from such stockholder on his shares of stock; (3) no assessment is shown to have been made on defendant's shares of stock; (4) there is a defect of parties,—the other stockholders and all creditors and the said Sioux City Street-Railway Company being necessary parties hereto.

It will be observed that the last paragraph of petition, copied in

full above, apparently sustains no close relation to that part of the petition which precedes it. Defendant claims that this paragraph proves this action is "not an action to recover unpaid assessments on shares of stock, or unpaid balances due thereon," but that the action is "in the right of the creditor seeking to show that the proceedings by which the issuance of the stock as fully paid up operated as a fraud on him, of which he can complain; an action wherein plaintiff seeks to show a liability on part of defendant,—that the sum due from him is a trust fund, which the plaintiff, as a creditor, can reach." And thereupon defendant claims that the action must be brought in equity; that is, must be so brought as that the court will compel plaintiff to bring in the corporation and the other stockholders, to the end that the entire matter of unpaid stock may be determined, and each stockholder compelled to bear his due and proper portion of the outstanding indebtedness. If the character of the action is to be determined solely from the closing paragraph of petition, and without reference to the Iowa statute, the argument of defendant must have great force. But such was not the theory of counsel for plaintiff or defendant at the oral argument. The theory on which argument then proceeded was that the action was brought to recover at law judgment against defendant because of his being the owner and holder of unpaid stock,—an amount sufficient to discharge plaintiff's said judgment. Apparently there are two causes of action attempted to be set up. An examination of the Iowa statute may assist here. Sections 1632-1635, McClain's Iowa Code, are as follows:

1632. Neither anything in this chapter contained, nor any provisions in the articles of incorporation, shall exempt the stockholders from individual liability to the amount of the unpaid instalments on the stock owned by them, or transferred by them for the purpose of defrauding creditors, and execution against the company may, to that extent, be levied upon the private property of any such individual.

1633. In none of the cases contemplated in this chapter, can the private property of the stockholders be levied upon for the payment of corporate debts, while corporate property can be found with which to satisfy the same; but it will be sufficient proof that no property can be found, if an execution has issued on a judgment against the corporation, and a demand has been made thereon of some one of the last acting officers of the body for property on which to levy, and if he neglects to point out any such property.

1634. Before any stockholder can be charged with the payment of a judgment rendered for a corporate debt, an action shall be brought against him, in any stage of which he may point out corporate property subject to levy; and upon his satisfying the court of the existence of such property, by affidavit or otherwise, the cause may be continued or execution against him stayed, until the property can be levied upon and sold, and the court may subsequently render judgment for any balance which there may be after disposing of the corporate property; but, if a demand has been made as contemplated in the preceding section, the costs of such action shall in any event, be paid by the company or the defendant therein, but he shall not be permitted to controvert the validity of the judgment rendered against the corporation, unless it was rendered through fraud or collusion.

1635. When the private property of a stockholder is taken for a corporate debt, he may maintain an action against the corporation for indemnity, and against any of the other stockholders for contribution.

It will no doubt be conceded the pleader has sought to draft the petition, except the closing paragraph, with the intent to bring him-

self within the sections just quoted. Section 1621, McClain's Iowa Code, is as follows:

1621. Intentional fraud in failing to comply substantially with the articles of incorporation, or in deceiving the public or individuals in relation to their means or liabilities, shall subject those guilty thereof to fine and imprisonment, or both, at the discretion of the court. Any person who has sustained injury from such fraud, may also recover damages therefor against those guilty of participating in such fraud.

The pleader, in the closing paragraph of petition, apparently had in mind the section last quoted, and sought to bring himself within its terms. So that, instead of the paragraph serving the purposes suggested by defendant's counsel, it is brought at law, as a new and distinct cause of action, and should be numbered as such. The main argument of defendant's counsel is aimed at that part of petition which precedes this closing paragraph. I will, therefore, for convenience, and with a view to brevity, hereafter speak of such part as the "petition."

The energy and ability with which counsel have presented their views, and the exhaustive research shown in the briefs submitted, compel at the hands of the court a fuller and more lengthy statement of the views which control the decision herein reached than might otherwise be deemed necessary.

The first two grounds of demurrer, as above stated, may profitably be considered together. Defendant claims that, even though the action herein proposed might, under the decisions of the supreme court of Iowa, be maintained at law in the state courts of Iowa, yet it cannot be so maintained in this court. Assuming, then, that an action at law would lie in the state courts, let us examine the matter as applied to the federal courts. We are cited to various cases decided by the supreme court of the United States, wherein has been considered how far the federal courts are bound by and follow the state courts in actions against stockholders in corporations. We may suggest that these cases relate to two distinct classes of liability of stockholders, and that, unless we keep in mind this distinction, we are liable to draw incorrect conclusions as to what has been actually decided by the supreme court. One of these classes is the liability which is created by statutory enactment, as, for instance, where the statute provides that each stockholder shall be liable, to the par value of stock held by him, for indebtedness of the corporation, or liable for the debts of the corporation, until a certificate is filed with the proper officers (named in the statute), showing entire amount of capital stock, etc. The other class of liability is where the statute declares the liability of the stockholder under certain circumstances—or after certain preliminaries have been performed by the creditor—to a creditor of the corporation for unpaid amounts on shares held by him. As to the first class named, the supreme court has uniformly held strictly to the remedy in or by the statute provided, as the remedy to be enforced in federal, equally with state, courts. Thus, in *Pollard v. Bailey*, 20 Wall. 520, the supreme court use this language:

The individual liability of stockholders in a corporation for the payment of its debts, is always a creature of statute. At common law, it does not

exist. The statute which creates it may also declare the purposes of its creation, and provide for the manner of its enforcement.

In *Bank v. Francklyn*, 120 U. S. 747, 7 Sup. Ct. 757, the court say:

The question of the manner in which the liability of stockholders under the statutes of the state which creates the corporation may be enforced in the courts of the United States, is not a new one in this court.

And the court proceed to consider *Pollard v. Bailey*, *supra*, and, in addition to what was above quoted, there is quoted:

The liability and the remedy were both created by the same statute. This being so, the remedy provided is exclusive of all others. A general liability created by statute, without a remedy, may be enforced by an appropriate common-law action. But, where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be enforced.

The court thereupon declare that:

Pursuant to these principles, this court has repeatedly held \* \* \* that the question whether the remedy in the federal courts should be by action at law or by suit in equity depends upon the nature of the remedy given by the statutes of the state. [Citing *Mills v. Scott*, 99 U. S. 25, and a large number of other cases.]

As to the second class of liability, above noted, the supreme court has declared that the state statutes providing liability of a stockholder to the extent of unpaid amounts on shares held by him do not create a new right, but merely recognize a liability of the stockholder—a right to the corporation creditor—which existed at the time the statute was enacted. In *Patterson v. Lynde*, 106 U. S. 519, 1 Sup. Ct. 432, the court, in considering the provision of the Oregon constitution, that “the stockholders of all corporations shall be liable for the indebtedness of said corporation to the amount of the stock subscribed for and no more,” etc., declare:

The constitution of Oregon created no new right in this particular; it simply provided for the preservation of an old one. The liability is not to the creditor, but for the indebtedness. That is no more than the liability created by the subscription.

So in *Clark v. Bever*, 139 U. S. 96, 116, 11 Sup. Ct. 468, the court say, when referring to statutes under the Revision of 1860 (which immediately preceded the Code of 1873, in Iowa), whose provisions as to the point now under consideration, are substantially the same as those now in force, say:

The recognition in the Iowa statutes of the right of creditors of corporations to look to unpaid installments of stock subscriptions, to obtain satisfaction of their demands, did not confer a new right, but is a recognition of a right existing before the statute, by virtue of the relations between a corporation and its creditors and stockholders.

In all the decisions of the supreme court to which our attention has been called by counsel, this same general distinction or classification obtains; and many of the seeming inconsistencies in cases cited by counsel, on either side, are cleared away, and the line of decision made uniform, by bearing in mind the fact just noted. In that portion of the petition which we are now considering, no claim is made to any liability beyond that which arises because of unpaid amounts on shares of stock held by defendant. Assuming

liability exists, the question to be considered is, how is it to be enforced? The contention of defendant is that it cannot be enforced at law, but must be enforced in equity. Defendant concedes that receivers and assignees of insolvent corporations may sue at law to recover of stockholders fixed and determined assessments. The reasoning which supports this concession is that the stockholder is liable in such a case to the corporation, and the receiver represents in that action the corporation. Hence he sues, as the corporation might have done.' But in case at bar the defendant holds shares, on their face, paid up. The corporation cannot sue for whatever amounts are actually unpaid on these shares. It must be conceded, we think, that, unless relieved therefrom by the Iowa statute, plaintiff's remedy in this court must be in equity. In *Handley v. Stutz*, 139 U. S. 417, 427, 11 Sup. Ct. 530, it is said:

Ever since the case of *Sawyer v. Hoag*, 17 Wall. 610, it has been the settled doctrine of this court that the capital stock of an insolvent corporation is a trust fund for the payment of its debts; that the law implies a promise by the original subscriber of stock, who did not pay for it in money or other property, to pay for the same when called upon by creditors.

In *Clark v. Bever*, 139 U. S. 96, 11 Sup. Ct. 468, the court says:

In *Sawyer v. Hoag*, 17 Wall. 610, 620, it was held that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund, sub modo, for the benefit of its general creditors. And this principle was reaffirmed in *Upton v. Trebilcock*, 91 U. S. 45. [And the court cite various other cases, extending to *Richardson's Ex'r v. Green*, 133 U. S. 30, 10 Sup. Ct. 280.]

And there is no contention but that, had such been the desire, suit in equity might have been brought, wherein might have been attempted and obtained general and full decree with regard to unpaid amounts on the shares then outstanding in said corporation.

It will be noticed, upon an examination of the cases which have been decided by the supreme court wherein the collection of unpaid amounts on shares of capital stock was by suit in equity, and approved by that court, or was at law, and disapproved by the court, that none of these cases closely resemble the case at bar.

*Pollard v. Bailey*, supra, was an action at law, where the holder of bills of an insolvent bank attempted to recover the amount of same from an owner of shares therein. The provision under which plaintiff claimed to recover was:

The individual stockholders shall be bound respectively for all the debts of the bank in proportion to their stock holden therein.

The court call attention to the fact that:

Each stockholder is bound for the debts in proportion to his stock. \* \* \* The provision, therefore, for a proportionate liability is equivalent to a provision for an appropriate form of equitable action to enforce it. The case is different from what it would be if the chapter had provided generally that all stockholders would be individually liable for the payment of debts.

In *Manufacturing Co. v. Bradley*, 105 U. S. 175, the statute provided:

The members \* \* \* shall be jointly and severally liable for all debts of the company, etc.

**The court say:**

The statute under consideration prescribes no form of action, and the jurisdiction may be regarded as concurrent, both at law and equity, according to the nature of the relief made necessary by the circumstances upon which the right arises.

After the recognition by the court of the right to sue at law, the court declare that in the case then under consideration there was an acknowledged jurisdiction to grant equitable relief, because of the lien of the bond in evidence, upon the corporate property, and, as an incident to that, to make a decree against the corporation for the payment of the debt. Such equitable jurisdiction having attached, it was proper, to avoid multiplicity of suits, to extend to plaintiff full and complete relief in that action.

In *Mills v. Scott*, 99 U. S. 28, where the charter of the bank pledged and bound the persons and property of the stockholders for the redemption of the bills issued by the bank, "in proportion to the number of shares" held by the several stockholders, the court say:

The proportion of the indebtedness with which the stockholder is to be charged can be ascertained only upon taking account of the debts and stock of the bank, and a court of equity is the proper tribunal to bring before it all necessary parties for that purpose; but by the law of the state, as declared by the highest tribunal, an action for debt will lie where the amount of the bank's outstanding indebtedness and the number of shares held by the stockholder can be stated. In such cases the extent of the latter's liability is fixed, and the amount with which he should be charged is a mere arithmetical calculation.

In *Terry v. Little*, 101 U. S. 216, the language establishing the liability of the stockholder was, "Liable and bound for any sum not exceeding twice the amount of their shares." After declaring that this "provision is, in legal effect, for a proportionate liability of the stockholders," and therefore to be enforced in equity, the court say:

Undoubtedly, under some charters, suits at law may be maintained by one creditor against one or more stockholders. The form and extent of a statutory liability of this kind depend upon the particular phraseology of the statute creating the liability.

In *Kennedy v. Gibson*, 8 Wall. 498, the receiver of a national bank, by bill in equity, sought to recover from various defendants, as stockholders, for a deficiency in assets. The case was decided in the supreme court adversely to the complainant, but on the ground that the bill contained no averment as to necessary action by comptroller preliminary to right to sue. The reasoning of the court is valuable, in matters considered bearing on the point now in question. It is declared that, in actions to enforce the orders of the comptroller in enforcing individual liability of stockholders to pay the debts of the banking associations—

The liability of the shareholders is several, and not joint. The limit of their liability is the par of the stock held by each one. When the whole amount is sought to be recovered, it must be at law. Where less is required, it may be in equity, and in such a case an interlocutory decree may be taken for contribution, and the case may stand for the further action of the court, if such action should subsequently prove necessary,—until the full amount of the liability is exhausted.



Stone v. Chisolm, 113 U. S. 302, 5 Sup. Ct. 497, was an action heard on certificate of division of opinion, where the only question was whether the liability imposed on corporation directors by the statutes of South Carolina might be enforced in an action at law, at the instance of one or more creditors, or must be enforced by creditors' bill in equity. The statutes provided that, in case of debts in excess of capital stock actually paid in, the directors should be personally liable for same, both to the creditors and to the corporation. After considering the applicability of various statutes of that state, in the attempt to ascertain what if any remedy the statutes provided for enforcement of the statutory liability thus created, the court say:

No special remedy being prescribed by statute for enforcing the liability created by that section, from a consideration of its nature and the circumstances which are made the conditions of it, we are led to the conclusion that the only appropriate remedy in the courts of the United States is by a suit in equity.

The subsequent reasoning of the opinion shows that this conclusion is based on the fact that there must be an ascertainment of the total amount of this excess indebtedness and of capital stock paid in, and thus a basis is reached, once for all, concluding all parties interested; and that if left to the determination of various juries, in different actions which might be brought against the stockholders under varying circumstances, the findings of these juries might essentially vary, either in amount of excess indebtedness or of capital stock paid in, and therefore the per cent. to be paid in by the stockholders in the different actions would possibly vary, and indeed there might be variance as to any amount to be paid in, so that the amounts to be paid might result in grossly unequal results to the different stockholders.

A review of the cases cited above presents pretty clearly the controlling principles which determined the conclusions reached by the court as to whether the attempt to enforce the stockholder's liability should be by action at law or by suit in equity. But we are not left to ourselves to deduce these controlling principles. The court has stated them. In *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. 263, a judgment creditor sought to recover from a stockholder on the ground of statutory liability of stockholder for all corporation debts made before the entire capital stock was paid in. The statute provided that:

All stockholders \* \* \* shall be severally individually liable to the creditors of the company \* \* \* to an amount equal to the amount of stock held by them respectively, for all debts, etc. No stockholder shall be personally liable for the payment of any debt contracted by the company \* \* \* unless a suit for the collection of the debt shall be brought against said company within one year after the debt shall become due; and no suit shall be brought against any stockholder \* \* \* until an execution against the company shall have been returned unsatisfied, in whole or in part.

The court consider the point urged, that this should have been a suit in equity, instead of an action at law. And the court distinguish the pending case from *Pollard v. Bailey*, supra, where "the

liability of the stockholders was in proportion to the stock held by them":

Each stockholder was therefore only liable for his proportion of the debts. This proportion could only be ascertained after an account of the debts and stock, and a pro rata distribution of the indebtedness among the stockholders. This, the court held, could only be done by a suit in equity. But in this case the statute makes every stockholder individually liable for the debts of the company, for an amount equal to the amount of his stock. This liability is fixed, and does not depend on the liability of other stockholders. There is no necessity of bringing in other stockholders or creditors. Any creditor who has recovered judgment against the company, and sued out execution thereon, which has been returned unsatisfied, may sue any stockholder, and no other creditor can.

We now turn to the Iowa statutes, and the similarity, as to remedies provided by statute, between these and the provisions construed in *Flash v. Conn*, supra, seems remarkable. In both it is provided that suit must be first brought against the corporation, and execution issue thereon, with the result of being unsatisfied. And both provide for suit being then brought against the stockholder. But, if there be any difference in this particular, the Iowa provisions are more definite, in specifically providing for "action against him" (the stockholder). The reasoning in *Flash v. Conn* is strikingly applicable to the Iowa statute. This "statute makes every stockholder individually liable for the debts of the company, for an amount equal to the amount of the unpaid installments of his stock." The liability is fixed, and does not depend on the liability of other stockholders. Any creditor who has recovered judgment against the company, and sued out execution thereon, which has been returned unsatisfied, may sue any stockholder whose shares of stock are not paid up, "and no other creditor can." But if it be urged that in the *Flash Case* the amount of capital stock held was the only matter to be determined, as to the holder of stock, in fixing the limit of his possible liability, while here, under the Iowa statutes, there must be found both the amount of stock held and the amount unpaid thereon, and that as this matter is not "fixed, but to be ascertained, therefore the action should be in equity," the answer is (without now considering the established practice in the state courts of Iowa) that (quoting the language of *Mills v. Scott*, supra) "actions of debt will always lie, where the amount sought to be recovered is certain, or can be ascertained from fixed data by computation." Here the petition states the number of shares the defendant owns, and that no part thereof is paid up. The entire \$274,000 is liable for debts of creditors. While the judgment which is sought to be paid therefrom is fixed, no computation being necessary, except to find what interest is to be added to the amount in the judgment named. In *Mills v. Scott*, supra, which was an action at law against a stockholder of an insolvent bank, the supreme court made the computation, stating that "in such cases, the extent of the [stockholder's] liability is fixed, and the amount is a matter of mere arithmetical calculation"; and the court, having by such calculation thus fixed the liability of the defendant on the debt sought to be charged against him at an amount less than the

judgment which had been recovered in the court below, ordered that, unless plaintiff therein should remit the excess over the amount so fixed by the court, a new trial should be granted.

Turning now to the decisions of the supreme court of Iowa as to the manner in which this liability of the stockholder should be enforced under the Iowa statutes first above quoted, we find the practice, which that court has recognized and approved as the correct practice, is settled beyond the possibility of doubt,—as to whether the action shall be at law or equity. But first let it be noticed that we are not now considering the question whether or not, as a matter of fact, defendant holds his stock so that he can be made liable under the Iowa statutes to plaintiff's judgment against the corporation. That is a matter of defense, to be hereafter examined, if such defense be tendered. The demurrer, on point now under consideration, viz. the appropriate remedy to be enforced by plaintiff, is conceding such ultimate liability. If at this point we were considering the question of defendant's liability, the case of *Clark v. Bever*, supra, might control. In that case the question before the court was not the remedy to be enforced, and its manner of enforcement (that action was at law); but the question considered, the determination of which determined the judgment of the court, was whether, under the facts presented, the shareholder was liable for the judgment sought to be fastened upon him. In *Bayliss v. Swift*, 40 Iowa, 651, the question was directly presented and determined whether, under the Iowa statutes, the remedy must be enforced through action at law or in equity. The plaintiff, Bayliss, had recovered judgment against the corporation, had issued execution thereon, which was returned unsatisfied, and he now sued the stockholder in such corporation for amount of his judgment. The supreme court of the state (page 651) state the contention of plaintiff to be that the Iowa statute "authorizes an ordinary judgment against the stockholders":

We think the section in question sustains this position. It provides that, "before any stockholder can be charged with the payment of a judgment rendered for a corporate debt, an action shall be brought against him." The section does not prescribe what kind of an action shall be brought, and there is no principle of construction which warrants us in determining it to mean any other action than an ordinary action attended by the ordinary consequences.

Section 3712, McClain's Iowa Code, provides:

All forms of action are abolished in this state; but the proceeding in a civil action may be of two kinds, ordinary or equitable.

So that, when the court declare the appropriate proceeding under the statute to be "the ordinary action," there can be no question, by that they mean an action at law, as contradistinguished from an action in equity.

In *Stewart v. Lay*, 45 Iowa, 604, a receiver brought action at law against a stockholder, to recover judgment upon his unpaid stock. The defendant pleaded, among others, certain equitable grounds of defense, such as fraud in conduct of receiver and officers of corporation, in various ways. To the equitable defense the receiver demurred,—among other grounds, "that defendant has a full and ade-

quate remedy at law for the matters therein set out." The demurrer was sustained, and defendant appealed. The court say:

The depositor or other creditor of the bank would be exposed to great hardship, were he required to wait the slow progress of an equity action, wherein all the stockholders are parties, brought to settle the equities between them, growing out of their liabilities and relations as associates in the corporation.

And again, with reference to the equitable defenses set up:

The defendant can, under the legal defenses plead by him, show the conditions and facts set up in the parts of his equitable answer now under consideration. They afford a defense at law, and the holding of the court below is affirmed.

In *Singer v. Given*, 61 Iowa, 93, 15 N. W. 858, judgment creditors of a corporation were seeking payment of a judgment against the corporation by action at law against a stockholder for unpaid amounts upon his stock. The case was tried to a jury, with verdict for plaintiffs. While no objection seems to have been made against the form of action, being at law, defendant contended that the statute did not authorize judgment against him on the verdict of the jury. The court say:

We think, however, that section 1084 of the Code [section 1634, McClain's Code] contemplates the rendition of such judgment. *Bayliss v. Swift*, 40 Iowa, 648.

In *Water-Power Co. v. Hopkins*, 79 Iowa, 653, 44 N. W. 797, plaintiff, as judgment creditor of a corporation, sued defendant, at law, as a stockholder with unpaid installments of stock, to recover amount of his judgment. Trial to jury, and verdict for plaintiff. On his appeal the court (page 657, 79 Iowa, page 797, 44 N. W.) say as to one of the errors assigned:

"Appellant claims that the (corporation) has ceased to exist, and that in consequence the relief sought by plaintiff can be obtained only in equity. We do not discover that any objection was made in the court below to the kind of proceedings adopted. The liability of defendant, and the method of obtaining relief, are provided for by sections 1082-1084, Code [McClain's Code, §§ 1632-1634]. The facts upon which the liability of a stockholder depends can, as a rule, be as readily ascertained by an action at law as a proceeding in equity. We think the proper action was adopted." *Bayliss v. Swift*, 40 Iowa, 651."

We may here cite, without delaying to particularize further, as additionally showing that an action at law is recognized by the supreme court of Iowa as the proper remedy, *Jackson v. Traer*, 64 Iowa, 469, 20 N. W. 764; *Carbon Co. v. Mills*, 78 Iowa, 460, 43 N. W. 290.

Having thus ascertained the proper proceeding to be by action at law, according to the decisions of the highest court of the state, we may observe that as to the remedy to be pursued, where the statute provides for an action, the supreme court of the United States has expressly recognized the propriety and duty of the federal courts to follow the state practice in that regard. *Mills v. Scott*, *supra*, states and expressly recognizes that "by the law of the state, as declared by its highest tribunal, an action for debt will lie," etc., and thereupon proceeds to follow that declaration as to the state law. In *Bank v. Francklyn*, *supra*, the court, after care-

fully examining the decisions of the highest court of Rhode Island, where the corporation was organized, as to whose capital stock defendant was sought to be held liable, and those from the like court in Massachusetts, from which state the Rhode Island statute was adopted, state that the court has repeatedly held "that whether the remedy in the federal court should be by action at law or by suit in equity depends upon the nature of the remedy given by the statutes of the state"; and the decision reached is largely, if not entirely, governed by the decisions of the Rhode Island court. In *Clark v. Bever*, supra, the supreme court, while refusing to follow the supreme court of Iowa as to the decision there given (64 Iowa, 469, 20 N. W. 764) on the matter of the liability of a shareholder for unpaid installments or portions of his shares, on the ground that this was a question of general law, as to which the federal courts must follow their own views and constructions, yet the court expressly recognize that the Iowa statute has given a new remedy for enforcement of such liability when that liability exists (page 116):

The new right given to the creditor by the statute is to have his execution, when corporate property cannot be found, levied upon the private property of the stockholder who is indebted on his subscription of stock.

And had it become material to consider it, undoubtedly, that court would have recognized the remedy by the next section of the state statute,—“an action,”—as the legitimate and proper method of enforcement, as construed by the state court.

In *Patterson v. Lynde*, supra, in which it was held that the proceeding under the Oregon statute should be by a suit in equity, as one reason therefor the supreme court say, “The creditor has not been given, either by the constitution or the statute, any new remedy for the enforcement of his rights.” Well may it be said, as to the remedy to be here pursued, using the language of the supreme court in *Flash v. Conn*, supra:

We think this is a case where the construction of the state court is entitled to great, if not conclusive, weight with us. \* \* \* It is clear that confusion and uncertainty would result, should the state and federal courts place different constructions on the section. \* \* \* If this was a case arising in the state of [Iowa,] we should follow the construction put upon the statute by the courts of that state.

And if in matters involving the determination of general principles, how much more when there is involved simply the question of the remedy to be adopted in enforcing a right, is the language of the supreme court pertinent, that:

The federal courts administering justice in Iowa, having equal and co-ordinate jurisdiction with the courts of that state, \* \* \* will lean towards an agreement of views with the state court, if the question seem to them balanced with doubt. *Clark v. Bever*, 139 U. S. 117, 11 Sup. Ct. 468, and cases there cited.

The question heretofore considered does not involve the point whether a state statute may limit the sphere of jurisdiction within which the federal courts exercise their equity powers. Counsel upon either side concede this as settled in the negative by repeated de-

decisions of the supreme court of the United States. But as said in *Payne v. Hook*, 7 Wall. 425:

The absence of a complete and adequate remedy at law is the only test of equity jurisdiction, and the application of this principle, as applied to a particular case, must depend on the character of the case, as disclosed in the pleadings.

The first two points above named, of the demurrer, are overruled.

The next ground of demurrer is that no assessment is shown to have been made on defendant's shares. This opinion has already transgressed its proper bounds, and must not be unnecessarily lengthened.

In *Clark v. Bever*, supra, it is said:

So, when the interests of creditors require, those who hold shares of stock in a corporation, purporting to be, but which are shown not to be, paid for to their face value, should be held liable to pay their shares in full, unless it appears that they acquired their stock under circumstances that did not give creditors and other stockholders just grounds for complaint.

In *Hatch v. Dana*, 101 U. S. 214 (creditors' bill to charge stockholders holding unpaid stock), the court says:

That the appellants [stockholders] are not protected by the fact, if such was the fact, that their subscriptions for stock were payable "as called for by the company," we think, is clear. Assuming that such a clause in the subscription meant more than an agreement to pay on demand, and that it contemplated a formal call upon all the subscribers of a company, the subscriptions were still in the nature of a fund for the payment of the company's debts, and it was the duty of the company to make the calls whenever the funds were needed for such payment. If they were not made the officers of the company violated their trust, held both for the stockholders and the company. And it would seem singular if the stockholders could protect themselves from paying what they owe by setting up the default of their agents.

And it is not perceived why the reasoning of the opinion just given may not here apply.

*Singer v. Given*, supra, states the doctrine that a subscriber to capital stock "assumes towards the creditors of the corporation an obligation which can be discharged in no other way than by payment of that sum." And in *Jackson v. Traer*, supra, the court expressly declare that one who accepts and holds stock in a corporation has all the liabilities as to payment thereof which obtained as to the original subscriber. The words "unpaid installments" are used in the statute. But in the various Iowa cases cited by counsel there appears no case wherein the court has not regarded the unpaid amounts on capital stock as bound to a judgment creditor of an insolvent corporation, who attempts to recover under the statute against the holder of such stock.

The remaining ground of demurrer is that the railway company, its creditors, and the other stockholders are necessary parties. In none of the cases above cited from the United States Reports is there any statement or suggestion that in an action at law either the insolvent corporation, its other stockholders, or the other creditors are necessary parties. Manifestly, an attempt wherein there is "the necessity of enforcing a trust, the marshaling of assets, and equalizing contributions" (*Manufacturing Co. v. Bradley*, supra),

could not be sustained as against one stockholder. Such cases, however, are in equity. All the cases cited on this point by counsel for defendant are suits in equity, and governed by the suggestions just made. The very point of the Iowa statute is to provide a speedy and adequate method to give complete aid to a judgment creditor who pursues a stockholder for the amounts unpaid on his shares. The reasoning of the Iowa supreme court in *Stewart v. Lay*, supra, as above given, manifests the purpose of the statute. The shareholder has no grounds of complaint that he alone is sued, for his is a several, individual liability. And the very fact that section 1634 entitles him to his separate action against another stockholder for contribution argues strongly against even the right of another stockholder to be joined with him as defendant in this action. He can avoid this statutory proceeding by paying in full his shares. And, since his obligation is alone sought to be enforced by the judgment creditor, he alone is the proper party. The creditor is not attacking the corporation in this action. The corporation has already had its day in court in the matter of the creditor's claim. The corporation is not interested in the attempt of the creditor now to force from the stockholder, under the remedy afforded by the statute, the payment of so much of his unpaid shares as may be necessary to discharge the judgment already obtained against the corporation. "This liability is fixed, and does not depend on the liability of other stockholders. There is no necessity for bringing in other stockholders or creditors. Any creditor who has recovered judgment against the company, and sued out execution thereon, which has been returned unsatisfied, may sue any stockholder, and no other creditor can." *Flash v. Conn*, supra. This ground of demurrer must be overruled.

Let an order be entered overruling the demurrer, to which defendant excepts. And defendant is given until February 1, 1895, to elect to stand on his demurrer or to answer by that date, as he may be advised.

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BALFOUR et al. v. ROGERS et al.

(Circuit Court, D. Oregon. December 17, 1894.)

No. 1.986.

1. EXECUTION SALE—REDEMPTION—MESNE PROFITS—OREGON STATUTE.

The statute of Oregon, relating to execution sales of land, provides that "the purchaser, from the day of sale until resale or a redemption, and the redemptioner, from the day of his redemption until another redemption, shall be entitled to the possession of the property \* \* \*, unless the same be in possession of a tenant \* \* \*, and, in such case, \* \* \* to \* \* \* the rents \* \* \*." 1 Hill's Ann. Laws, § 307. *Held*, that the right to receive rents and profits under this statute does not imply that what is thus received can be retained by the purchaser in case of a redemption, but in all such cases the product of the property must be accounted for to the redemptioner.

2. PLEADING—PRAYER FOR RELIEF.

Where there is no obstruction to the particular relief prayed, the plaintiff cannot abandon that and ask a different decree under the general prayer.

This was a suit by Robert Balfour and others against R. J. Rogers and others for the foreclosure of a mortgage. The case was heard upon a stipulation of facts.

Frederick V. Holman, for complainants.

John M. Gearin, for defendants.

BELLINGER, District Judge. This is a foreclosure suit brought by complainants to foreclose a mortgage for \$20,000 executed by the defendants Rogers and wife and Williamson and wife. It appears that, immediately prior to the execution of the mortgage in suit, attachments were levied on the mortgaged property, which was subsequently sold upon execution in the attachment suits. The complainants, to protect their mortgage, acquired the rights of the purchaser at such sale by an assignment of the certificate of sale from the defendant Scriber, who had acquired it from the purchaser. The sale was confirmed to Balfour, Guthrie & Co., but the order of confirmation was afterwards corrected by substituting the names of the complainants, Robert Balfour, Robert Brodie Forman, and Alexander Guthrie for that of Balfour, Guthrie & Co. Within the time fixed by statute in which redemption may be made, the mortgagors conveyed to Scriber the mortgaged premises, excepting 320 acres thereof, describing in their deed the estate or interest conveyed as their "equity of redemption" in the premises which were particularly described. Thereafter Scriber made redemption by paying to the sheriff the amount required for such purpose. In the meantime complainants, while in possession of the premises, collected \$1,660.81 insurance money for loss on the premises, of which they expended \$489.92 in repairs on the insured building. They also received \$1,320.49 from rents and profits of the mortgaged property, of which \$27.93 was expended in repairs. The complainants pray that an accounting be had, and the amount due them on their note and mortgage, and on account of insurance, and of the purchase of the certificates of sale by them, be ascertained, and that the mortgagors be decreed to pay such amount, with their costs and attorney's fee in the foreclosure; that their mortgage be foreclosed, and the proceeds of such foreclosure sale be applied in payment of the amount so found due; that the amount paid by complainants in purchase of the title derived from the sale in the attachment suits be decreed to be a lien on the property prior to all other liens. They also pray for the appointment of a receiver, and for general relief.

The case was heard upon a stipulation of facts, nearly all of which are immaterial to any question in the case. It is argued on behalf of complainants that Scriber was without title to redeem; that the description in the deed to him of the title conveyed as "the equity of redemption" in the lands described is insufficient; that the deed purports to be for the benefit of certain of the grantors' creditors, and, not appearing to be for the benefit of all such creditors, is void; that Scriber's notice of redemption was insufficient, because it was addressed to Balfour, Guthrie & Co., whereas it should have been to the complainants as named in this bill; that the redemption was



also ineffective because Scriber did not redeem as to all the land, and for the further reason that he redeemed in his own name, instead of doing so as trustee. If all these various matters were proper to be considered, they would not be effective to defeat the right of Scriber in the property subject to the lien of complainants' debt. By the term "equity of redemption," the grantors undertook to convey all their estate in the premises subject to complainants' lien. It is not a technically accurate description of a mortgagor's title, under a statute like that of Oregon, where the legal title remains in the mortgagor and the mortgagee's interest is a mere chattel, but it is a perfectly well understood and popularly accepted description of such title. If the deed appeared to be for the benefit of only a part of the grantors' creditors, the omitted creditors would be the only persons to complain. A party not affected by the preference could not do it. The notice to redeem was served upon Balfour, Guthrie & Co. instead of complainants, presumably because of the fact that the confirmation of sales made in the attachment suits was made to such apparent company, instead of being made to complainants by their individual names. It is not pretended that the complainants did not in fact have notice; that the notice to them as a partnership did not reach them as individuals. This objection is a mere quibble; and the same thing deserves to be said of the objections that Scriber did not describe himself as trustee in making redemption, and did not redeem as to all the property, although he paid all that was necessary to redeem the whole. But these objections have nothing to do with the case. As already stated, the complainants pray for an accounting, and that the purchase price of the certificate of sale held by them be decreed a lien upon the land to be paid with their mortgage debt out of the proceeds of the sale of the land. There is no issue as to this. The only question in the case is one of law,—whether complainants are entitled to retain the money derived from the property while it was in their possession. The various objections argued in complainants' behalf, going to Scriber's right to redeem, do not obstruct the particular relief prayed for by them; and, where there is no obstruction to the particular relief prayed, the plaintiff cannot abandon that, and ask a different decree under the general prayer. 1 Daniell, Ch. Pr. 379, note.

The statute provides that "the purchaser from the day of sale until resale or a redemption, and the redemptioner, from the day of his redemption until another redemption, shall be entitled to the possession of the property purchased or redeemed, unless the same be in possession of a tenant under an unexpired lease, and, in such case, shall be entitled to receive from such tenant the rents or the value of the use and occupation thereof during the same period."<sup>1</sup> The right to receive rents and profits under this section does not imply that what is thus received need not be accounted for in case of redemption. In *Cartwright v. Savage*, 5 Or. 397, it is held that, when a judgment debtor redeems, he may recover the value of a crop growing upon the land at the time of the sale and harvested by

<sup>1</sup> Hill's Ann. Laws, § 307.

the purchaser while in possession. It follows that the product of the property must in all cases be accounted for to the redemptioner. It is not the policy of the statute to give the creditor more than his debt, with interest and proper charges.

The complainants in this case will be charged with the amounts received by them as stipulated, less what has been expended by them for repairs. The money paid by them in purchase of the certificate of sale is in the sheriff's hands subject to their order. It is not necessary that there shall be any decree as to that. The foreclosure will be decreed as prayed, and an allowance made of \$500 for attorney's fees therein.

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**DOE v. NORTHWEST COAL & TRANSPORTATION CO. et al**

(Circuit Court, D. Oregon. December 17, 1894.)

No. 2,156.

**CORPORATIONS—INSOLVENCY—APPOINTMENT OF RECEIVER.**

While the mere insolvency of a corporation is not enough to authorize the appointment of a receiver at the suit of its general creditors, yet when it clearly appears that on account of such insolvency, and the misconduct of its officers, the corporation is no longer able to proceed with its business, or its assets are in process of being fraudulently misapplied, to the injury of creditors, who are without other adequate means of relief, it becomes the duty of the court to appoint a receiver. Under such circumstances, the property of the corporation becomes a special fund, out of which creditors are entitled to satisfaction of their demands, and hence is the subject of an equitable lien or trust for their benefit.

This was a suit by Bartlett Doe against the Northwest Coal & Transportation Company, Samuel Coulter, and others, to obtain the appointment of a receiver of the corporation, and the administration of its assets as a trust fund for the benefit of its creditors. Defendants demurred to the bill.

Wirt Minor, for complainant.

Thomas H. Strong, for defendants Samuel Coulter, Sylvester Farrell, and James Humphreys.

Alex. Mernstein, for defendant A. J. Knott.

J. W. Whalley, in pro per.

**BELLINGER**, District Judge. This is a suit by a creditor of the defendant corporation for the appointment of a receiver to take possession of and administer its assets as a trust fund for the benefit of its creditors. The defendant corporation is organized under the laws of Oregon. It appears from the bill of complaint that the plaintiff at different times, at the company's instance, advanced money to pay its taxes and other liabilities, and to take up indebtedness of the company which it was unable to pay, and upon which it was threatened with legal proceedings, to an aggregate amount of about \$6,800; that the company owes other overdue indebtedness, exceeding \$50,000, all of which it is unable to pay, and that it is insolvent; that the defendant Coulter is president of the corporation, and his son Al. Coulter and the defendant Farrell

are directors therein. The complaint alleges that the defendants Farrell and Coulter, claiming to act as a majority of the company's board of directors, authorized the making of a note and mortgage to secure the same by the company to Farrell for \$7,992.60; that said note and mortgage were executed in pursuance of such authority, Coulter being at the time president of the company; that such note and mortgage were without consideration, and were fraudulently contrived between such president and Farrell for the purpose of defrauding the creditors of the company; that Farrell claims to hold, as a purchaser, other notes of the company, made by Coulter as its president, for sums aggregating about \$6,000, all of which notes are without consideration and were fraudulently issued, which facts were known to Farrell when he pretended to purchase them; that all of said last-mentioned notes were made payable to the order of Samuel Coulter, and were authorized by the votes of said Samuel Coulter and his son Al. Coulter, claiming to comprise a majority of the board of the company's directors, Samuel Coulter being at the time president of the company. It is also alleged that Farrell threatens to foreclose his mortgage for \$7,992.60, obtained as described; that Samuel Coulter, by the authority of his own vote and that of his son, on said board, caused a note for \$400 to be executed by the company, payable to his order, which note is without consideration; that said note for \$400 was transferred by the said Coulter to the defendant Knott, who took the same with knowledge of its fraudulent character; that, through collusion between Knott and said Coulter, Knott has obtained a judgment on said note against the company in the state circuit court; that Samuel Coulter, acting upon the authority of a resolution passed by his own vote and that of his son, executed to himself, and without consideration, a note of the corporation for \$1,000, which he assigned to the defendant Whalley, who took with notice of the fraudulent character of said note and of the insolvency of the corporation; that thereafter, and for the purpose of taking up said note, a note of the company for \$1,057.30, secured by a mortgage, was executed and delivered to Whalley; that this note and mortgage were upon the authority of a resolution of the directors of the company, adopted by the votes of Samuel Coulter, as president of the company, and Farrell, and that the same resolution was the authority for the note of \$7,992.60 executed to Farrell; that the defendant Humphreys claims to hold liabilities of the company purchased from said Samuel Coulter, but that all such evidences of debt are fraudulent, and were contrived between Humphreys and Coulter for the purpose of defrauding the corporation and its creditors. It is alleged that the several defendants all knew that the corporation was insolvent at the time of taking the several notes and securities above mentioned, as it in fact was and is, but that they conspired together to defraud the corporation and its creditors. To this bill of complaint all the defendants demur upon the ground that the property of an insolvent private corporation is not charged by law with any trust or specific lien in favor of general creditors, and that a federal court has no jurisdiction to dissolve a corporation created by the state.

The insolvency of a corporation is not enough to authorize the appointment of a receiver at the suit of its general creditors. It is only where the creditor has acquired some special or equitable lien in the property of the insolvent corporation that he is entitled to this remedy. Such is the general rule. This rule is without precise limitations as to what will constitute an equitable lien in favor of creditors in the property of insolvent corporations. In a recent and well-considered case decided in the circuit court of appeals for the Seventh circuit (Mr. Justice Harlan delivering the opinion of the court), it is held that where a corporation becomes insolvent, and determines to discontinue the further prosecution of its business, its property is thereafter affected by an equitable trust or lien for the benefit of creditors; and a receiver was appointed. The fact that the corporation had determined to discontinue its business was reached, not through any definite proceedings or declaration of the corporate authorities to that end, but from their manner of dealing with the property of the corporation, which resulted in transferring title to all its property, by a mortgage and deed of assignment, to another corporation, owned and controlled by the stockholders and managers of the grantor company. *Manufacturing Co. v. Hutchinson*, 63 Fed. 498. The reason why the mere insolvency of the corporation is not enough to authorize the appointment of a receiver is in the fact that it may be to the best interest of the creditors that its business should continue, and its financial embarrassment will not necessarily prevent that result. But when it clearly appears, as alleged in this case, that the corporation is insolvent, and that its creditors and president are fraudulently contriving to absorb all its property, and that such property is threatened with sale on collusive judgments obtained upon notes executed by the officers of the corporation to themselves without consideration, on the authority of their own votes as directors, the corporation is so far civilly dead that it is the duty of the court to administer its property as a trust fund for the benefit of its creditors. In such case the property of the corporation is affected by an equitable lien for the benefit of its creditors. Under such circumstances the ends of justice require the interposition of the court, by its receiver, to protect the rights of creditors. While an insolvent corporation, or one that, being insolvent, has made an illegal conveyance of property, or one whose officers have mismanaged their trust, may still be capable of continuing its business and of accomplishing the object for which the corporation was formed, and may be so engaged, and is therefore exempt from judicial interference at the suit of general creditors, yet when it clearly appears that, on account of such insolvency and the misconduct of its officers, the corporation is no longer able to proceed with its business, or its assets are in process of being fraudulently misapplied to the injury of creditors, who are without other adequate means of relief, it becomes the duty of the court to appoint a receiver. Under such circumstances the property of the corporation becomes a special fund, out of which creditors are entitled to satisfaction of their demands, and hence is the subject of an equitable lien or trust for their benefit. The general rules

invoked in support of the demurrers are not of universal application. The sound discretion of the court is always to be exercised, in view of the circumstances of the particular case, to promote the ends of justice.

The question of the forfeiture of the corporate franchise is not involved here. Actions for such purpose must be brought by the state. These actions are based upon some violations of law, or abuse of power, or some act or omission which amounts to a surrender of corporate rights. They must be brought by the state, since the question of such forfeiture concerns only the state. If the state is willing to overlook a wrong thus done to its authority, no one can complain. The preservation of the rights of creditors in the property of a corporation has no relation whatever to such question of forfeiture. The demurrers are overruled.

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BADGEROW et al. v. MANHATTAN TRUST CO. et al.

(Circuit Court, S. D. New York. December 29, 1894.)

CONTRACTS WITH PROMOTERS—EQUITABLE LIEN—ALLEGATIONS SUFFICIENT TO ESTABLISH.

Complainants' bill alleged that they and others had subscribed to a fund for the construction of three railroads to be subsequently consolidated in one, in accordance with the terms of a circular issued by defendants, the promoters of a construction company, and a trust company, their financial agent, inviting such subscriptions, and agreeing that, as part of the consideration thereof, certain bonds of one of said railroad companies, which company was specifically named, when issued, should be set apart for and delivered to complainants and the other subscribers; but that defendants caused the bonds, when issued, to be hypothecated and sold, depriving complainants and the other subscribers of all valuable return for their investment. *Held*, on demurrer, that these allegations were probably sufficient to establish an equitable lien in complainant's favor upon the bonds in question, that the court should not attempt to deal with the novel and complicated situation foreshadowed by the bill until the proofs were before it, and that the demurrer should be overruled.

This was a suit by Gordon R. Badgerow and others, suing in behalf of themselves and others similarly situated against the Manhattan Trust Company, Amos T. French, individually and as executor of Francis O. French, deceased, and the Wyoming Pacific Improvement Company to establish a lien upon certain bonds, and for other relief. The bill of complaint, omitting certain unimportant parts, was as follows:

Gordon R. Badgerow, Charles Breun, William L. Joy, Thomas J. Stone, and E. H. Stone, citizens of the state of Iowa, and residents of Sioux City, in that state, suing in their own behalf and in behalf of all other subscribers to the construction fund hereinafter described of the Wyoming Pacific Improvement Company, similarly situated with them, who shall come into this suit and contribute to the expense thereof, bring this, their amended bill, by leave of the court, against the Manhattan Trust Company, a corporation created and existing under the laws of the state of New York, and a citizen of that state, having its principal place of business in the city of New York; Amos T. French, a citizen and resident of the state of New York, the said Amos T. French, as executor of the last will and testament of Francis O. French, deceased; and the Wyoming Pacific Improvement Company, a cor-

poration existing under the laws of the state of Wyoming, and a citizen of that state. And thereupon your orators complaining show unto your honors, as follows:

(1) The defendant Amos T. French, and Francis O. French, now deceased, with one Edward R. Gedney, George R. Blanchard, and Donald McLean, were at all the times hereinafter mentioned promoters of a company known as the Wyoming Pacific Improvement Company, one of the defendants above named (hereinafter called the "Improvement Company"), and, through the instrumentality of said company, of a project for constructing and equipping a line of railway from Covington, Nebraska, on the Missouri river, opposite Sioux City, Iowa, to Salt Lake City, or Ogden, Utah, a distance of about 960 miles, which line of railway was known as the Pacific Short Line, and was intended to embrace three connecting lines of railway to be constructed, to wit, the Nebraska and Western Railway (hereinafter called the "Nebraska Railway"), the Wyoming and Eastern Railway, and the Salt Lake Valley and Eastern Railway. Francis O. French was the principal promoter, and at all times exercised a controlling influence over his associate promoters. Amos T. French, who is a son of Francis O. French, was an active promoter of said company and said project. The defendant the Manhattan Trust Company was cognizant of and actively aided in the promotion of said company and of said project. Said Gedney, Blanchard, and McLean are all non-residents of the state of New York and of the state of Iowa, and are not known or believed by your orators to be solvent or financially responsible. The promoters caused the improvement company to be incorporated in March, 1888, under the laws of the then territory, now state, of Wyoming, with a nominal capital of \$1,500,000, and to be reincorporated in March, 1889, with a nominal capital of \$3,000,000. They at all times controlled the improvement company, and through it the railway companies owning the lines of railway aforesaid, which they caused to be incorporated contemporaneously, or nearly so, with the improvement company. The stock of the railway companies was issued and owned by the improvement company. The only portion of the projected Pacific Short Line which the improvement company and the promoters actually undertook to construct and equip, and which was actually constructed, was a section of the Nebraska Railway from Covington to O'Neil, Nebraska, a distance of about one hundred and twenty-nine miles, which section of railway was completed some time during the year 1890.

(3) The plan adopted by the promoters at the inception of the improvement company to carry out their project and to place the capital stock of the improvement company was the formation of a syndicate, composed of the promoters and of all those persons who should subscribe and contribute to a construction fund for building and equipping the first section of the projected line of railway from Covington westward, and, having thus completed this section, and paid for it, to proceed with the enterprise, with the aid of capitalists, which they expected then to be enabled to procure. This plan was, at the inception thereof, and at all the times hereinafter mentioned, well known to the defendant the Manhattan Trust Company. Thereupon the promoters, some time in the latter part of the year 1888 or early in 1889, through printed circulars issued and published through the agency of the improvement company, and by oral solicitations, invited the public of Sioux City, including your orators, to subscribe to a construction fund of the improvement company for the purpose of building said section. The circular above referred to was in the following form:

"Pacific Short Line.

"The Salt Lake Valley & Eastern, the Wyoming & Eastern, and the Nebraska & Western Railway Companies, respectively, have contracted with the Wyoming Pacific Improvement Company for the construction of their several lines extending from Covington, Nebraska (opposite Sioux City, Iowa), to Salt Lake City, Utah, a distance of about 960 miles. It is proposed to consolidate these companies in one corporation, to be styled the Pacific Short Line. The Wyoming Pacific Improvement Company will receive for the road as constructed stock and bonds as follows: \$20,000 of forty years' five per cent. bonds and \$19,500 of stock for each mile of completed road.

The companies above named will issue for each mile of road \$25,000 of forty years' five per cent. bonds and \$20,000 of stock. The stocks and bonds issued to and received by the Wyoming Pacific Improvement Company will be exchanged at par for stock and bonds of the Pacific Short Line Company, when same are issued. The Wyoming Pacific Improvement Company invites subscriptions on the following terms: Each subscriber of \$10,000 or any multiple thereof, and on payment of the amount to the Manhattan Trust Company, becomes entitled to receive—

\$5,000 bonds at 90.....	\$ 4,500
Trust receipts for fifty-five shares Wyoming Pacific Improvement Company stock, at par.....	5,500
	<hr/>
	\$10,000

—In accordance with terms of certificate, copy of which follows:

“No. \$.....

“Certificate of Subscription.  
“Pacific Short Line.

“This is to certify that having subscribed dollars, will be entitled, on payment thereof to the Manhattan Trust Company, to receive trust certificates for Wyoming Pacific Improvement Company stock for shares (being 55 per cent. of said subscription), and also railway bonds for \$ (being 50 per cent. of said subscription), which shall be delivered within two years from date, or as soon thereafter as the same are issued; subject to option to purchase said bonds at 95 and accrued interest within two years.

“This certificate is negotiable only by transfer on the books of the company, and with the assent of this company first obtained thereto.

“Wyoming Pacific Improvement Company,  
“By

“Secretary.

“New York, , 18 .

“Countersigned and registered by Manhattan Trust Company.

“By

“President.’

“[Indorsement.]

“The installments on account of the subscription represented by this certificate have been paid as follows:

Per Cent.	Date.	Amount Paid.	
25			Manhattan Trust Co. By
15			Manhattan Trust Co. By
10			Manhattan Trust Co. By
10			Manhattan Trust Co. By
10			Manhattan Trust Co. By
10			Manhattan Trust Co. By
10			Manhattan Trust Co. By
10			Manhattan Trust Co. By
10			Manhattan Trust Co. By

“At the option of the subscriber, payment may be made in full. In case of default, at option of the Wyoming Pacific Improvement Company, all further rights of the subscriber shall cease to the extent of such default; and for all cash actually paid there shall be required to the subscriber, in lieu of any other interest, the amount paid in bonds at par.

“In consideration of one dollar in hand paid, the receipt of which is hereby acknowledged, the undersigned hereby agree, each for himself, and not

one for another, to subscribe the sum set opposite our respective signatures, and to pay the same to the Manhattan Trust Company, trustee, for credit of Wyoming Pacific Improvement Company, payable 25 per cent. on signing this agreement and the remainder in seven installments, one of 15 per cent. and six of 10 per cent. each respectively, when called for by Wyoming Pacific Improvement Company, but not oftener than once in thirty days. On final payment negotiable certificate will be given, countersigned by the trust company, in the form hereinbefore set forth.

Signature.	Address.	Amount."
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(4) Thereupon your orators, before the 4th day of February, 1889, accepted said invitation, and subscribed to said construction fund the amounts hereinafter set opposite their names, respectively, by signing a circular in the form above set forth, to wit:

Gordon R. Badgerow.....	\$ 2,500
Charles Breun.....	1,000
William L. Joy.....	10,000
Thomas J. Stone.....	10,000
E. H. Stone.....	10,000

Contemporaneously with these subscriptions, the sum of \$337,500, or thereabouts, including your orators' subscriptions, was subscribed to said construction fund by residents of Sioux City.

(6) Thereupon, and after the agreements hereinbefore set forth had been duly made, and before the 28th day of June, 1890, your orator Gordon R. Badgerow paid his subscription in full in installments as they were called for, and, contemporaneously with his payments, all or nearly all the subscriptions made to said construction fund in Sioux City, as hereinbefore set forth, were duly paid in.

(7) Upon completing the payment of his subscription, your orator Gordon R. Badgerow, on or about the 28th day of June, 1890, received from the Manhattan Trust Company a trust certificate and a subscription receipt, of which the following are copies:

"No. 16. 13¾ Shares.

"Trust Certificate for Stock of the Wyoming Pacific Improvement Company.

"This certifies that G. R. Badgerow is entitled to receive, on the first day of October, 1893, thirteen ¾ shares of \$100 each, par value, of the capital stock of the Wyoming Pacific Improvement Company, and also to receive any dividends that may in the meanwhile accrue thereon, when and as the same may be paid. The shares represented by this certificate are deposited with and stand in the name of the Manhattan Trust Company, trustee, under the agreement dated October 12th, 1888. This certificate is transferable in person or by attorney only with the consent of the Wyoming Pacific Improvement Company indorsed hereon, and on surrender of this certificate.

"Manhattan Trust Company, Trustee,

"By C. W. Haskins, Secretary.

"Registered this ninth day of June, 1890.

"Wyoming Pacific Improvement Company,

"By Wendell Goodwin, President."

"No. 16. \$1,250.00.

"Subscription Receipt for First Mortgage Five Per Cent. Gold Bonds of the Nebraska and Western Railway Company.

"This is to certify that G. R. Badgerow is entitled to receive, on the first day of May, 1891, or as soon thereafter as same may be issued, one one-quarter first mortgage five per cent. gold bonds of \$1,000 each of the Nebraska and Western Railway Company, due 1920, according to the terms of subscription to the Wyoming Pacific Improvement Company, subject to the right of the Wyoming Pacific Improvement Company to cancel this receipt on payment to G. R. Badgerow of ninety-five per cent. and accrued interest for said bonds on or before May 1, 1891. This receipt is transferable in per-



son or by attorney only with the consent of the Wyoming Pacific Improvement Company indorsed hereon, and on surrender of this receipt.

"Wyoming Pacific Improvement Company,  
"By Wendell Goodwin, President.

"Countersigned and registered this twenty-eighth day of June, 1890.

"Manhattan Trust Company,  
"By C. W. Haskins, Secretary."

(8) Your orators Charles Breun, William L. Joy, Thomas J. Stone, and E. H. Stone duly paid their subscriptions in full in installments as called for as aforesaid, and thereupon severally duly received from the Manhattan Trust Company trust certificates and subscription receipts in the same form as and substantially like the certificate and receipt above set forth, excepting that the proportionate amounts of said stock and bonds to which they were respectively entitled were duly specified in their certificates and receipts.

(9) The Manhattan Trust Company became financial agent of the syndicate at its inception, and acted in the relation of such financial agent at all the times hereinafter mentioned. At the time these circulars were issued and published, none of the capital stock of the improvement company had actually been subscribed for, excepting, perhaps, a very small amount thereof, but what precise amount, if any, is unknown to your orators, and not more than about four shares of the par value of \$100 each issued, if at all, to enable the promoters, or some of them, to qualify as trustees of said company had been actually paid for, and the stock of the improvement company referred to in the circulars was stock to be issued to the subscribers to the construction fund, as original subscribers to the stock of the improvement company. Only a portion of the stock of the improvement company, to wit, not more than \$764,707.85 par value thereof, was ever subscribed for, and none of the stock, excepting, perhaps, the shares issued to the trustees as aforesaid, to enable them to qualify, were ever delivered to the subscribers. but all said stock, so far as it was issued, if at all, was immediately when issued delivered to the Manhattan Trust Company, and retained by it under the agreement of October 12, 1888, mentioned in the trust certificate of stock hereinbefore set forth, with a voting power upon said stock, until the 1st day of October, 1893, reserved and secured to certain of the promoters, to wit, Francis O. French, George R. Blanchard, and one other person designated by them whose name is to your orators unknown, but is believed by them to be Edward R. Gedney. Through the exercise of this voting power, Francis O. French and the promoters associated with him were enabled to elect, and they did at all times elect or cause to be elected, trustees or directors as well as officers of the improvement company, of their own choice, who at all times remained under their influence and control. Francis O. French was a trustee or director and the first president of the improvement company, and continued to act as such until about January 1, 1889, when he resigned. Amos T. French was from the outset, and until late in the year 1890, the secretary and treasurer of said improvement company. After the said Francis O. French resigned as aforesaid, he continued to be represented in the board of trustees by his son, said Amos T. French. The said Francis O. French was also at all the times hereinbefore and herein-after mentioned president of the Manhattan Trust Company, and Amos T. French was at the same times treasurer of said trust company. Donald McLean, hereinbefore mentioned, was agent of the improvement company, and of the promoters to solicit subscriptions in Sioux City.

(10) On or shortly after the 1st day of February, 1890, an agreement was effected between the improvement company and the Manhattan Trust Company, through the procurement or with the connivance and aid of Francis O. French and of the defendant Amos T. French, pursuant to which agreement all the bonds issued or agreed to be issued to the improvement company by the Nebraska and Western Railway Company were hypothecated with the Manhattan Trust Company to secure loans to the improvement company to the amount of \$1,000,000. Subsequently, in the same year, all the stock of the said railway company, and all the bonds issued by said company, were, by the procurement or with the connivance and aid of Francis O.

French and the defendant Amos T. French, hypothecated with the said trust company to secure a further loan to the improvement company of \$600,000. Pursuant to the terms of said agreement, a commission of five per cent. was paid by the trust company out of said loans to underwriters thereof, who had agreed to purchase said bonds at the rate of fifty cents on the dollar, and a further commission of two and one-half per cent. to Francis O. French and others for securing the underwriting of said loans.

(11) Before the 1st day of February, 1890, and at the times said hypothecations above mentioned were made, the Manhattan Trust Company and said Francis O. French and Amos T. French well knew that your orators had subscribed to said construction fund, and that subscriptions to said fund had been made in Sioux City to the amount of \$337,500, and in all to over \$500,000, and that subscription agreements in the form and in the manner hereinbefore set forth had been made with your orators and the other subscribers to said fund; and that your orators and the other subscribers had duly paid in installments of their subscriptions as called for under the terms of said agreements, and that your orators had thus paid in the whole or the greater part of their subscriptions respectively, and that the other subscribers had also paid in the whole or the greater part of their subscriptions; and that your orators and the other subscribers to said fund, under the terms of their subscription agreements, and upon completing the payments of their subscriptions, were entitled to receive trust certificates for stock and subscription receipts for bonds entitling them to stock of the improvement company and to said first mortgage bonds of the Nebraska & Western Railway Company in proportion to the amounts of their subscriptions as specified in their subscription agreements respectively. The Manhattan Trust Company, in pursuance of your orators' said agreements, duly delivered to your orators their said certificates and receipts in the form and in the manner above set forth, and also delivered to the other subscribers to said fund, upon their paying their subscriptions in full respectively, similar certificates and receipts, for the amounts of stock and bonds to which they were severally entitled under their said agreements. The total amount of bonds to which the said subscribers were thus entitled, as the Manhattan Trust Company and said Francis O. French and Amos T. French well knew, exceeded the sum of \$250,000 par value of said bonds.

(12) When your orators contributed to the construction fund as aforesaid, it was understood by and between them and the improvement company and the Manhattan Trust Company, to the knowledge of Francis O. French and Amos T. French, that the bonds of the Nebraska and Western Railway Company, when issued, on account of said section of railway from Covington to O'Neil, and the stock of the improvement company when issued, should, to the amounts specified in the subscription receipts and trust certificates hereinbefore mentioned, be set apart and reserved for delivery to your orators at the time specified in said receipts and certificates respectively. But the said Manhattan Trust Company, in willful disregard of said understanding, wrongfully, and in fraud of your orators, at the instance or with the connivance and aid of said Francis O. French and said Amos T. French, caused said hypothecations of bonds and stocks to be made, and accepted and effectuated said hypothecations. The bonds so hypothecated were bonds secured by a mortgage made by the said Nebraska and Western Railway Company to the Manhattan Trust Company upon the said section of railway from Covington to O'Neil, and embraced the entire issue of said bonds, and all the bonds which by the terms of said mortgage the said railway company was authorized to issue. And the said Manhattan Trust Company, with full knowledge that said hypothecations embraced all the bonds which the said Nebraska and Western Railway Company had issued, or was authorized to issue, and that said hypothecations rendered impossible a delivery of bonds and stock in compliance with said receipts and trust certificates, nevertheless, in fraud of your orators and the other subscribers, at the instance or with the connivance and aid of said Francis O. French and Amos T. French, caused said bonds and stock to be hypothecated with it as aforesaid, and accepted and effectuated said hypothecations. All said bonds and stock so hypothecated with the Manhattan Trust Company, as aforesaid,

were during the year 1890 sold out pursuant to the terms of said hypothecations, and passed into the possession and ownership of many persons, to your orators unknown. The facts of said agreement to hypothecate said bonds and of said hypothecations of bonds and stock were never disclosed to your orators, but were fraudulently concealed from them by the said trust company and by said Francis O. French and Amos T. French, and your orators did not know and did not learn said facts until long after said bonds and stock had been hypothecated and sold out as aforesaid.

(13) The fair cost of constructing the said section of railway from Covington to O'Neil did not exceed \$10,000 per mile. Before the said hypothecations of stock and bonds were made, there had been subscribed for the purpose of constructing said section of railway over \$600,000, and there was actually paid in on account of such subscription over \$500,000, to wit, the sum of \$513,000 or thereabouts.

(14) The said bonds and stock comprised all the valuable assets of the improvement company, and by the hypothecation and sale thereof the stock of the improvement company was rendered wholly worthless, and said company has never since had, and it has not now, any valuable assets whatsoever. Said mortgage has been foreclosed by the trust company, and the said section of railway has been sold under a decree of foreclosure and sale. The improvement company became, in the latter part of the year 1890, hopelessly insolvent, and passed into the hands of receivers, and has practically ceased to exist. It is made a formal party to this bill. Neither the stocks nor bonds designated or mentioned in the trust certificates and in the subscription receipts hereinbefore described have been delivered to your orators, or either of them, or to the other subscribers, and they have never received anything of value for or on account of their said subscriptions. Your orators did not know or learn of the frauds and wrongs hereinbefore alleged until after the sale of the stock and bonds so hypothecated as aforesaid.

Defendants demurred to the bill.

Oliver P. Buel, for complainants.

John L. Cadwalader, for defendant Manhattan Trust Co.

De Lancey Nicoll, for defendant French

COXE, District Judge. The transactions out of which this controversy arose are complicated and perplexing. The actors are so numerous and appear in so many different characters, individual and representative, their rights, duties and obligations cross and recross at so many points that it is by no means an easy task to weigh the questions involved in the light of all these relations or to follow to a demonstration any of the theories presented. If the complainants had an equitable lien upon the bonds of the Nebraska Company to the extent of their interest under the subscription receipts they are entitled to relief of some sort in equity. The court understands that this is not seriously disputed, but, even if it were, it is thought that the proposition is a sound one. If the bonds of this company were impressed with such a lien, and the defendants, with full knowledge of its existence, disposed of the bonds without the complainants' consent and to their injury, equity will afford relief. The question is, does the bill allege such a lien? The following is a summary of the alleged facts: It was agreed that the complainants' money was to be expended in constructing the Nebraska Railway and that the bonds to be delivered to them, in return for their money, were to be the bonds of that railway company and no other. The subscription receipts delivered to them by the improvement company expressly re-

cite that the complainants were entitled to receive bonds of the Nebraska Company. At the time the complainants contributed, it was understood by and between them and the defendants that these bonds, to the amount specified in the receipts, should be set apart and reserved for delivery to the complainants. In short, upon the express agreement that they should receive these bonds—it being the intent and purpose of both parties that a sufficient number of bonds should be set apart and reserved for the complainants—they subscribed their money. If they were deprived of the bonds their money was lost. There was nothing else of value left. In these circumstances the defendants, with full knowledge of complainants' rights and in fraud of those rights, entered into a scheme which resulted in taking from the complainants their bonds and leaving them without a dollar to show for the money they had advanced. These, in brief, are the averments. Are they sufficient? It is true that the bill might be more explicit. It is not, perhaps, as clear and full as it should be on this subject. On the other hand it must be remembered that the form of the agreement which creates a lien is not as material as the ultimate intent of the parties. Equity looks through form to substance. If the intent to charge designated property is established the lien follows. 3 Pom. Eq. Jur. § 1237. The bill is not demurrable if its allegations when aggregated establish an agreement from which the deduction follows that it was the intent and purpose of the parties to create such a lien. While conceding that the proposition is not free from doubt the court is inclined to the belief that the bill states a cause of action. As was said by Mr. Justice Miller in *Merriam v. Publishing Co.*, 43 Fed. 450:

"The demurrer goes to the whole bill and asserts that it contains no averments warranting equitable relief of any sort. We are unable, at this time, to assent fully to that view; but, at the same time, we do not wish to be understood as declaring definitely that the complainant is entitled to equitable relief."

Many authorities have been examined without finding one exactly in point, but in the action brought by the Fidelity Loan & Trust Company against these defendants to recover damages, this court decided that the western subscribers had no remedy at law against the Manhattan Trust Company, and, incidentally, suggested that their remedy was to enforce their lien in a court of equity. Though this suggestion was, probably, obiter, it is not unlikely that the complainants were influenced by it in bringing this action and, though not controlling, it is, in the circumstances, entitled to weight. It is thought that wisdom and prudence require that the court should not at this time attempt to deal with the novel and complicated situation foreshadowed by the bill, but should postpone its consideration until the proofs are all before it.

The demurrers are overruled, the defendants to answer within 30 days.

## SAMPSON et al. v. CAMPERDOWN COTTON MILLS.

Ex parte McBEE.

(Circuit Court, D. South Carolina. December 21, 1894.)

## 1. LANDLORD AND TENANT—ASSIGNMENT OF LEASE—STATUTE OF FRAUDS.

M. leased certain lands in South Carolina to the C. Mills, a corporation, the lease giving express permission to the lessee to erect buildings, and pull down or change the same during the term. The C. Mills became insolvent, and its property, including the lease, was sold by a receiver to H. and his associates, who organized a new corporation, the C. Cotton Mills, which took possession of the property of the former corporation and of the leased premises, but without any assignment of the lease or other writing from H. and his associates. Subsequently, the C. Cotton Mills made a mortgage of its personal property to S., minutely enumerating sundry machines, furniture, etc., and including "all personal property of whatever nature, on the premises of the C. Cotton Mills, or in any manner belonging to them." S. brought his action to foreclose the mortgage, in which a receiver was appointed, who notified the lessor of his intention to surrender the lease, and subsequently advertised the personal property for sale, following the enumeration in the mortgage of machines, etc., and adding, after such enumeration, "all other personal property on the premises belonging to the C. Cotton Mills, and covered by the mortgage." S., having purchased the mortgaged property at the receiver's sale, was proceeding to tear down and remove a warehouse erected on the leased premises by the C. Cotton Mills for use in its business. M., the lessor, filed his petition in the cause to restrain such removal. *Held*, that the C. Cotton Mills was never a tenant of M., no written assignment of the lease having been made as required by the statute of frauds of South Carolina.

## 2. TRADE FIXTURES—WHEN REMOVABLE.

*Held*, further, that while, under the general rule as to trade fixtures or under the provision in the lease as to pulling down buildings, the lessee might have removed the warehouse during the term, and while in possession of the premises, its right to do so did not continue after its possession ceased and was terminated, as to any right of the C. Cotton Mills, by the receiver's notice of his intention to surrender the lease.

## 3. SAME—WHEN REALTY AND WHEN PERSONALTY.

*Held*, further, that, even if the right existed to remove a building erected on the leased premises, such building, until the right was exercised by an actual removal, was part of the realty, and not included in the mortgage or sale of personal property.

## 4. JUDICIAL SALE—SUFFICIENCY OF ADVERTISEMENT.

*Held*, further, that the form of the advertisement was not such as to give notice to persons, not otherwise informed, that a building on the leased premises was intended to be included in the sale, and a sale, made under such advertisement, would not be held to include such building.

This was a suit by O. H. Sampson & Co. against the Camperdown Cotton Mills for the foreclosure of a mortgage. Vardry E. McBee filed an intervening petition. A rule to show cause was issued to the plaintiff, purchaser at the foreclosure sale, to which he filed a return.

Cothran, Wells, Ansel & Cothran, for complainants.  
Julius H. Heyward, for petitioner.

SIMONTON, Circuit Judge. The Camperdown Cotton Mills, a corporation, executed to the complainant in March, 1893, a mortgage of its personal property. The description of the property mortgaged

begins thus: "125 H. P. Buckeye automatic cut-off engine, two steam boilers, one steam pipe, one two-beater opener, 56 36-inch Wellman cords, with railway, troughs, and fixtures complete;" going on and giving in minute detail, article by article, the machinery and appliances used in a cotton mill. After this long and minute detail come these words in a separate paragraph: "All personal property of whatever nature on the premises of the Camperdown Cotton Mills, or in any manner belonging to them, including property loaned to others or held by other parties on commission or storage for Camperdown Cotton Mills." This mortgage was foreclosed in the main cause, and the receiver appointed thereunder was instructed to sell at public auction, after due advertisement, the property mortgaged on a day fixed by the court. This sale took place. In his advertisement of sale the receiver followed the description of the property in the mortgage in its minute detail, changing, however, the punctuation, and ending the description as follows: "Two watchman's clocks, two sets harness, sundry carpenters' and masons' tools, six wheelbarrows, all other personal property on the premises belonging to the Camperdown Cotton Mills, and covered by the mortgage foreclosed in this case." At this sale, under this advertisement, O. H. Sampson became the highest bidder, and was declared the purchaser. The date of the sale was 31st of October, 1894. On the 24th of November thereafter, O. H. Sampson sent certain workmen to tear down the principal warehouse on the premises, heretofore occupied by the Camperdown Cotton Mills, claiming that he had purchased it as a part of the mortgaged property. Thereupon this petition was filed. The warehouse was put up by the Camperdown Cotton Mills for the purpose of storing cotton, used in its business of manufacture, and is affixed to the freehold. If it passed at this sale, it did so because it was included in the words "all personal property of the Camperdown Cotton Mills." The Camperdown Cotton Mills conducted its business upon certain leased premises in Greenville, S. C. The lease was executed by Alexander McBee and Vardry E. McBee, in 1876, to the Camperdown Mills, another corporation, for a term beginning March 1, 1876, and ending March 1, 1906. The lease is to that corporation and its successors and assigns, and does not require the assent of the lessees to any assignment of the lease. The Camperdown Mills became insolvent, passed into the hands of a receiver appointed in the state court; and all its property, including this lease, was sold in 1885 at public auction by the receiver to H. P. Hammett and his associates. The deed, executed 3d August, 1885, conveys the entire property, including the lease, to H. P. Hammett and his associates, naming each of them and his proportion of interest, habendum to the said H. P. Hammett and his associates above named, according to their respective interest as above set forth, and their and each of their executors, etc., forever. At the session of the general assembly held in November following this purchase and conveyance, Hammett and his associates were incorporated as the Camperdown Cotton Mills, the act reciting the above-named purchase by them. 19 St. at Large S. C. 347. The new corporation was placed in possession of all the property of the old company and of the leased prem-

ises. No deed was made, and, as far as this record shows, no writing whatever attended this transfer. When, in its turn, the Camperdown Cotton Mills failed and went into the hands of a receiver, the receiver, within a month after his appointment, notified Vardry E. McBee, the petitioner, who in the meantime had become sole owner of the fee in the leased premises and the lease, that he did not intend to undertake the lease, and, as far as lay in his power, he surrendered it, notifying him of his intention to turn over the possession of the leased premises as soon as practicable and the court shall direct. V. E. McBee to this, in substance, replied, denying the right of the receiver to destroy the validity of the lease, and notifying him that he would insist on his rights thereunder. The matter comes up on a rule issued upon the petition of O. H. Sampson to show cause why, etc., and on his return thereto. The return claims that all the buildings erected by the Camperdown Cotton Mills on the leased premises for the purposes of its business were trade fixtures, and so personal property, included in the very terms of the mortgage; that, being so included, they were all sold at the sale for foreclosure, and passed to and are the property of the respondent, the purchaser at that sale. On the other hand, the intervener, owner of the fee in the land, denies that these buildings of a permanent character let into the freehold, became and are personal property; that, whatever may be the general law on the subject of trade fixtures, the erection of buildings and the interest of tenants in them were controlled by the terms of the lease, which permitted the erection of buildings and the pulling down and changing them, as may be deemed necessary and convenient, during the term of the lease only. He further denies that the Camperdown Cotton Mills ever were his tenant, or occupied towards him the relation of lessee and lessor, there never having been any assignment to it of the lease in writing; that, whatever may be the conclusion on these points, these buildings were not sold at the sale, and did not pass to the purchaser, because nothing in the advertisement disclosed, and no notice was given at the sale, that structures on the land were a part of the property offered for sale. Finally, he claims a lien for rent to accrue. On this last point no reason is seen to change the conclusion heretofore reached in this same case. The law of South Carolina gives no lien for rent to accrue.

At the threshold of this case it is best to ascertain the precise relations which the petitioner, the owner of the fee, and the Camperdown Cotton Mills occupied towards each other. Were these relations those of lessor and lessee? The original lease was to the Camperdown Mills. It was assigned by deed to Hammett and his associates, to their and each of their executors, etc. No assignment in writing was made to the Camperdown Cotton Mills. The statute of frauds of force in South Carolina (Gen. St. c. 73) forbids the assignment, grant, or surrender of a lease unless by deed or note in writing. Gen. St. § 2018. See *Charles v. Byrd*, 29 S. C. 544, 8 S. E. 1; *Davis v. Pollock*, 36 S. C. 544, 15 S. E. 718. McBee could not, under the terms of this lease, complain of any assignment by his lessee. The law, however, protected him in prescribing a mode of assignment. The Camperdown Cotton Mills, a corporation, was an entity distinct from Ham-

mett and his associates. It could contract with them. It was not bound by any of their acts, except in a corporate capacity. Mor. Corp. § 232. Property held by them in cotenancy did not, by the mere fact of incorporation, become its property. A deed was necessary to pass property which could only pass by the observance of formalities,—a deed or writing. A lease is of this character. The conclusion is evident that the relation of lessor and lessee never existed between McBee and the Camperdown Cotton Mills.

There can be no doubt that, as between lessor and lessee, buildings put up on the leased premises for the purposes of trade, distinct from the use of the land by the lessor, do not become a part of the land and vest absolutely in the owner of the soil, but are removable by the lessee during the term. *Van Ness v. Pacard*, 2 Pet. 137; *Freeman v. Dawson*, 110 U. S. 264, 4 Sup. Ct. 94; *Wiggins Ferry Co. v. Ohio & M. Ry. Co.*, 142 U. S. 396, 12 Sup. Ct. 188. This last case, after quoting the conclusion reached in *Van Ness v. Pacard*, "that whatever is affixed to the land by the lessee for the purpose of trade, whether it be made of brick or wood, is removable at the end of the term," adds: "It is difficult to conceive that any fixture, however solid, permanent, and closely attached to the realty, placed there for the mere purposes of trade, may not be removed at the end of the term." These cases declare the right of removal only during the term. In one case quoted, in *Van Ness v. Pacard*, the right of removal is extended beyond the term, the tenant still remaining in possession. *Penton v. Robart*, 2 East, 88.

The law as laid down by the supreme court of the United States is in full accord with the law in South Carolina. *Evans v. McLucas*, 15 S. C. 70; *Dominick v. Farr*, 22 S. C. 585; *De Laine v. Alderman*, 31 S. C. 267, 9 S. E. 950; *Padgett v. Cleveland*, 33 S. C. 339, 11 S. E. 1069. But, although this is true, it by no means follows that while the buildings remain on the land, fixed in the soil, they are personal property. They can be removed, and can then become personal property; but, so long as they remain undisturbed, they are a part of the realty, and are in fact realty. They can become personalty by reason of an express agreement with the owner of the soil, or of an agreement, implied by law, that they can be severed from the realty, and thus regain their status as personal property. It is a long and well settled rule of the common law that everything which is annexed to the freehold becomes a part of the realty, and can only be severed from it, and reinvested with the character of personal and removable property, by the act of the owner of the land. *Elwes v. Mawe*, 2 Smith, Lead. Cas. (6th Am. Ed.) 267, and cases cited. If this be so, an instrument expressly creating a mortgage in personal property only will not create a lien on buildings not removed, and removable only.

The law allowing the removal of buildings erected by lessees for trade purposes, how does it apply to the case at bar? The rights of O. H. Sampson, the purchaser, depend on the rights of the Camperdown Cotton Mills. Shortly after his appointment, in May, 1894, the receiver notified the lessor that he would not be bound by the lease, and, so far as lay in his power, surrendered it. He represented



the Camperdown Cotton Mills. While, therefore, if the corporation was not the owner of the lease, and his action could not affect the existence of the lease as between the lessor and his original lessees, yet it did end the tenancy of the Camperdown Cotton Mills some months before the sale. Even then, if it be assumed that there had been a right of removal in the Camperdown Cotton Mills, that right was lost by the termination of its occupation.

In the note to *Elwes v. Mawe*, 2 Smith, Lead. Cas. (6th Am. Ed.) 280 (\*257), the learned annotators say:

"Notwithstanding the liberal interpretation which the courts put on the right of the tenant to remove fixtures, it is well settled that, if he fail to exercise it during the continuance of the term or before surrendering the premises, he cannot re-enter for the purpose of exercising it afterwards, nor sustain an action against the landlord or those claiming under him for the recovery of that which he has voluntarily abandoned;" quoting many cases on this point.

In *Wood, Landl. & Ten.* § 532, the same doctrine is stated, and sustained by numerous authorities. Mr. Justice Miller, in *Kutter v. Smith*, 2 Wall. 497, addressing himself to this question, says:

"The doctrine concerning this class of fixtures [buildings], which is a strong innovation upon the common-law rule that all buildings become a part of the freehold as soon as they are placed upon the soil, has extended no further than the right of removal while the tenant is in possession."

Further, if we were to conclude that, notwithstanding the non-existence of a written assignment of the lease to the Camperdown Cotton Mills, that corporation, entering as it did, was entitled to the protection of the lease during its holding, we must come to the same conclusion. If parties enter into a contract without express reference to the general law controlling contracts of that character, the law enters into and becomes a part of the contract. But if the contract, in its terms, departs from the general law, the terms of the contract control. In the contract between the lessors and the lessee we find two provisions, one permitting the lessees to remove any and all the machinery in the mill within three months after the end of the term. This express provision, giving a qualified right of removal, would seem to exclude the idea of a general right. "Expressio unius," etc. The other provision permits the erection of buildings upon the premises, and during the term the pulling down or changing them, as may be deemed convenient or necessary. This is a distinct recognition of the right of the lessee to declare his assent to the erection of buildings, and also of his right to give such consent with modifications; that is, to erect, pull down, or change buildings during the term. This cannot mean to remove them after the term has ended.

There is another view of this case bearing on the question made by the intervention. The advertisement is so worded and punctuated that no notice whatever was given to those of the public who attended the sale at auction that the purchaser would get these buildings. *Prima facie*, they were a part of the freehold, inseparable therefrom. *Reid v. Kirk*, 12 Rich. Law, 54, 64. The only part of the advertisement which is now supposed to cover them are the words "all other personal property on the premises belonging to

the Camperdown Cotton Mills and covered by the mortgage foreclosed in this case." These words come after, and are separated by a comma only from, a long list of mill apparatus and machinery, ending "clocks, tables, chairs, and other office furniture." "Noscitur a sociis." *Insurance Co. v. Hamilton*, 12 App. Cas. 484, 38 Moak, 433. The natural conclusion is that they embrace the odds and ends of similar articles to those mentioned before them. A sale under these circumstances, even if the mortgage could cover buildings not severed from the freehold in the term "personal property," was altogether to the advantage of the well-advised mortgagee, and to the disadvantage of every one else. Sales made under judicial proceedings "are always regarded as under the control of the court, and subject to the power to set them aside for good cause shown, and to open them at any time before they are confirmed, if the circumstances of the case require the exercise of that power." *Blossom v. Railroad Co.*, 3 Wall. 207; *Mayhew v. Land Co.*, 24 Fed. 215. The sale under this advertisement did not carry any buildings erected on the leased premises.

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WELLS, FARGO & CO. v. VANSICKLE.

(Circuit Court, D. Nevada. December 12, 1894.)

No. 580.

PROMISSORY NOTE—LAW OF PLACE.

A promissory note is not complete until it has been delivered, and the place of the contract evidenced by such note does not depend upon where the note is dated, but upon the place where it is delivered, which may be shown by parol evidence, though the note is dated elsewhere.

This was an action by Wells, Fargo & Co. against P. W. Vansickle upon a promissory note. The case was tried by the court without a jury.

J. L. Wines, for plaintiff.

D. W. Virgin and Trenmor Coffin, for defendant.

HAWLEY, District Judge (orally). This is an action at law upon a promissory note which reads as follows:

"\$4,000.00.

San Francisco, Cal., March 29, 1887.

"Two years after date, for value received, I promise to pay to the order of W. W. Lapham, at Wells, Fargo & Co.'s Bank, in this city, in gold coin, four thousand dollars, with interest, in like coin, from the date hereof, at the rate of one per cent. per month until paid; payable monthly, and, if not so paid, to become part of the principal, and bear like rate of interest.

"P. W. Vansickle."

This note, before maturity, was, for value received, transferred and assigned to plaintiff. Two defenses are made to this note: (1) Statute of limitations; (2) payment.

1. The first contention of defendant is that the note sued upon is, upon its face, a California note; that it is barred by the statute of limitations of the state of California (section 337, Code Civ. Proc.), and by the statute of limitations of the state of Nevada (section

3661, Gen. St. Nev.), and that no evidence is permissible to change or vary the terms of the note, as to its place of execution, etc.

The statute of this state provides that:

"An action upon a judgment, contract, obligation, or liability for the payment of money, or damages obtained, made, executed, or incurred out of this state can only be commenced as follows: \* \* \* Third. Within two years \* \* \* after the cause of action accrued."

The amended complaint alleges that at the time of the execution and delivery of the note the defendant was a resident of the state of Nevada, and that W. W. Lapham was a resident of the state of California; that the note, although dated "San Francisco, Cal.," was actually drawn up, signed, executed, and delivered in Carson City, Nev.

W. W. Lapham testified, in relation to the blank form and of the execution and delivery of the note, as follows:

"We made the arrangements in Genoa, and went down to Carson City to get the paper executed. The indebtedness was contracted at Carson City. I was dealing with Wells, Fargo & Co., and borrowing money of them, etc., and I had those blanks with me. It was a Nevada contract. I said to him [defendant], 'You will have six years after maturity.' The law there is six years. So he must have understood it to be a Nevada contract. \* \* \* I used the blanks as a convenience, because I had dealings with Wells, Fargo & Co.'s Bank, and in case I was not at Carson he could send the money to Wells, Fargo & Co.'s Bank, in San Francisco, where the note was made payable. It was understood that this was a Nevada contract. \* \* \* I wanted the note payable in San Francisco, at Wells, Fargo & Co.'s, and so used the bank's form of note."

Defendant testified that the note was executed and delivered in Carson City, Nev., but that it was the understanding that it should be a California contract, so as to enable Lapham, in the event the interest was not promptly paid, to collect compound interest thereon, which was not allowable upon contracts made in the state of Nevada.

I am of opinion that parol evidence is admissible to show that, notwithstanding the printed words, "San Francisco, Cal.," upon the face of the note, the note was actually made, executed, and delivered in Carson City, Nev. A promissory note is not complete until it has been delivered, and it takes effect only from the time of its delivery. The place of a contract evidenced by a promissory note does not depend upon where the note is dated, but upon the place where it is delivered. It is the delivery of the note that consummates the contract. 1 Daniel, Neg. Inst. § 865; 1 Pars. Bills & N. 48; 2 Am. & Eng. Enc. Law, 330; Lawrence v. Bassett, 5 Allen, 140; Overton v. Bolton, 9 Heisk. 762; Gay v. Rainey, 89 Ill. 225; Woodford v. Dorwin, 3 Vt. 82; Fritsch v. Heisler, 40 Mo. 555; Flanagan v. Meyer, 41 Ala. 132; King v. Fleming, 72 Ill. 21; Tied. Com. Paper, §§ 34b, 34c. "Commercial paper takes effect only from the time of delivery, and where there is a date given in the paper the delivery is presumed to have been made \* \* \* on that date. \* \* \* But this presumption may be rebutted, and it may be shown by parol evidence that the paper had been delivered on some other day." Id. § 34b. In Davis v. Coleman, 7 Ired. 424, a note v.64f.no.8—60

made in North Carolina was delivered in Georgia for a loan there made, and it was held to be a contract made in Georgia. In *Hyde v. Goodnow*, 3 N. Y. 266, two notes signed in Ohio were void by the law of that state, but, being delivered in New York, it was held that the place of delivery controlled the contract, as to its validity. The contract in the case under consideration was not "obtained, made, executed, or incurred out of this state," and does not come within the provisions of the statute of limitations of Nevada, heretofore quoted.

2. The defense of payment is not sustained by the evidence. The weight and preponderance of evidence on the merits are in favor of plaintiff. Judgment is therefore ordered in favor of plaintiff for the sum of \$4,000, with interest thereon from March 29, 1887, at the rate of 1 per cent. per month,—all payable in gold coin,—and for costs.

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#### UNITED STATES CHEMICAL CO. v. PROVIDENT CHEMICAL CO.

(Circuit Court, E. D. Missouri, E. D. December 17, 1894.)

No. 3,759.

##### CONTRACTS IN RESTRAINT OF TRADE—MONOPOLIES—PUBLIC POLICY.

The U. Co., which was engaged in the manufacture of bone tartar, leased its building and equipment, used in such manufacture, to W. for 10 years, at \$12,000 per year. The actual rental value of the land and building was between \$2,000 and \$2,500 per year, but the profits derived by the U. Co. from the business conducted on the premises with the leased equipment were from \$10,000 to \$12,000 per year. The lease contained a covenant that, during its continuance, the U. Co. would not engage in the manufacture of bone tartar, and other provisions which, it was claimed, showed that the intention was not to operate, but to close, the leased factory. On the day the lease was made, it was assigned, with the consent of the U. Co., to the P. Co., which was engaged in the same business, and had for many years been the chief producer of bone tartar. It appeared that the lease had been made with the intention that it should be assigned to the P. Co., and that it was made for the purpose of removing the U. Co.'s competition from the market. Other competitors afterwards sprung up. The price of bone tartar declined. The P. Co. ceased to pay the agreed rent, and, being sued, set up in defense that the lease was void, as being in restraint of trade, and tending to create a monopoly. *Held*, that as the contract conferred no special or exclusive privilege, but left the trade open to the competition of any other parties, it had no tendency to create a monopoly; that it was no more than a lawful exercise of the power to contract for the protection of the business of the P. Co., and was not against public policy, nor void.

This was an action by the United States Chemical Company against the Provident Chemical Company for rent, on a lease. Trial by the court, without a jury.

Action for rent. Defense that the lease is void, because antagonistic to public policy. On the 25th of September, 1888, the plaintiff company leased to Henry H. Welch, for the term of 10 years, from the 1st of September of that year, at a monthly rental of \$1,000 per month, in advance, the building and equipment then used by it for the manufacture of bone tartar in Camden, N. J. The mutual covenants are expressed in seven paragraphs. The first stipulates for the right of entry for default in the payment of rent, and is of the usual character. The second prohibits the assignment of the leasehold or an underletting without the written consent of the lessor.

The third provides that, if the premises be destroyed by fire, the lessor shall have 20 days within which to elect to rebuild, and, if the lessor shall choose to rebuild, the rental should then continue for a period of three months, and not longer, until after the complete restoration of the rebuilding, when it would again revive. If the lessor elected not to rebuild, such determination concluded the term. The fourth is a covenant that in the event the buildings should be destroyed by fire, and the lessor elect not to rebuild, then the lessor will not engage in the manufacture of bone tartar so long as the lessee shall continue to pay the rental of \$1,000. The fifth assures to the lessee the right to remove any engine, boilers, tools, machinery, or fixtures placed upon the premises. The sixth relates to the prudent use of the premises, so as not to increase the risk by fire, and restricts the employment of the premises to the manufacture of bone tartar. The seventh and concluding covenant is as follows: "Said lessor, for itself, its successors and assigns, hereby covenants to and with said lessee, his heirs, executors, administrators, and assigns, that it, said lessor, will not, during the period that this lease may be in force, and that the rent herein reserved shall be paid as it falls due, ever manufacture or sell any bone tartar." On the day the lease was executed, it was, with the consent of the lessor, assigned to the defendant, a corporation organized pursuant to the laws of Missouri, and which, for many years antecedent, had been engaged in the manufacture of bone tartar at the city of St. Louis, and whose trade in that product extended throughout the United States, wheresoever there was a demand for that article. Although the lease was made to Mr. Welch, it was understood by both parties that he was merely the representative of the defendant company, whose officers had negotiated and consummated the terms of the trade. The plaintiff was organized as a corporation under the laws of New Jersey, and had for a number of years been engaged in manufacturing various kinds of chemical compounds, principally sulphuric acid, alum, rock tartar, fertilizers, and latterly bone tartar, at Camden, N. J. It used a separate building for each of the different kinds of its products, and each was operated by mechanical power derived from a common motor. The building which the defendant leased had no power, and unless supplied with engine, as seems to have been contemplated by paragraph 5 of the lease, or power rented from the defendant, would be useless for the manufacturing purpose for which it had been rented. The defendant points to this incident as a clear indication of a design, of which both parties must be cognizant, not to employ the building in the business to which it was especially adapted, but to close it up, so that the defendant would be in complete control of the trade in bone tartar. And there is some evidence that, in conversations attending the negotiations which culminated in the lease, the defendant expressed an intention not to operate the factory; and also that, at least for the immediate future, if the negotiations were concluded, the defendant would have complete control of the trade in the bone tartar commodity; and that this latter feature was utilized by the plaintiff to obtain the rental finally agreed upon.

"Bone tartar" is a coined term for the chemical compound "acid phosphate of calcium," and is obtained by treating calcined bone or fossil and kindred rock with sulphuric acid. Whether made of bone or fossil rock is not discernible in the finished product, either by taste, analysis, or effect in use. Bone and rock tartar are indiscriminately used as one of the prime components of baking powder. It was the trade of the manufacturers of baking powder that the defendant had been cultivating for years, and of which, so far as bone tartar, its exclusive product, was used, it had almost the exclusive patronage up to the time when the plaintiff began to produce bone tartar. The plaintiff's first manufacture of acid phosphate of calcium was from rock, but, for two or three years before the date of the lease, it had added to its works, at Camden, the building leased to the defendant, especially adapted to the making of bone tartar, and early began to press this product upon the market, in competition with that of the defendant, and threatening to become a dangerous rival. The defendant, in order to protect its trade, conceived the idea of perpetuating its regency in this particular field by gaining control of the plaintiff's works whereat

the rival product was made. Its efforts resulted in the lease which is the basis of this suit. The quality of the plaintiff's bone tartar was equal to that of the defendant's. While the manufacture of acid phosphate of calcium was open to the talent and capital of any one, yet, to successfully make it, great skill and experience were required, and this skill had only been attained by the plaintiff and defendant, with a few unimportant exceptions, up to the time of the lease. A Mr. McNab was the expert in charge of the plaintiff's works, and, after the execution of the lease, the defendant requested the plaintiff to endeavor to keep him in its employment in the other departments of its business, so that he might not engage in starting a business that would compete with the defendant's; and this the plaintiff, in a spirit of accommodation, consented, so far as it could with propriety, to do. The defendant, after the lease was made, purchased of the plaintiff all of its finished products, both of rock and bone tartar, and the raw material for making them. The raw material was sent to the defendant's works at St. Louis, and the manufactured sold from Camden to customers, including those who had been purchasers of the plaintiff, and to whom the plaintiff used its best endeavors to introduce defendant, under the name of the United States Tartar Company, the defendant thinking it prudent to disguise the fact that it had acquired the plaintiff's factory and bone tartar business. The value of the leased premises is shown to be between \$17,000 and \$24,000 and the annual rental to be from 10 to 15 per cent. of this value, while the rental stipulated in the lease is \$12,000 per annum. Inasmuch as the lease contains no grant of the good will of the plaintiff, the defendant contends this large monthly sum is but the price which the plaintiff demanded for withdrawing its rivalry to the defendant; while, upon the other hand, the plaintiff contends that it is but a fair compensation for the profit it had been realizing and might reasonably anticipate from that particular branch of its business, and the use of the leased property; and I am convinced of the accuracy of the plaintiff's contention by the evidence. Up to May, 1893, the rental was promptly paid by the defendant. McNab, without the connivance of the plaintiff, had left its employment, and had started a factory for making bone tartar. Other rival institutions sprang up, and the prices of bone tartar were tending downward; and under these influences the defendant repudiated the lease, as contrary to the policy of the law. The plaintiff sues for the rent in arrear.

John C. Orrick, for plaintiff.

Harmon, Colston, Goldsmith & Hoadley and A. Moore Berry, for defendant.

PRIEST, District Judge (after stating the facts). The question of moment in this case is whether the seventh covenant of the lessor, not to manufacture or sell any bone tartar during the period the lease may be in force, is in restraint of trade, and for that reason void. The transaction in which this restriction appears is the leasing of premises and equipment especially devoted to the manufacture of bone tartar. The rental value of the real estate and buildings was between \$2,000 and \$2,500. The profits derived by the plaintiff from making and sale of bone tartar were from \$10,000 to \$12,000 per annum at the time the lease was made. It is manifest that the inducement moving the plaintiff to lease the premises was to obtain a fixed and certain sum, rather than a contingent and uncertain one; and the motive of the defendant was to get rid of a dangerous and aggressive competitor in the trade of the article of which it was in practical control, and to the manufacture of which it was exclusively devoted. The plaintiff sought a trade for this article throughout the United States,—an achievement which the

defendant had already accomplished, being earlier in the field. In view of these conditions, is the covenant condemned by public policy?

The restraint extends literally everywhere, but a fair construction would limit it to the United States. If valid to that extent, we have no concern with the broader boundary. It is commonly and casually said that contracts in general restraint of trade are void. This rule, whatever may have been its earlier character, is now neither arbitrary nor inflexible. The sense of the modern decisions is that, if the restraint is only commensurate with the fair protection of the business sold, the contract is reasonable, valid, and enforceable. It is only where the restriction can be of no avail to the vendee, and unnecessarily hampers the vendor, that it becomes oppressive and void. *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. 658; *Ellerman v. Stock-Yards Co.* (N. J. Ch.) 23 Atl. 287; *Long v. Towl*, 42 Mo. 545; *Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419; *Lawson*, Cont. § 327.

Among the potent reasons first assigned against such contracts was that the person restrained by thus surrendering his chosen occupation—one for which he had been especially prepared—might become a public charge, and the public be injured in being deprived of his personal skill in the avocation to which he had been brought up. Such reasons cannot be applied to artificial persons without absurdity. The substantial ground in all cases, especially where corporations are concerned, is that such contracts tend to create monopolies. In discussing this phase of the subject, we must not lose sight of some other principles, the disregard of which would be more harmful to public interest than monopolies. The right to contract is a cardinal element of constitutional liberty, and, as such, should be jealously guarded. In one of the cases *supra* it is said:

"It is clear that public policy and the interest of society favor the utmost freedom of contract within the law, and require that business transactions should not be trammelled by unnecessary restrictions. 'If,' said Sir George Jessell, in *Printing Co. v. Sampson*, L. R. 19 Eq. 462, 'there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts, when entered into freely and voluntarily, shall be held good, and shall be enforced by courts of justice.'" *Match Co. v. Roeber* (N. Y. App.) 13 N. E. 422.

Private corporations are subject to the control of the states from which they derive their charters. From an abuse or misuse or excess of their powers, they can be called to an account by the state. It is better such control and regulation should be had by that ample authority than, indirectly, by a foreign forum, upon collateral questions of public expediency. The facts of this case disclose no tendency to monopoly. Monopoly implies an exclusive right, from which all others are debarred, and to which they are subservient. *Greene's Case*, 52 Fed. 104. In *Match Co. v. Roeber*, *supra* (a case very similar in facts to this), the court observed:

"To the extent that the control prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition. But the business is open to all others, and there is little danger that the public will suffer harm from

lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privilege."

That the contract in this case was ineffectual to create a monopoly, or even to confer a dominating control over the trade in bone tartar, is confessed to some extent by the answer, wherein it assumes, as a just reason for repudiating the contract, competition subsequently started. Acid phosphate of calcium is made by several processes. The plaintiff employed two,—one from rock, and the other from bone. It leased the plant for making bone tartar only, reserving the other. The process was not discernible in the finished product. There is nothing in the contract from which we can reasonably infer a tendency to create a monopoly such as the law condemns. Even if an article be of prime necessity, the public is not concerned with who makes, but only with the reasonableness of, the price. But it is said that the defendant had, by its part in the transaction, such a purpose in view. This may be. The intent is only condemned as it is manifested in an unlawful act. If a person does a lawful act with a vicious intent, he is without the pale of legal punishment. Whatever may have been the defendant's motive, and even if reprehensible, there is no rule by which we may reprimand the plaintiff for the defendant's evil or wrongful intentions or acts. Whether the defendant's purpose is condemned by law or not does not affect the validity of the contract, unless plaintiff contributed something more to the accomplishment of the unlawful design than the mere leasing of its property. *Labbe v. Corbett*, 69 Tex. 503, 6 S. W. 803; *Tied. Sales*, § 294. But we are of the opinion that defendant has been hastily and unnecessarily self-accusing. The plaintiff was making inroads upon the defendant's business, and greatly cutting the prices of its sole manufactured product, while with the plaintiff this product was but a single feature of its manufacturing plant. The defendant had a perfect right to buy off the competition of a dangerous, powerful, and aggressive rival. The law of self-defense and protection applies to one's business, as well as to his person. But, if another springs up in the stead of the one silenced, the courts cannot, under the guise of public expedience, relieve him from the improvidence of his first contract.

Our attention has been called to many cases which condemn, in perhaps not too severe terms, combinations and trusts. It is a nervous and alarmed imagination which sees in every transaction involving large exchange of properties a monster threatening public interests. Combinations in the nature of modern trusts, so soundly condemned, are those which aim at a union of energy, capital, and interest to stifle competition, and enhance the price of articles of prime necessity and staples of commerce. In such cases there is absent the element of exchange of one valuable right or thing for another. In the contract here we find none of the elements of a combination or trust. It is a simple lease and sale for a fair and reasonable compensation, with stipulations only commensurate with a reasonable, necessary protection. The effect of the transaction, while not so literally expressed, was to convey with the premises the good will of the plaintiff in its bone tartar product and trade.



It is both unnecessary and unprofitable to discuss the many cases cited in the briefs. Upon a topic of public expedience, adjudications are, seemingly, necessarily inharmonious.

Judgment for the plaintiff for the rent sued for, and 6 per cent. interest upon each installment from the date it became due.

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SOUTHERN PAC. CO. v. JOHNSON.

(Circuit Court of Appeals, Ninth Circuit. November 5, 1894.)

CONTRIBUTORY NEGLIGENCE OF EMPLOYEE.

An engineer who, to make necessary repairs, goes out on the running board of his locomotive while it is running 17 or 18 miles an hour, and while it is unusually dangerous because of the defects in the engine, when the engine and train can be stopped or the speed slackened in a short distance, is guilty of such contributory negligence as will preclude a recovery for his death, caused by being thrown from the engine.

Error to the Circuit Court of the United States for the District of Nevada.

Action by Eliza Ann Johnson, administratrix of the estate of Horace Johnson, deceased, against the Southern Pacific Company, to recover for the death of plaintiff's intestate, caused by defendant's negligence. There was a judgment for plaintiff, and defendant brings error. Reversed.

This action was brought by defendant in error, under an act of Nevada, against plaintiff in error, to recover damages for the death of her husband, alleged to have been caused by the carelessness and default of plaintiff in error. The defendant in error obtained a verdict for \$25,000, but \$10,000 were remitted as an alternative to a new trial. At the close of the testimony in the court below, plaintiff in error (there defendant) moved the court to instruct the jury to find a verdict for it. The court refused, and this is assigned as error.

The statute under which this action was brought provided as follows: "Whenever the death of a person shall be caused by wrongful acts, neglect, or default, and the act, neglect, or default is such as would, (if death had not ensued,) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured. \* \* \*" Gen. St. Nev. § 3898.

The evidence of defects in the engine may be summarized from the testimony as follows:

Freeman (who was the fireman on the train): "Engine No. 1,266, on the 14th day of August, 1892, was a hard-running engine. I think it would be from looseness of the engine. Continual wear, I should think, would make it loose,—I mean wear of the boxes. The boxes were loose, and the cylinders were loose, and there would be a continual pounding and jarring. There was more or less swinging motion in cab and locomotive, occasioned by this looseness. At the time of the accident, as the engine was going down Brown's hill, there was considerable jarring. It was a hard-running engine."

Peterson testified: "Her cylinders were loose, particularly on the left side, and her driving boxes were worn out, and probably her brasses also worn or in a bad condition. This would have the effect on the engine of giving it a swinging motion, especially on the curves. It would rock you from side to side very rapidly. The engine would ride like a dead-axe wagon. It will kind of strike solid. This would certainly increase the danger of the engineer in going out of his cab onto the footboard when the engine was in motion quite

a little. I do not know anything about the driving wheel, but I know that when I saw the engine she had a very bad pounding in the boxes. It would pound like a sledge hammer. The effect of lost motion causes more or less inconvenience to the engineer and fireman in the respect mentioned before. It rides harder, and will have a swinging motion more to one side than the other. When a fireman is firing up the engine, and it is on a curve, the least swing will throw him from one side of the cab to the other. That is what is called 'lost motion.' That is true on a perfectly straight track. It will swing from side to side on a perfectly straight track if you strike low joints in your track. \* \* \* Wornout driving boxes cause a pounding in your engine."

Driscoll testified: "On the morning of the fourteenth of August, when I was on her, she was in a very rough riding condition, caused, I presume, from the poor condition of the engine at the time. There would be several causes which would produce hard riding. Being down on her boxes would cause it. Lost motion between the engine and tender would cause it. That is all I know of, unless it would be looseness of the engine. The wearing of the boxes would have a tendency to make the engine sway. As a matter of fact, this engine did sway and rock more than engines in general,—quite a good deal. The road at the place of the accident had some slight curves, but I do not think there were any sags on the line where this accident occurred. I know what you mean by 'sags.' I do not think there were any sags. I did not observe particularly the motion of the locomotive at the moment when Johnson disappeared. My attention was attracted at the time to some other place." Cross-examination: "I had been acquainted with engine No. 1,266, off and on, for about five years. I mean, by 'off and on,' that I have been away from Wadsworth for some time, and when I was away I did not know it then. I would go away, and then come back and renew my acquaintance with it. When I was at Wadsworth I knew it, and I was at Wadsworth most of the time. I knew this engine very well by reputation. I have known it for a period of about five years, and I know it had been in that condition for some time. I should judge for about three years. Johnson had not commenced to run on it then. He had been running it for about two years. I suppose that Johnson knew the condition of that engine better than I did. He knew that it rocked and swayed, and knew all about it. At the moment that Johnson disappeared, I do not know what the motion of the engine was. I had observed that rocking and swaying motion ever since I had been on the engine that morning. That was not the first time I had ever been on a train in connection with that engine. As to the time I had been on a train pulled by that engine before that time, I cannot say positively,—I should judge about two months; and I think Johnson was engineer at that time. I presume it had that rough riding and swaying motion then. I cannot remember whether it rocked and swayed at that time or not, I did not state that it had been rocking and swaying for two years that I knew of. I am sure of that. It had been swaying and rocking that day for about fifteen minutes. That is all. It took us, to run from Wadsworth to the place where the accident occurred, about two and one-half hours, and out of that time I was only on the engine fifteen minutes. I cannot remember whether it shook when I was on it, two months before. What knowledge I have of its swaying and rocking is confined to the fifteen minutes that I was on the engine that morning. I mean by 'rough riding,' an up and down motion and a to and fro motion. That motion to the right and left is what I call 'swaying.' I cannot say that it had this right and left motion for several months. On the morning of the fourteenth, so far as it was rough riding from this swaying backward and forward, I only knew it for fifteen minutes. Rough riding consists of an up and down motion or jarring, and also a to and fro motion or right and left motion,—both or either. The right and left motion is what I mean by the rocking and swaying, and I only knew this right and left motion for fifteen minutes before the accident occurred. I know she had it when I was on the engine before. If she did not have the right and left motion, and was still a rough riding engine, then it was confined to an up and down motion. I do not know how long I had known the engine to have that motion. I know she had it when I was on her before. I cannot say how long I was on that engine, or a train pulled by that engine, at the time I speak of,—two months before,—

but I think I was working ahead one trip. I do not remember where from. I was out seven or eight hours. This was two months before the accident. I do not know where or when. This was the time I discovered this rough riding condition. The other time was on the morning of August 14, 1892. I cannot remember any other time."

The circumstances of Johnson's death are related by two witnesses, Freeman and Driscoll, who were on the engine with him.

Freeman testifies as follows: "I was on this engine on the morning of the 14th of August, 1892, in the capacity of fireman. Had been fireman upon engine 1,266 five months. Mr. Johnson was the engineer during that time. On the morning of the 14th of August we left Wadsworth, I think, about 6:30 or a quarter of seven, I am not positive which. We were going to Winnemucca. They claim it is one hundred and thirty-five miles from Wadsworth to Winnemucca. That was the end of our run for that day, but if we were the only engine in Winnemucca, and a train came in, we were supposed to take it out. Our orders were to go to Winnemucca that day. Q. Did you witness the occurrence in which Johnson, the engineer, was hurt? A. Well, I did not see him at the time he fell off the train, but I saw him shortly afterwards. Q. Where were you at the time? A. I was in the cab, on the fireman's side of the engine. It happened about one or one and one-half miles this side of Brown's station, and about thirty-five miles from Wadsworth. Brown's hill is just this side. The hill slopes slightly towards Brown's, the greater part towards Wadsworth. The locomotive was on the eastern slope going towards the Humbolt. There are several small curves in the road at that place. Q. Where, with respect to these curves, did the accident take place? A. It was a straight track where the accident took place. Q. Were there any sags? A. No, sir; the character of the grade is not very steep. After we got over Brown's hill, we generally worked steam to give the train a good run, then shut off steam, and would roll into Brown's. We had an average train that day, I think a full train, twenty loads; that is what we call a full train,—twenty carloads. Before we came to Brown's hill, Johnson was working the engine pretty hard. What we call 'we took a run' to Brown's hill. We got a pretty fast speed on to go up the hill. The engine was a hard-steaming engine. We could not keep steam up, and we had to double the hill. We took the first cut over, and went back after the second, and going down Brown's hill the water was pretty low. There was about an inch or an inch and a half in the glass. We had the blower on the engine, trying to get up steam. He tried to start his injector, and got it to prime a little water into the boiler. We had about ninety pounds of steam on, and he shut off to give me a chance to get up more steam, and, as he shut the injector off, the check stuck. As it did so, he picked up an eight-inch monkey wrench, and went out on the running board. Mr. Driscoll was standing back of him. Mr. Johnson went out on the running board, and, I believe, knocked the check valve down, because the water ceased coming back into the cab any more. Mr. Driscoll looked out, and Mr. Johnson was not there, and we threw the engine on the back motion, and I went over to the engineer's side and looked out, and saw Mr. Johnson was gone, and I looked back and could not see him, so I got down and ran back and found him in the ditch, with his feet up, and head down on his left side. After he had shut the injector off, the check stuck. I do not know as I can describe the injector very thoroughly. There are three parts, I think,—the ram, lazy cock, and jet. This machine is used to put water into the boiler from the tank. The check is out on the side of the boiler where the injecting pipe connects with it. There is a valve in it; that is, the check that was on this engine was a round cup valve, and the water had force enough to raise the valve and force itself into the boiler. It stuck up; that is, the water coming from the tank going into the boiler raised the valve, and it did not drop back. The result was the steam and water came back into the cab, after he shut the injector off, worse than I ever saw it. It was hot. The engineer and all of us had to get out of the way. I went out on the gangway, Driscoll went out on the tank, and Johnson got out on the running board to knock down the check valve. It is done by taking something and tapping on the top of it, and, if that does not knock it down, you must tap on the bottom of it. I did not see Johnson's hand on the check, but, after he went out, the steam

and water stopped flowing, and my determination was that the valve was knocked down. The foot board, or running board, is a board (there are different sizes) running from the back of the cab. It is on each side of the engine, and goes almost over the steam chest near the end of the boiler. It runs about one and one-half feet past the check valve, and is from seven to ten inches wide. With reference to that running board, this check is at the furthest end towards the front. When the check valve was stuck, and Johnson was on the front end, and we had only one and one-half inches of water in the boiler, I tried to work my injector on my side, because his stuck, and I could not work mine at all. I let it go, and did not bother, and after Mr. Johnson fell off the engine, we stopped and shut off the air pumps, so as not to use any more water. Driscoll cut the engine off, and went to Brown's station. I got some water and a sponge, and went back to Johnson, and took care of him the best I could. I attempted to use the left-hand injector because I wanted to get water into the engine. It was not necessary, but the more water in a hard-running engine the better. On that engine we carried 'out of sight' in the water-valve gauge glass. The water valve is nine inches long, and what we mean by 'out of sight' is to have that glass full. I tried to work the injector after Johnson had gone out on the board, but I could not at the time the check was up, because of the water and steam coming into the cab. After Johnson was hurt, Mr. Driscoll went to Brown's, and telegraphed to Wadsworth. I ran back and picked Johnson up, and bathed his temples and head. Driscoll came back and backed the engine up to the train, then came to the hind end of the train where I was, and we carried Johnson into the caboose. I think there was an engineer by the name of Short that took the train to Winnemucca. I went with the engine to Winnemucca. I know the engine was reported at Winnemucca. I was present when the report was made by Short to the night hostler. The engine reached Winnemucca a quarter of nine on the evening of the 14th, and Johnson fell from the engine at 8:30 in the morning. The next morning about ten o'clock the engine was taken out again, and was run to Carlin. I fired her to Carlin. The check stuck three or four times in the trip to Carlin. There was no other trouble on that trip." The testimony was in effect repeated on cross-examination, and he further testified: "The train was running at the time at 17 or 18 miles an hour. I saw Johnson go on the running board."

Driscoll testified as follows: "I left Wadsworth, I should think, about 6:30 in the morning. Horace Johnson was engineer. George Freeman was fireman. I was upon the locomotive at the time Johnson was thrown off. I came there in this way. It was customary to double the hill. With a full load we always doubled it, taking one section over, and then coming back and getting the other. Brown's was a coaling station. It was customary for the rear brakeman to ride on the engine, and assist. I was on the engine to run over to Brown's. The train was divided. It was my duty to be on the front section of the train at that time. I had known engine No. 1,266 before August 14, 1892, over five years, and had ridden upon it before, but not very often. I was as well acquainted with the engine as with any other engine that trainmen had to work with. I was on the engine just back of Johnson. We went down the hill, perhaps three-fourths of a mile. Shortly afterwards he shut the injector off, and the check stuck up. Steam commenced to come back through the overflow into the cab. I stepped back upon the gangway, and sat upon the front of the tank directly back of the cab. The fireman and brakeman stepped into the opposite gangway. I looked out and saw Johnson go out with his handrail and a monkey wrench, I think, in his hand. I turned and looked at the fireman and brakeman. The fireman had his hand and arm up, trying to keep off the steam. He came back into the cab, and attempted to work his injector. I looked out again through both windows, and I could see the engineer strike the check valve with whatever he had in his hand. I turned around again and looked at Freeman, and when I looked outside again, perhaps half a minute later, I saw the engineer, Johnson, standing up. I took my eyes off him, and when I looked out again I did not see him. I looked down towards the ground, and I could see him doubled up, and he was either just striking the ground, or else had struck and was on the rebound. I reversed the engine and stopped the train as quickly as possible.

The brakeman went back to where Mr. Johnson was. I had orders to cut the engine off and run to Brown's station, and advise Wadsworth of what had occurred. I did so, and Engineer Gunn was at Brown's station with a broken-down engine. He had instructions from Wadsworth to come back and take the train. I saw Johnson shortly after he fell off, and helped him into the caboose. He was then senseless and bruised severely. I washed the blood off him. At the moment when the injector valve stuck, Johnson was sitting on his seat. The train was in motion. The grade was down hill. Steam was shut off. The train was running of its own accord. It had no propelling force. It was down hill, and trains will run down hill alone. I think we had twenty-two cars. It is a full train for a seventeen-inch engine. The train, at that moment, was going, I should think, about eighteen miles an hour. As it went forward it would very soon slow up. When Johnson went out on the board, I do not know as there was any material difference in the speed of the train. To check the speed of the train it would be necessary to apply the air. It is applied with the engineer's valve. At the time the check stuck up, there was considerable hot water and steam coming into the cab, and it was very hot. There were large drops of hot water. It got into the cab from the overflow and the injector. I got out of the way to escape from the steam, and was protected by the rear windows and a part of the cab. The fireman first stepped over into the gangway on the left-hand side. He then came back, and tried to work his injector. The brakeman remained where he was. The tapping that Johnson delivered upon the injector caused the check to seat itself, thereby stopping the steam. It did have that effect, and it was necessary to be done. There is no other way that I know of that the steam and hot water could be stopped from the overflow from coming into the cab. The only other way by which water could be put into that boiler, excepting by using that injector, would be by using the left-hand injector, and that would not work when the fireman attempted to use it. The amount of water in the boiler is indicated by the glass. As an engineer, I would say it is necessary to keep water in the boiler to keep it from burning, and to furnish steam for the engine. Every engineer tries to keep, generally, from one-half to three-fourths of a glass of water. The glass is nine or ten inches long. It is the intention to keep from four to eight inches of water in the boiler. When the water in the glass gets below that, the engineer generally tries to catch up with the water again. I have ridden on Engine No. 1,266, and have known her four or five years."

On cross-examination he said: "I suppose that Johnson knew the condition of the engine better than I did. He knew that it rocked and swayed, and knew all about it. At the moment that Johnson disappeared, I do not know what the motion of the engine was. I had observed that rocking and swaying motion ever since I had been on the engine that morning. \* \* \* It had been swaying and rocking that day for about 15 minutes. That is all. It took us to run from Wadsworth to the place where the accident occurred, about two and one-half hours, and out of that time I was only on the engine 15 minutes. At the time Johnson attempted to, or did, start the injector, we had then passed over Brown's hill. At the time I saw Johnson go out on his running board we had then passed over Brown's hill, and were on the eastern slope. I saw him walk along the running board to the check valve with a hammer or monkey wrench. Q. You saw him slipping his hand on the rail? A. I did not see the motion of his hand, but I saw his arm extended. Q. Did you see him tap the check? A. Yes, sir; I did. Q. Did you hear the tapping? A. I could not hear anything. Q. Are you sure you did not hear the tapping? A. Pretty sure; yes, sir. Q. Did you ever state that you did hear it? A. I do not think I ever did. I know what you refer to,—my interview with Mr. Whitehead. I was not under oath then. Q. Do you admit now that you did say to Mr. Whitehead and myself that you did hear the tapping of the hammer? A. I make no such admittance. After I saw him tap the valve, I saw him stand up. When he was in the act of tapping the valve, he was stooping over. He stood over this way (showing), with his hand on the rail, and I think his knee was on the running board. I saw him strike this way (showing), and then I saw him stand up, and that was the last time I saw him on the running board. When he was standing up, his back was towards the cab. He

had not turned around. It is not customary for firemen or engineers, after they have gone out on the running board, to walk backward to the cab. They turn around and face the cab; at least, I always do. I could not say that others always do. They may have different methods. If Mr. Johnson had attempted to face the cab, he would have to let go the rail with his left hand, most likely. I should think he would put his right hand on the rail before he let go with his left. I did not see any movement of that character, because I was looking another way. The next I saw of him was when he was on the ground. I did not see Johnson start the injector. It was working when I got into the cab. I saw him reach over, and I think I saw him shut it off. Then it was that I observed the steam and hot water coming into the cab, and then I saw him start out on the running board. There is a way by which the steam can be prevented from coming back into the cab other than by seating the valve by going out and knocking it down. A man could shut down the frost cock. That is a small valve on the injector pipe about three inches from the injector. I think that can be used to stop it, but I never saw it used to stop it, and I never used it myself. I never had occasion to use it for that purpose. I do not know, in this instance, whether Johnson attempted anything of the sort or not. I do not know how much water was in the glass, but I think it was low. I almost always look at the water in the glass, but I do not remember whether my attention was called to it or not on this occasion. I have no recollection of looking at the glass. Yes, I have a recollection, but I do not remember the amount in the glass. I have run an engine six months, which was a similar engine to those on this line. If, in this particular engine, there was from one to one and one-half inches of water in the glass, going down hill, and the steam was shut off, and the engine was 'running without power,' the distance it would rock with that amount of water would depend upon circumstances. I understand the circumstances as shown in this case. Under these circumstances, with from one to one and one-half inches of water in the glass, I should judge it would roll a very short distance; possibly a mile. It might have been possible to run to Brown's, but I would not want to take the chances. I do not know positively that it would not have run six miles, but it would not run six miles under those circumstances. There would be water consumed by the fires, and one thing or another. If, however, they had used this appliance I speak about, and shut the steam off from coming into the cab, it would probably have burst the injector pipes. I think it possible."

The rules of the company referred to in the testimony are as follows:

"Southern Pacific Company (Pacific System) Rules and Regulations for the Government of Employés of the Operating Department. To Take Effect July 1, 1892, at 12:01 A. M.

"General Notice.

"It is of the utmost importance that proper rules for the government of employés of this company should be literally and absolutely enforced, in order to make such rules efficient. If they cannot or ought not to be enforced, they ought not to exist. Officers or employés whose duty it may be to make or enforce rules, however temporary or unimportant they may seem, should keep this clearly in mind. If, in the judgment of any one whose duty it is to enforce a rule, such rule cannot or ought not to be enforced, he should at once bring it to the attention of those in authority. All persons entering or remaining in the service of this company are warned that their occupation is hazardous; that they do so with a full knowledge of the dangers incident to the operating of railroads; that in accepting or retaining employment they must assume the ordinary risks attending it; that they are required to exercise great care in the performance of their duties to prevent accident to themselves or others; and before using tools or apparatus of any kind, they should know that they are in a safe condition to perform the service required, and report to the superintendent, in writing, defects in tracks, cars, machinery, and appliances of any kind, liable to cause accidents. The company does not wish or expect its employés to incur any risk whatever, from which, by the exercise of their own judgment and by personal care, they can protect themselves, but enjoins upon them to take time in all cases to do their duty in safety, whether

they may be, at the time, acting under the orders of superiors or not. In dealing with the public, especially with the company's patrons, it is often necessary that employes should observe much patience and self-restraint, always endeavoring to follow the dictates of good sense and prudence, in order to make the most favorable impression, and treating them as any good business man would treat his customers, with the view of making the road popular.

"Approved:

"A. N. Towne, Gen. Manager.

J. A. Filmore, Gen. Supt."

"Train Rules: (121) In all cases of doubt or uncertainty, take the safe course, and run no risks."

The second and third subdivisions of rule 213 are as follows: "Every employe is required to exercise the utmost caution to avoid injury to himself or to others, especially in the switching or other movement of trains." "No person who is careless of the safety of himself or of others will be continued in the service of the company."

William F. Herrin, E. S. Pillsbury, and G. W. Baker, for plaintiff in error.

Robert M. Clarke, for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and MORROW, District Judge.

After stating the case, McKENNA, Circuit Judge, delivered the following opinion:

The determination of the correctness of the ruling of the court refusing the motion of defendant (plaintiff in error here) requires a consideration of the testimony and its probative force. It is clear, conceding to the latter the highest degree to which, by the laws of evidence, it was entitled, if it failed to warrant a verdict for the plaintiff, it was the duty of the court to so have instructed the jury. *Pleasants v. Fant*, 22 Wall. 116; *Southern Pac. Co. v. Hamilton*, 4 C. C. A. 441, 54 Fed. 468. Or the rule is sometimes stated as follows:

"It is only when the facts are undisputed, and are such that reasonable men can fairly draw but one conclusion from them, that the question of negligence is ever considered one of law for the court." *Railroad Co. v. Peterson*, 12 U. S. App. 259, 5 C. C. A. 338, 55 Fed. 940; *Kenna v. Railway Co.*, 101 Cal. 26, 35 Pac. 332; *Railway Co. v. Cox*, 145 U. S. 606, 12 Sup. Ct. 905.

The allegation of the complaint is:

"(9) That on the 14th day of August, 1892, said deceased, Horace M. Johnson, was a locomotive engineer employed by the defendant, Southern Pacific Railroad Company, on one of its engines, and was in the proper and necessary discharge of his duty as an engineer in running an engine, and on said day, through the willful carelessness and negligence of the said defendant, Southern Pacific Company, in failing and neglecting to keep its engine in repair, and without any carelessness, negligence, or fault of the said Horace M. Johnson, and by reason of defects in the said engine, of which defects defendant had notice, and which it was its duty to repair, and which defects it knowingly permitted to exist, the said Horace M. Johnson was thrown from the said engine, which he was at the time operating as engineer for the said defendant, and was mortally injured, of which mortal injury the said Horace M. Johnson afterwards, and on the 20th day of August, 1892, died, to the injury of plaintiff, and of the said Eliza M. Johnson, Edith Maud Johnson, Gertrude Madge Johnson, Horace Glenn Johnson, and Rodney Laurence Johnson, and to their damage in the sum of twenty-five thousand dollars."

This allegation contains three propositions: (1) That there were defects in the engine of which plaintiff in error had notice; (2) that it failed and neglected to repair them; (3) that, by reason of such defect, Johnson lost his life, without his fault or negligence. For the purposes of the case we shall assume that the evidence establishes the first two propositions, and we shall only consider what truth there is of the third, which involves the counter proposition, was he guilty of contributory negligence? This court held in *Railroad Co. v. Charless*, 2 C. C. A. 380, 51 Fed. 562, reviewing the prominent cases, that it was the duty of an employer to supply and maintain suitable instrumentalities for the performance by his employes of the work required of them, and that responsibility could not be avoided by charging the neglect to other employes. But this duty does not exempt the employe from care and prudence. In *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, cited in *Railroad Co. v. Charless*, supra, the action was by a brakeman for injuries received. Contributory negligence was charged. The court, by Mr. Justice Field, said on page 655, 116 U. S., and page 590, 6 Sup. Ct.:

"As to the alleged negligence of the plaintiff, only a few words need be said. Of course, he was bound to exercise care to avoid injuries to himself. If he had known, or might have known by ordinary attention, the condition of the brakes and cars when he mounted the cars, and thus exposed himself to danger, in other words, if he did not use his senses as men generally use theirs to keep from harm,—he cannot complain of the injury which he suffered."

The rule of law is tersely and comprehensively stated by the learned judge who tried the case in the circuit court, as follows:

"Personal negligence is the gist of the action. It must therefore appear, to render the defendant liable, that it knew, or from the nature of the case ought to have known, of the unfitness and unsafe condition of the engine and machinery, and that the employe did not know, or could not reasonably be held to have known, of the defect. Knowledge on the part of the defendant and ignorance on the part of deceased are of the essence of the action."

In *Malone v. Hawley*, 46 Cal. 413, the supreme court of California held that the liability of a defendant in a case like the one at bar depended upon three facts: (1) That the instrument or machine was defective, and that the injury was caused by the defect; (2) that the defendant knew, or ought to have known, of the defect; and (3) that the plaintiff did not know, and had not equal means of knowledge. There are many other cases to the same effect, but which we need not review, nor the cases modifying the rule and holding the master liable, notwithstanding the servant knew of the defect, if he was induced to continue his work by a promise that the defect would be remedied. See 2 *Thomp. Neg.* pp. 985, 1008, et seq., where the cases are collected. Assuming, as we have assumed, the existence of the defects and the company's knowledge of them; conceding that the deceased was justified in continuing in employment,—the question still remains, was he or was he not culpable, under the circumstances, in going out on the running board? The plaintiff in error is only liable if Johnson's death was caused by the defects



in the engine. It certainly was not caused by the defects in the injector alone. They were, it is true, the occasion of his going out on the running board; but going on the running board was not of itself hazardous to railroad men, and only became so, if at all, by the other defects in the engine. If these, however, made it so, it was surely apparent to Johnson, and he should not have risked it. He was a skilled engineer, and, besides, had had months of experience with the engine, including the day preceding the accident. We know from the testimony of Driscoll, *supra*, that for at least 15 minutes before the accident (all of the time he was on the engine) she swayed and rocked. Maybe she had done so for two hours before. And Freeman testified: "There was considerable jarring." If this rendered the running board dangerous to any one, Johnson was guilty of reckless negligence to go out on it. There was no emergency which demanded the risk. The train was running, the fireman said, 18 miles an hour. Its speed could easily have been slackened by an application of the air brakes. It could have been stopped as it was stopped by Driscoll immediately after the accident; and surely this inconvenience cannot be offset against and justify his assuming a dangerous risk to his life. Besides, the rules of the company enjoined him, in such situation, to take no risks. If the testimony shows that the risk was not obvious, it also shows that danger could have been avoided by care. Driscoll testified, in addition to what has been quoted *supra*:

"It was not so rough that the engineer could hardly keep his seat, but I never was on an engine that jarred as much as this one. It would not jar a man so that he would be likely to slip off his seat. If he was in the cab, he could not. I did not say that jarring motion was sufficient to throw a man off the running board. Q. Why won't you say it? Is it because you do not know? Do you mean this,—that the up and down motion or the jarring motion that constituted it a rough-riding engine would be sufficient to throw a man off the running board if he had his hand on the hand rail? A. I do not think it would if he had his hand on the hand rail. Q. Your experience is that engineers don't very often go out on the running board without keeping their hand on the hand rail? A. Yes, sir; as soon as they can get it on there. Q. Then you do not conclude that the jarring you have described, if the engineer had his hand on the hand rail, would be sufficient to throw him off if he was exercising any care? A. If he had his hand on the hand rail, I do not think it would. I would not go out without having my hand on the rail."

And Charles Short, also a witness for the defendant in error, and who succeeded Johnson as engineer about one hour after the accident, and ran the engine that day about 100 miles, testified:

"Between Brown's and Winnemucca the right injector check stuck up frequently,—8 or 10 times, perhaps. To remedy it, the fireman went out over the running board, and I went out and tapped it down."

Neither the condition of the engine, its swaying or rocking or jarring, nor the fate of Johnson deterred him or his fireman (and the latter had seen the accident to Johnson) from going out over the running board to the injector valve, or prevented it from being safely done when care was used. It was suggested on the argument by counsel for defendant in error that the engine may have suddenly lurched, breaking Johnson's hold on the rail; but there is no evi-

dence of this, and the condition of the road seems to preclude it. Describing the road, Freeman testified:

"The hill slopes slightly towards Brown's, the greater part towards Wadsworth. The locomotive was on the eastern slope going towards the Humbolt. There are several small curves in the road at that place. Q. Where, with respect to these curves, did the accident take place? A. It was a straight track where the accident took place. Q. Were there any sags? A. No, sir; the character of the grade is not very steep."

And Driscoll testified that:

"The road at the place of the accident had some slight curves, but I do not think there were any sags on the line where this accident occurred."

Neither witness testified to a sudden lurching of the engine. Whatever its motion, it seems to have been constant and uniform, and it appears impossible for a sudden lurching to have occurred, violent enough to wrench the hand of the deceased from the rail, and it not have been noticed by either Freeman or Driscoll. If the injury could have been avoided by care, defendant is not liable. *Railroad Co. v. Baugh*, 149 U. S. 390, 13 Sup. Ct. 914, and cases cited. We think that the circuit court should have instructed the jury as requested by the plaintiff in error, and its judgment, therefore, is reversed, and the cause remanded for a new trial.

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SPOKANE FALLS & N. RY. CO. v. ZIEGLER.

(Circuit Court of Appeals, Ninth Circuit. October 15, 1894.)

No. 81.

On rehearing.

McBride & Allen and Jay H. Adams, for plaintiff in error.  
Turner, Graves & McKinstry, for defendant in error.

McKENNA, Circuit Judge. In the opinion filed in this case (9 C. C. A. 548, 61 Fed. 392) we held that the right of way over public lands granted to railroads under the act of March, 1875, did not vest at the passage of the act, but vested upon filing a profile map of the road. We said:

"The act, therefore, did not give a right of way presently, but entitled any company to obtain the right of way upon performing certain conditions, and its right attached upon filing a profile map of its road as provided in section 4."

It is not necessary to repeat the reasoning by which we arrived at those conclusions.

Appellant has filed a petition for rehearing, and cites in support thereof *Noble v. Railroad Co.*, 147 U. S. 165-177, 13 Sup. Ct. 271. In that case Justice Brown said (to quote all that is applicable to the case at bar):

"The lands over which the right of way was granted were public lands subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the secretary of the interior to decide, and, when decided, and his approval

was noted upon the plats, the first section of the act vested the right of way in the railroad company. The language of that section is 'that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory,' etc. The uniform rule of this court has been that such an act was a grant in praesenti of lands to be thereafter identified. *Railway Co. v. Alling*, 99 U. S. 463."

It is not clear what appellant claims from this language, but assuming it claims, as it claimed in the original briefs, that the grant took effect at the time of filing its articles of incorporation with the secretary of the interior, it is certainly disputable if the language of the court sustains the claim. It must be interpreted by the facts of the case. Contending rights, depending upon the time of the vesting of the right of way, were not involved. The authority of the secretary of the interior over the acts of his predecessor only was involved. The facts as to the papers filed, as stated by the court, were as follows:

"In January, 1889, the company, desiring to avail itself of an act of congress of March 3, 1875 (18 Stat. 482), granting to railroads a right of way through the public lands of the United States, filed with the register of the land office at Seattle a copy of its articles of incorporation, a copy of the territorial law under which the company was organized, and the other documents required by the act, together with a map showing the termini of the road, its length, and its route through the public lands according to the public surveys. These papers were transmitted to the commissioner of the land office, and by him to the secretary of the interior, by whom they were approved in writing, and ordered to be filed. They were accordingly filed at once, and the plaintiff notified thereof."

All the documents required by the act were filed. Of course, therefore, the profile of the road, as required by section 4, was filed, and then, by approval of the secretary of the interior, as the court said, "the first section of the act vested the right of way in the railroad company." This is not contrary to our decision. But if this language of the court be construed as holding that the right of way vested upon filing the articles of incorporation, the judgment of the circuit court was nevertheless correct, because the pre-emption claim of appellee antedates the filing of the articles of incorporation, and the land was not then public land. The authorities justifying this conclusion are cited in our original opinion, and need not be repeated. Petition for rehearing denied.

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### CHURCH v. CHEAPE.

(Circuit Court, S. D. California. November 26, 1894.)

#### 1. OPTION CONTRACT—MODIFICATION—CONSTRUCTION.

Plaintiff gave P. an option on the stock of an irrigation company for \$200,000, with a provision that, if paid by a certain time, all water rents due should be included. P. acted for himself and defendant, his interest to be half the profits after defendant had been reimbursed for the price which he was to pay. Afterwards the contract was modified by agreement that \$100,000 should be paid at a certain date, and the balance when certain litigation should be concluded. Thereafter, when defendant sent the \$100,000 to P. with which to make the first payment, P. secured a

further modification, by plaintiff agreeing to take \$90,000 in lieu of the \$100,000 which was to have been paid at that time. At the same time P. executed two instruments, one providing that, if he took an interest with defendant in the company, and succeeded in making a certain sale of it, he would pay plaintiff \$10,000, otherwise not; the other reciting payment by P. to plaintiff of \$90,000, receipt by P. for defendant of the stock of the company, and the agreement by defendant to pay the remaining \$100,000, subject to the conditions of the agreement as twice modified between P. and plaintiff. P. accounted to defendant for the \$10,000 retained. *Held*, that nothing more was due from defendant to plaintiff on the first payment.

2. SAME—CONDITIONS OF PAYMENT

Under the provision in an option for the purchase of the stock of an irrigation company that the deferred payment should not be made till all the litigation in which the company was concerned was satisfactorily concluded, the burden is on the seller to prosecute the litigation at his own expense.

3. SAME.

Suits between an irrigation company and others, in which it claimed the paramount right to all the waters of a river to the extent of the capacity, which was 1,000 cubic feet, of its canals, cannot be said to have been satisfactorily concluded where the decree gave the company the first 100 feet of the water, and the other parties the next 350 feet, after which there was no limitation on the company's rights, the flow at low water being 300 feet, though during the period of low water the company may not need more than 100 feet, irrigation not being much practiced at that time.

4. CONTRACTS—EVIDENCE.

On issues as to what, if any, contracts were made, the testimony being conflicting, resort must be had to corroborating circumstances and the probabilities of the case.

5. SAME—DEFERRED PAYMENT—ACKNOWLEDGMENT THAT PAYMENTS ARE DUE.

The fact that, after the payment by defendant to plaintiff of all but the deferred payments of \$100,000 on a purchase, which the contract stipulated should not be paid till certain litigation should be satisfactorily concluded, defendant gave to plaintiff 25 bonds, on which a third person agreed to loan plaintiff \$20,000 for six months, the bonds to be taken by him as payment for the loan if plaintiff so desired, is not an admission that the \$100,000 deferred payment was fully due, where plaintiff, on receiving the bonds, indorsed on the contract an acknowledgment that he had received \$25,000 as "an additional payment on the \$100,000 due when all litigation is ended," and an agreement to accept, at any time within seven months, seventy-five of the bonds "in payment in full for all sums now due or to become due to me in accordance with this agreement."

Action by M. J. Church against George C. Cheape for balance due on contract. Judgment for defendant.

Frank H. Short, Edwin A. Meserve and Groff & Lefroy, for plaintiff.  
W. S. Wood and Lamme & Wilde, for defendant.

ROSS, District Judge. It is surprising that the agreement in respect to so large and important a transaction as that involved in this case should have been drafted in such vague and indefinite terms; and the irreconcilable conflict that exists in the testimony devolves upon the court the duty of carefully weighing and considering every circumstance in the case, to the end that the contract of the parties may be truly interpreted, and then enforced as they themselves made it, without regard to the person or persons upon whom the loss or suffering may fall. Neither the great value of the property, as compared

with the price for which the plaintiff sold it, if such disparity exists, nor the large additional investments made by the defendant to secure its advantages, will justify the court in at all departing from what the parties themselves have stipulated.

The case shows the subject of the contract to have been the capital stock, consisting of 5,000 shares of a California corporation called the "Fresno Canal & Irrigation Company," which company claimed, by appropriation, the right to divert, by means of its canals, a large part of the waters of Kings river, in Fresno county, of this state, for sale and distribution for irrigation and other useful purposes. The plaintiff was the owner of the entire capital stock of the corporation, 994 shares of which stood in his own name. The remaining six shares stood in the names of other persons, to enable them to serve as directors of the company, but the plaintiff was the real owner of those shares also. Being such owner, on the 18th day of August, 1886, he gave, in writing, to Dr. E. B. Perrin, of the city of San Francisco, this option:

"San Francisco, August 18th, 1886.

"For and in consideration of the sum of one thousand dollars, to me in hand paid, the receipt of which is hereby acknowledged, I, M. J. Church, president of the Fresno Canal and Irrigation Company, and owner of five thousand shares, which includes all the capital stock of said corporation, do hereby bind myself, my heirs and assigns, to grant to E. B. Perrin the exclusive option to purchase the capital stock of said corporation, including all canals, machinery, books, maps, and property, of every description, belonging to said corporation, and all land and money due the same; the price of said purchase to be two hundred thousand dollars, gold coin. It being understood and agreed that, if the two hundred thousand dollars is paid to me by the 15th day of September next, I am to transfer the above property, including all assessments for water rights and moneys now due or to become due to said corporation by that date; but, if the above sum is not paid before the 1st of December next, then I reserve the right to collect the assessments that may be due on or before that date. In witness, I have hereunto set my hand and seal, this 18th day of August, 1886.

M. J. Church.

"Witnessed: Robert Perrin."

At the same time the plaintiff signed and presented to Dr. Perrin this statement:

"San Francisco, Aug. 18, 1886.

"The Fresno Canal and Irrigation Company was incorporated under the laws of the state of California on Feby. 16th, 1871. The canals have a capacity of one thousand cubic feet of water per second. Number of cubic feet of water sold, per second, 430; number unsold, 570, which at \$800<sup>00</sup>/<sub>100</sub> per foot, the regular price of selling, will bring \$456,000. Annual payments due Sept. 1st. about \$30,000, which amount will be much greater next year at same time. on water rights already sold. Annual payments that will be due on the entire amount of 1,000 cubic feet, when all is sold, will be about \$95,000 annually. There is now due the company on water-right contracts \$14,000. Annual payments due for last year, \$7,009.85; also due the company, one and  $\frac{3}{4}$  sections of land. There are now pending contracts with J. B. Haggin for forty, and with M. Theodore Kearney for forty-six, cubic feet of water.

M. J. Church.

"Witnessed: Robert Perrin."

Prior to the giving of the option, Dr. Perrin had met the defendant, Cheape, who is a Scotch gentleman of large means, and had confessedly talked with him with a view to inducing him to make investments in California; and in view of the circumstance that, nearly

two months before the date of the option,—that is to say, on the 23d of June, 1886,—the defendant, Cheape, had appointed a Mr. Cuyler, who is a lawyer residing in the city of Philadelphia, his attorney in fact, for him, and in his name, place, and stead, “to do and perform any and all acts, matters, and things, of every nature and character, related to, connected with, or growing out of, any and all contracts, engagements, or other writings entered into between myself, of the one part, and Edward B. Perrin, of the other part, or in which I may be in any way or manner conjointly interested with the said Edward B. Perrin,” and of the further circumstance that between the 18th of August and the 9th of September, 1886, Cuyler, as the attorney of the defendant, Cheape, came to California with respect to the option, I think it does not admit of doubt that, in securing it, Dr. Perrin really acted for himself and the defendant, Cheape, jointly; the interest of Dr. Perrin then being, according to the testimony, one-half of all of the profits that might be made out of the transaction after the reimbursement of the defendant, Cheape, of the purchase price of the property, which he was to pay, together with interest thereon, at the rate of 7 per cent. per annum.

A few months prior to the giving of the option, to wit, on the 26th of April, 1886, the supreme court of California decided, by a vote of four to three of its then justices, that there could be, upon the public lands in California, no valid appropriation of any of the water of a nonnavigable stream as against a lower riparian proprietor thereon, and that such proprietor is entitled to an injunction to prevent the diversion by such appropriator of any part of such water. *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674. And at the time of the giving of the option, as also on September 9, 1886, there were pending against the Fresno Canal & Irrigation Company, in the courts of California, a large number of suits contesting the right claimed by it to divert the waters of Kings river. Among those suits, and the most important of them, were: (1) A suit in equity brought in the superior court of Fresno county, by Poly, Heilbron & Co., who claimed to hold a valid contract for the purchase of a rancho called “Laguna de Taché,” which rancho borders upon Kings river for about 30 miles, and below the point at which the Fresno Canal & Irrigation Company diverted the water therefrom claimed by it, and by which suit Poly, Heilbron & Co. sought to obtain an injunction preventing that company from diverting any of the water of the river. (2) A suit in equity, brought in the superior court of Fresno county by John Heinlen, as a lower riparian proprietor upon Kings river, to obtain an injunction against the Fresno Canal & Irrigation Company, enjoining it from diverting any of the water of the river. (3) A similar suit by Heinlen, in the superior court of Tulare county. (4) A suit in equity, in the superior court of Tulare county, by the Lower Kings River Ditch Company, claiming, as a prior appropriator to the Fresno Canal & Irrigation Company, the right to divert certain of the waters of Kings river, and seeking an injunction against that company, preventing it from diverting any of the water of the river until the claim of the Lower Kings River Ditch Company should be satisfied. (5) A similar suit, by the Last Chance Water-Ditch Company, in the super-

ior court of Tulare county. And (6) a similar one by the Centerville & Kingsburg Irrigation Ditch Company, in the superior court of Fresno county.

In this condition of affairs, Cuyler, as the attorney and representative of the defendant, Cheape, came to California, with a view to exercise, on behalf of the defendant, the option that had been secured by Dr. Perrin. Cuyler finding that the Fresno Canal & Irrigation Company was in litigation respecting the water claimed by it, there was, on September 9, 1886, made and indorsed on the piece of note paper on which the original option was written this modification:

"The above agreement is modified so that it is agreed that, if one hundred thousand dollars of the above amount be paid by Oct. 25th, all sums now due and to become due by said date shall be paid over. It is also agreed that the remaining one hundred thousand dollars shall not be paid until all of the litigation in which the canal company is concerned is satisfactorily disposed of and concluded.

M. J. Church.

"Sept. 9, 1886.

"Witness: Thos. Dewitt Cuyler."

Prior to October 25, 1886, the defendant, who was in Europe, caused to be sent to Dr. Perrin, at San Francisco, \$100,000, to be paid to the plaintiff on the contract. Plaintiff went to San Francisco to receive it, and appeared so anxious to get the money that Dr. Perrin saw a chance to induce him to accept a less sum in lieu of that amount. The talk between them in regard to that matter resulted in Dr. Perrin paying to and plaintiff receiving \$90,000 in cash, and the execution by plaintiff of the following writing, indorsed upon the paper on which was written the original option and the modification of September 9, 1886, to wit:

"San Francisco, Cala., Oct. 25, 1886.

"This agreement is hereby modified to this extent: In lieu of the \$100,000<sup>100</sup> to be paid at this date, I agree to take the sum of \$90,000<sup>90</sup>, and I agree that this agreement in all respects shall remain in full force and effect.

"M. J. Church.

"Witness: M. P. Minor."

—And the execution by Dr. Perrin of the following instrument:

"San Francisco, Cala., Oct. 25, 1886.

"This is to certify that if I take an interest with Capt. George C. Cheape in the Fresno Canal and Irrigation Company's property in Fresno county, California, and succeed in selling whatever bonds may be mine at ninety cents on the dollar, at any time within eighteen months from this date, that at such time I agree to pay to M. J. Church the sum of ten thousand dollars; otherwise not.

E. B. Perrin.

"Witness: M. P. Minor."

At the same time, Dr. Perrin executed to the plaintiff this instrument:

"San Francisco, Cala., October 25th, 1886.

"On the payment by me to M. J. Church of ninety thousand dollars, I have this day received for Capt. George C. Cheape certificate No. 81, containing 4,994 shares of the capital stock of the Fresno Canal and Irrigation Company, and the further obligation of M. J. Church to deliver the remaining six shares of the capital stock of said corporation, and that Capt. George C. Cheape has in writing promised to pay the remaining one hundred thousand dollars, subject to the terms and conditions of a written agreement made by M. J. Church, August 18th, 1886, and modified September 9th, 1886, and fur-

ther modified on this 25th day of October, 1886, reference to which is hereby made, as contract between M. J. Church and E. B. Perrin, and made a part thereof.

E. B. Perrin.

"Witness: M. P. Minor."

The present being an action at law for the balance alleged to be due upon the contract between the plaintiff and defendant, the first question that arises is: What is the legal effect of those proceedings in respect to the first payment? Did they constitute a discharge of that payment, as contended on the part of the defendant, or did they leave \$10,000 thereof still due from defendant to plaintiff, as contended on behalf of the latter? If it be conceded that in that matter Dr. Perrin was driving a hard bargain, it does not answer the question. It is but fair, however, to state that his explanation is that he and his brother, Robert Perrin, with whom he consulted respecting the transaction, had become so alarmed in regard to the litigation that his brother wanted him to withhold any payment, but that he concluded to offer the plaintiff \$90,000 in lieu of the \$100,000, upon the conditions stated, which plaintiff accepted. The testimony is that Dr. Perrin promptly notified defendant's attorney in fact in Philadelphia and his business agent in Europe that he had thus deducted and retained \$10,000 of the first payment, and that he accounted to defendant therefor. While this testimony might, under ordinary circumstances, be overcome by the fact that the defendant states in his deposition that he did not know of that deduction until the spring of 1893, it is not so in this case, for it clearly appears that the defendant was a man of large pecuniary affairs, and left the management of his business matters largely to his agents, and, so far as can be gathered from the evidence, paid but little attention to them. The testimony of Dr. Perrin was not only explicit that he did promptly notify Cuyler, as well as the defendant's business agent in Scotland, of his action in respect to the \$10,000, but he further testified that his books, in the hands of his secretary then in court, would verify his statement. No attempt was made to show that his testimony in that regard was untrue, and I think the court should accept it as true. As Dr. Perrin's pecuniary interest in the undertaking was in the profits that might arise from it after reimbursement of the defendant of the purchase price of the property, with interest, of course, the less the purchase price of the property, the greater would be his profit. It was no doubt this pecuniary advantage that induced him to endeavor to get the plaintiff to accept, in lieu of the first payment of \$100,000, the sum of \$90,000. He evidently induced the plaintiff to do so by giving him his (Perrin's) written promise that, if he should take an interest with defendant, Cheape, in the Fresno Canal & Irrigation Company's property in Fresno, and succeeded in selling whatever bonds he should acquire at 90 cents on the dollar at any time within 18 months thereafter, he would at such time pay to the plaintiff \$10,000; otherwise not. However hard a bargain this may have been, and notwithstanding the fact that Dr. Perrin already had a contingent interest with the defendant, Cheape, the court, at least in this action at law, is powerless to relieve either party from it. The acceptance by the plaintiff, in lieu of the



\$100,000 payment, of \$90,000 in cash, with this promise of Dr. Perin to pay an additional \$10,000 upon the conditions stated in the written promise, is inconsistent with the claim now made by plaintiff that he still looked, and had the legal right to look, to the defendant, Cheape, for the remaining \$10,000 of the first payment.

The remaining \$100,000, it was agreed by the modification of September 9, 1886, should "not be paid until all litigation in which the canal company is concerned is satisfactorily disposed of and concluded." By whom and at whose expense the litigation was to be carried on is not expressly stated, nor is it expressly declared to whom it should be "satisfactorily disposed of and concluded" before the remaining \$100,000 should become due.

The complaint contains two counts. In the first it is alleged that the plaintiff sold and delivered to the defendant 4,994 shares of the stock, for the agreed price of \$200,000, which the defendant agreed to pay as follows:

"Ninety thousand dollars (\$90,000) in cash, which was then paid by the defendant to plaintiff, and the balance of said purchase price, to wit, the sum of one hundred ten thousand dollars (\$110,000) as soon as the litigation in which the said corporation was concerned and engaged, in so far as such litigation affected the right of said corporation to divert water from Kings river, was satisfactorily disposed of and concluded."

It is then alleged that thereafter, and prior to the 1st of January, 1891, a certain action was brought in the superior court of Fresno county, Cal., by Charlotte F. Clark, as plaintiff, against August Heilbron and others, as defendants, in which action the defendant herein was the person chiefly interested; that, at or about the time of the commencement of that action, the defendant herein agreed with the plaintiff herein that if he (the plaintiff) would pay the sum of \$2,000 towards defraying the expenses of the action of Clark v. Heilbron et al., so soon as that action should be disposed of and finally terminated, then, and in that event, the condition upon which the balance of the purchase price of the 4,994 shares of the capital stock of the Fresno Canal & Irrigation Company was made to depend "should be and would be regarded and considered by said defendant [Cheape] as fully performed, and said balance of said purchase price of \$110,000 should thereupon become immediately due and payable from the said defendant to said plaintiff"; that the plaintiff, prior to the 1st day of April, 1891, paid said sum of \$2,000 towards defraying the expenses of the suit of Charlotte F. Clark v. Heilbron et al., and that that suit was begun, prosecuted, determined, and fully terminated and disposed of on or about the 1st day of April, 1891; that the plaintiff has fully performed all the terms and conditions to be by him kept and performed in the matter of the sale of the stock, and in the matter of the litigation in the first count mentioned; but that the defendant has failed and refused, and still fails and refuses, to pay the balance of the purchase price, except the sum of \$25,000, paid thereon on March 25, 1890, and the further sum of \$3,000, paid September 25, 1892, etc.

The second count of the complaint alleges that on or about the

25th of October, 1886, the plaintiff sold and delivered to the defendant, at his instance and request, goods, wares, and merchandise, for the agreed price of \$200,000, and that defendant paid on account thereof the sum of \$90,000; that, by agreement and understanding between plaintiff and defendant, the balance of the purchase price, namely, the sum of \$110,000, became due and owing from defendant to plaintiff on or about the 1st day of April, 1891; that the defendant has not made the said deferred payment, or any part thereof, except the sum of \$25,000, paid on account thereof on the 25th of March, 1890, and the sum of \$3,000, paid on account thereof September 25, 1892; and that the balance, together with interest thereon, remains due and unpaid from defendant to plaintiff.

In support of the second count, it is contended on the part of the plaintiff, first, that under the contract it devolved upon the defendant to dispose of the litigation, and that any unreasonable neglect in the prosecution of it by him entitled the plaintiff to treat the second payment as due, and to bring suit therefor. It is doubtless true that if, by the contract, the burden was cast upon the defendant to prosecute the litigation to a conclusion, the law would not permit him to unreasonably neglect it, and thus defer the payment of money he contracted to pay; but it is not, in my opinion, a fair or reasonable interpretation of the contract to say that the burden was upon the defendant. He was the purchaser, not the seller, of the property. The plaintiff, by virtue of his ownership of all of the stock of the canal company, claimed the right to divert 1,000 cubic feet of the waters of Kings river by means of the canals of the company, and to sell and dispose of it. It was this property, with its incidentals, that he offered and contracted to sell for \$200,000, and that the defendant agreed to buy. Surely, neither party contemplated that the defendant was to pay the plaintiff \$200,000 unless he got the water. It was the water that he was buying. It was that which constituted the very substance of the contract. It was that only which gave to the property any value. And, as the vendor's right thereto was then clouded by litigation, it was but reasonable and natural that he should undertake to remove the clouds. It would be unreasonable and unnatural to hold, from the language employed, and under the circumstances appearing, that the purchaser assumed that burden. The defendant, through his agents, evidently thought the purchase sufficiently desirable, notwithstanding the litigation, to make a large cash payment; but it was agreed that \$100,000 of the purchase money should not be paid until not only the litigation should be ended, but should be "satisfactorily disposed of and concluded." Satisfactory to whom? Manifestly, to the purchaser, to whom was given the right to withhold the deferred payment until that was accomplished. It follows from this construction of the contract that the burden was upon the plaintiff to prosecute and conclude, at his own expense, the litigation in which the canal company was engaged at the time of the making of the contract. That burden, the evidence shows, the plaintiff carried until the latter part of the

year 1890, at which time he refused to pay any other or further expenses of the litigation. If the evidence showed that the defendant in any way prevented the plaintiff from performing the obligation thus assumed by him, it might be held that his non-performance was excused. But the evidence in the case furnishes no just ground for that contention. The defendant did not stand in the way of the prosecution of the suits, or in any way prevent their trial and determination. There is nothing to show that the defendant was not at all times willing that the litigation respecting the property be brought to trial and disposition upon the payment of the expenses thereof by the plaintiff. It is not shown that he, or the company controlled by him, ever refused any request of the plaintiff to bring the cases, or either of them, to trial at plaintiff's expense. To do so at his own expense was not his undertaking, and for that reason, if for no other, no negligence on his part is shown.

It is further contended, in support of the second count of the complaint, that all of the litigation pending at the time of the making of the contract had been, prior to the commencement of this action, practically ended, and should be held by the court to have been "satisfactorily disposed of and concluded." The suit of Poly, Heilbron & Co. against the canal company had been disposed of in the manner hereinafter explained in considering the first count of the complaint. Two of the other pending suits, namely, those brought by the Lower Kings River Ditch Company and the Last Chance Ditch Company against the canal company, were tried in the superior court of Tulare county, and by that court decided in March, 1892. The Lower Kings River Ditch Company alleged in its complaint that it had a canal 32 feet wide, 4 feet deep, and with a grade of 20 inches to the mile. It claimed the right to divert sufficient of the water of Kings river to fill its ditch, except at low water; and during low water it claimed all of the water of the river to the extent of the capacity of its ditch. Besides damages, it asked a perpetual injunction against the defendant, Fresno Canal & Irrigation Company, enjoining that company from diverting the waters of Kings river, or in any manner obstructing or interfering with the free flow thereof, except such surplus water as there might be over and above a sufficient quantity flowing in the river at the mouth of the Lower Kings River Ditch Company's ditch to supply its entire carrying capacity, and to supply all other ditches and all riparian proprietors having rights superior to that company. The result of the trial in that case was a decree of the superior court giving to the Fresno Canal & Irrigation Company the first 100 cubic feet of the low water of Kings river, and giving to the Lower Kings River Ditch Company the next 159 cubic feet of the waters of the river, after which, as against the complainant in the suit, there was no further limitation in respect to the diversion of the waters. One hundred dollars damages, expressly adjudged as nominal damages, were allowed the complainant against the Fresno Canal & Irrigation Company. The Last Chance Ditch Company alleged in its complaint that it had a canal

30 feet wide, 6 feet deep, with a grade of 16 inches to the mile. It asked for an injunction similar to that prayed for in the case of the Lower Kings River Ditch Company, besides \$5,000 damages. The result of the trial in the superior court was a decree giving to the Fresno Canal & Irrigation Company the first 100 cubic feet of low water of Kings river, and giving to the complainant in the suit, the Last Chance Ditch Company, the next 190 feet, after which, as against the complainant in the suit, there was no limit respecting the diversion of the waters of the river. One hundred dollars damages, expressly adjudged as nominal damages, were also allowed the complainant in that case against the defendant therein, the Fresno Canal and Irrigation Company.

The plaintiff in the present case contends that the result in those cases was, or should have been, reasonably, if not highly, satisfactory to the Fresno Canal & Irrigation Company. It got, says his counsel, "the first 100 feet of the low water, and then its rivals got the next 349 feet, and after that it was not limited in these suits. Nominal damages only were given against it. Unless it was to have all the water, this should have satisfied it." The evidence shows that at low water Kings river only carries a little over 300 cubic feet of water. The findings of fact in the Last Chance Ditch Company's Case puts it at not exceeding 320 feet. The stream varies greatly at different seasons of the year. Rising in the mountains, and being mainly fed by the melting snow, in the winter its flow is small. When the warm rains begin to fall,—generally about the middle of February, in some seasons as early as the middle of January, and in others not until the end of February,—the water begins to rise. By the 1st of March, generally, the river carries many thousand cubic feet of water, and it increases during the months of April, May, June, and a part of July. It then begins to decrease, going down rapidly. The low-water period commences about the beginning of October, and continues until the commencement of the warm rains, in the early part of the succeeding year. The ordinary irrigation season in that section of the country is from February to September, and in January new land is often irrigated. The bulk of the irrigation, however, is done from April to August, during the period of high water. The contention of plaintiff's counsel that the result reached by the trial court in the suits of Lower Kings River Ditch Company and Last Chance Ditch Company against the canal company should be held to have been satisfactory to the defendant rests largely upon the negative answer given on the trial by the plaintiff to this question:

"If the Fresno Canal and Irrigation Company has the right to take out 100 feet before there is any restriction thereon, and then other parties have a right to take out, in round numbers, 350 feet, and then there is no further restriction, would that restriction of 350 feet at any time when the water is needed interfere with the company taking out water to the extent of the capacity of its canals?"

As has been said, the evidence shows that during low water the entire flow of the stream is but little over 300 cubic feet. According to the decision of the superior court of Tulare county in the

two cases already tried, the Fresno Canal & Irrigation Company is therefore limited during the period of low water to the 100 cubic feet. It is not surprising, therefore, that defendant should be indisposed to regard the result in those cases as a victory for the canal company, claiming the first and paramount right to all of the waters of the river to the extent of the capacity of its canals, and that its counsel should be moving for a new trial of those cases. It is no answer to this to say that, during the period of low water, irrigation is not much practiced, and that during that period the canal company does not need more than 100 cubic feet. That may or may not be so, although it appeared in evidence that during January last the canal company was supplying water for the irrigation of a large body of land, embracing some 60,000 acres. But, without regard to its necessities, the defendant cannot be held bound to accept as satisfactory the result of litigation subjecting a paramount claim of substantial right to the adverse claim of others. Of course, no merely pretended or capricious dissatisfaction on defendant's part would be allowed to avoid payment of the money he contracted to pay. Such dissatisfaction "must be actual, not feigned; real, not merely pretended." *Exhaust Ventilator Co. v. Chicago, M. & St. P. Ry. Co.*, 66 Wis. 218, 28 N. W. 343; *Gray v. Railroad Co.*, 11 Hun, 70; *McCarren v. McNulty*, 7 Gray, 139; *Silsby Manufg Co. v. Town of Chico*, 11 Sawy. 183, 24 Fed. 893; *Brown v. Foster*, 113 Mass. 136; *Zaliski v. Clark*, 44 Conn. 218; *Gibson v. Cranage*, 39 Mich. 49.

The views thus taken in respect to the decisions in the cases of the Lower Kings River Ditch and the Last Chance Ditch Companies against the Fresno Canal & Irrigation Company render it unnecessary to say anything upon this point in regard to the other pending litigation against that company.

The first count of the complaint, as has been seen, sets up that after the making of the original contract, and about the time of the commencement of the action of *Charlotte F. Clark v. Poly, Heilbron & Co.*, the defendant agreed with the plaintiff that if he (plaintiff) would pay \$2,000 towards defraying the expenses of that action, upon its termination, the condition upon which the balance of the purchase price of the 4,994 shares of the capital stock of the Fresno Canal & Irrigation Company was made to depend "should be and would be regarded and considered by said defendant as fully performed," and said balance of the purchase price should thereupon become immediately due and payable. The answer puts in issue all of the allegations in respect to that matter, and upon that issue there is much conflict in the evidence.

Poly, Heilbron & Co. were tenants in possession, under one Jeremiah Clark, of the Rancho Laguna de Taché, with a covenant giving them the right to purchase the rancho upon certain conditions. It was under that lease that they had brought the suit against the Fresno Canal & Irrigation Company to enjoin it from diverting any of the water of Kings river. That rancho was of such great value, and was so largely riparian to the river that the suits based upon its riparian rights were regarded by the parties to this action, as

also by other appropriators of the waters of Kings river, against whom Poly, Heilbron & Co. also had pending suits for injunctions, as the most formidable obstacle to the asserted rights of the appropriators. Charlotte F. Clark, the widow of Jeremiah Clark, had brought, or was about to bring, suit in one of the courts of the state against Poly, Heilbron & Co. to annul the lease under which they held possession of and claimed the right to purchase the Rancho Laguna de Taché, and to that end had employed, as her attorneys, Messrs. Craig & Meredith, a prominent law firm of the city of San Francisco, under a written contract, which provided that they were to bring and prosecute the suit at their own expense, and for their services were to receive 30 per cent. of what they should recover by the suit over and above the sum which, by the covenant in the lease, Poly, Heilbron & Co. were to pay for the rancho, to wit, \$160,000; and Craig & Meredith had, for value received, assigned to Robert Perrin twenty-thirtieths of whatever should inure to them under their contract with Mrs. Clark, and had associated him with them as associate counsel in all proceedings under the contract, agreeing to pay him therefor \$2,000, he (Perrin) to pay his own personal expenses. The purpose of the assignment by Craig & Meredith of twenty-thirtieths of whatever fee should inure to them from the suit of Clark v. Poly, Heilbron & Co. to Robert Perrin was to enable him to raise money with which to pay the expenses of that suit, which was expected and proved to be very costly; Perrin representing to Craig & Meredith, and expecting, that he could obtain the money from those appropriators and claimants of the waters of Kings River adversely affected by the riparian claim upon which the suits of Poly, Heilbron & Co. were based. His plan was to ask \$1,000 for each thirtieth of the twenty-thirtieths of the Craig & Meredith fee assigned to him, which money should be turned over to them, with which to pay the expenses of the suit of Clark v. Poly, Heilbron & Co.; and, according to all of the evidence in the case, the general plan was to induce the appropriators of the waters to take interests in the Craig & Meredith fee at the rate of \$1,000 for each one-thirtieth thereof, by representing to them that the suit of Clark v. Poly, Heilbron & Co. would surely be won by the plaintiff therein, as a result of which the purchasers of interests in the Craig & Meredith fee would get their money back, with some profit, and at the same time work the substitution of Mrs. Clark to whatever rights as riparian proprietors Poly, Heilbron & Co. had to the waters of Kings river, the disposition of whom, according to the assurances of her attorneys, was friendly to the irrigators, and who was willing that the appropriators should divert all of the waters of the river except so much thereof as should be needed for the uses of the rancho. Many of the appropriators and claimants of the waters of Kings river, upon those representations, took interests in the Craig & Meredith fee, paying therefor \$1,000 for one-thirtieth thereof, and receiving from Robert Perrin a written assignment of the same. Some of them took two-thirtieths, and one of them (Dr. Perrin, who had, apart from his interest in the canal company, a large quantity of land in the vicinity need-

ing irrigation) took five-thirtieths, at the same rate. But the contention on the part of the plaintiff, Church, is that he did not contribute to the expenses of the suit of Clark v. Poly, Heilbron & Co. upon any such basis or understanding; on the contrary, that the distinct agreement between him and Dr. Perrin, acting for the defendant, Cheape, was that, if he (Church) would pay \$2,000 towards defraying the expenses of that litigation, then, upon its settlement, the deferred payment for the stock of the canal company should become immediately due and payable from the defendant to the plaintiff.

There can be no doubt, I think, that Dr. Perrin was anxious for the successful consummation of the contract into which he entered on behalf of the defendant with the plaintiff. Indeed, his reward depended upon the success of the undertaking. As has been seen, one of the obstacles, and the principal one, as the parties seemed to think, in the way of that success, was the injunction suit brought by Poly, Heilbron & Co. against the canal company; and, becoming satisfied that the suit of Clark against Poly, Heilbron & Co. would be successful, Dr. Perrin entered into negotiations with Mrs. Clark by which he should have the right to purchase the rancho for a stipulated sum in the event she won her suit, and thus get rid of the injunctions secured by the proprietors of that rancho. In order that the necessary money might be secured for Craig & Meredith with which to prosecute the suit of Clark against Poly, Heilbron & Co., Dr. Perrin, therefore, took an active interest in inducing those adversely affected by the injunctions that had been secured by Poly, Heilbron & Co. to contribute towards the raising of that fund. He first sought the plaintiff, who was one of the pioneer appropriators of water in the district in question, and a man of much influence among the irrigators, to induce him to contribute, not only for the direct benefit to be derived from the money the plaintiff might put into the fund, but also for the indirect benefit of his influence with his neighboring irrigators similarly affected by the injunctions. He sent for the plaintiff to come to San Francisco, and there, at different times, had several interviews with him on the subject. The first is related by the plaintiff as follows:

"He said that he had a scheme by which, if he carried it through, it would settle all the litigation and all the troubles connected with the waters of Kings river, not only with the Fresno Canal Company, but with all other ditch companies; and he said that on the eve of the settlement of the title to the Laguna de Taché Ranch,—a title which Poly-Heilbron set up to it,—on the eve of the settlement of that title, he said he had a pledge from the parties that would obtain the land, a clear title to the land; that he should have it at a stipulated price; and he thought there was a great bargain in it, and he wanted to effect that arrangement. 'And,' says he, 'if you will pay a portion towards defraying the expenses of the lawyers in prosecuting it, if you will pay a portion, or if you will return home, which perhaps will suit you better, and you will go to all these ditch companies, and get them to put up,—just set forth to them what you are going to do, going to take the injunction off of all these ditches,—if this is effected, I will take the land, and the injunction will be set aside, and they will all have water.' 'Now,' says he, 'if you will even go and get them to pay, so that we can prosecute this, and carry it through, and get the title, get a settlement of that case, why,' says he, 'you shall have your money whenever that thing is effected. And,' says he, 'you can well afford to pay a good sum towards prosecuting the suit, and you can

afford to just take your horse and buggy, and go to all these ditch owners, and proprietors, and work them into it. And,' says he, 'I have agreed to give fifty thousand dollars, and,' says he, 'it is more than I can pay alone when there is so many parties interested, and especially you. I will make it interesting to you.' He told me before that whenever that suit was settled, that I should get my money. 'But,' says he, 'here is the way now it can be settled.' And I told him I would go and see what I could do. I was interested. Q. At this time, when you were in the city, was anything said in regard to seeing the attorneys representing his interests in that matter? A. Not at that time. I come down again. I went back. Q. Before we leave that, then, was anything further said in this conversation that you have been telling about now,—any more than you have recounted? Was that the substance of all that was said? A. That is the substance of it."

The second interview is thus stated by the plaintiff:

"When I came the second time to Fresno [San Francisco], he wanted I should go down and talk with Craig and Meredith, his attorneys, or Mrs. Clark's attorneys. I went down there, and Perrin introduced me to Craig and Meredith; and Mr. Craig says, 'Yes; this is Mr. Church, is it?' And he says: 'Doctor Perrin has been talking to me about his indebtedness to you, and he wanted I should explain to you the situation of the title.' And he said that Doctor Perrin had told him that you was one that ought to pay liberally towards prosecuting that suit, and we have got the suit on hand, and it is as good a suit, and I am just as sure of winning it, as any suit that I ever had; and Mr. Perrin tells me that on the settlement, on their getting this land through Jeremiah Clark,—he had got a proffer, he says, from Mrs. Clark for the land, providing he will defend the title, and carry it through, and get the title embodied in her perfectly,—then he says Mrs. Clark, there is an obligation on her part to deed it to Mr. Perrin upon certain conditions, which he can comply with, and this will settle all litigation. And Mr. Perrin tells me that on the settlement of this, that he will pay you your money.' And Mr. Perrin says: 'That is so. We can pay him his money.' Mr. Perrin then said that it would stop all litigation; it would virtually close out the power of any ditch company on the river,—their doing anything,—from the simple fact,' he says; 'if they come in, which some of them are coming in, (he told me that he had seen Helm), and they are coming in, and we are going to give them, all those that unite in helping to pay this, we are going to give them their water.' And there was some that was going to help in the matter was going to take an interest in the land. And he says: 'They are all going to get their money back,—those that help,—either in money or in land, or get their water.' And he says: 'You shall have your money as soon as the case is settled, and they get a title to the land.'"

While there is much confusion in the testimony of the plaintiff, the gist of it, I think, is that Dr. Perrin agreed that if the plaintiff would help pay the expenses of the Clark-Heilbron suit, and it should be won by Mrs. Clark, and he should acquire the rancho at the price agreed upon between himself and Mrs. Clark, then all litigation in respect to the subject of the contract between plaintiff and defendant should be considered ended, and the deferred payment become immediately due and payable.

The plaintiff's version of the agreement under which he contributed to the expenses of the Clark-Heilbron suit is to some extent corroborated by the witness Helm, who testified that he had conversations with both Dr. Perrin and Robert Perrin in regard to that suit, and, being asked to state what those conversations were, answered:

"Before the suit was commenced, they wanted to raise so much money to prosecute the suit, but when it was I do not know now. It was in regard to this transaction with the Laguna de Taché Rancho. If I could raise so much



money, they could win that suit for Mrs. Clark, and then they would lift the injunctions from our canal. I was interested in a canal out here. And at the same time, if that was done, then they would be in a position to settle with Church,—to pay Church what the canal company was owing to him."

On cross-examination, this witness testified that the principal inducement for his contribution to the fund was to enable Mrs. Clark to prosecute, and, if possible, win her suit, in the hope that upon her success the injunction against the canal in which he was interested would be removed, but that another consideration was, according to his understanding, that the contributors to the fund were to have an interest in any of the excess over \$300,000, for which the rancho should be sold.

Both of the Perrins explicitly deny all of the testimony on the part of the plaintiff tending to show that plaintiff contributed to the Clark-Heilbron suit upon the agreement or understanding that, upon its settlement in Mrs. Clark's favor, the litigation referred to in the contract between the plaintiff and defendant should be considered ended, and the deferred payment therein mentioned become due and payable from defendant to plaintiff, or for any different reasons or considerations than applied to and governed the contributions of all other contributors to that fund. And Mr. Craig denied that he had ever said to the plaintiff that Perrin had told him that, on the settlement of the Clark-Heilbron suit, he would pay the plaintiff his money.

In this conflict of testimony, the court must look, in its endeavor to ascertain the truth, to corroborating circumstances, and to the probabilities of the case. The suit of Clark against Poly, Heilbron & Co. was commenced in April, 1887; was tried during the winter of 1888-89; was decided by the trial court in favor of Mrs. Clark, subsequent to which the supreme court of the state interfered with its further progress before the trial judge by writ of prohibition; and the suit was finally compromised and settled in the summer of 1890, one of the essential conditions of the compromise, secured by Dr. Perrin, being that the Rancho Laguna de Taché should be sold to the defendant, Cheape. Towards the expenses of that suit, parties interested in irrigation, and injuriously affected by the injunction suits brought by Poly, Heilbron & Co., contributed, at the instance of the Perrins, \$20,000. Beyond controversy, one, at least, of the considerations moving each, was the desire to get rid of the injunctions obtained by Poly, Heilbron & Co., and the hope that such aid would bring about that result; and, at least, as to all but two of the contributors to the fund, a further consideration was the assignment by Robert Perrin of one of the twenty-thirtieths of the Craig & Meredith fee for each \$1,000 so contributed, under which the contributor hoped, in the event Mrs. Clark should be successful in the suit, to get back the amount of his contribution, with some profit. To one of the ditch companies that contributed \$1,000 no interest in the Craig & Meredith fee was assigned, and the plaintiff, Church, testifies that no interest therein was assigned to him in consideration of his contribution to the fund. Robert Perrin's testimony is directly to the contrary. The probabilities that the plaintiff received from

Robert Perrin a similar assignment for the money contributed by him as was received by all of the other contributors to the fund except one would be much stronger but for the fact that at least one ditch company, according to Robert Perrin's own testimony, contributed \$1,000, for which it did not receive the assignment of any interest in the Craig & Meredith fee. The plaintiff, Church, contributed \$2,000, \$400 of which he paid directly to Robert Perrin, and \$1,600 to Mr. Meredith, of the firm of Craig & Meredith. Mr. Meredith, who is a very careful man, and a gentleman of the highest character, testified, in substance, that, when the plaintiff paid him the \$1,600, he asked him if he thought he would surely get it back, and witness replied he thought he surely would. The evidence shows that the plaintiff, as did many of the other contributors to the expenses of the Clark-Heilbron suit, before agreeing to contribute, consulted with Mr. Craig in regard to the chances of Mrs. Clark winning the suit, and that each of them was assured by him that he considered the case one of the best he had ever had, and that it would surely be won. I regard the remark made by the plaintiff to Meredith when handing him the \$1,600 as extremely significant, and as throwing a flood of light on the true consideration of the plaintiff's contribution to the expenses of the Clark-Heilbron suit. It is entirely consistent with the claim on the part of the defendant that for his contribution he acquired an interest in the Craig & Meredith fee, like all of the other contributors, except one of the ditch companies already referred to; it is wholly inconsistent with the claim on the part of the plaintiff that for his contribution he got no interest in the Craig & Meredith fee.

Prior to March 17, 1891, the Fresno Canal & Irrigation Company issued bonds on its property of the face value of \$400,000. On that day, in the city of San Francisco, defendant and Dr. Perrin (defendant then being in California) delivered to the plaintiff 25 of the bonds, each of the face value of \$1,000, for which plaintiff indorsed upon the original contract as follows:

"This is to certify that I have this day received the sum of twenty-five thousand 00/100 dollars (\$25,000 00/100), being an additional payment on the \$100,000 00/100 due when all litigation is ended; and I hereby agree to accept at any time in the next seven months seventy-five (75) of the bonds, of one thousand dollars (\$1,000) each of the Fresno Canal and Irrigation Company now issued, in payment in full for all sums due or to become due to me in accordance with this agreement.

M. J. Church.

"San Francisco, Cala., March 17, 1890.

"Witness: M. P. Minor."

At the same time, Dr. Perrin executed to the plaintiff this instrument:

"San Francisco, March 17, 1890.

"I hereby agree and bind myself, my heirs and assigns, to loan to Mr. M. J. Church within the next ten days twenty thousand dollars for seven months, at six (6) per cent. interest, on the security given to me of (25) twenty-five bonds of the Fresno Canal & Irrigation Company, of one thousand dollars each, as security; and I also bind myself, my heirs and assigns, to take said bonds as payment in full for said loan and interest, provided the said M. J. Church asks or desires me to do so at the expiration of same.

"E. B. Perrin."

And subsequently Dr. Perrin loaned the plaintiff \$20,000, taking as security for its repayment the 25 bonds, and thereafter, at plaintiff's request, took the 25 bonds in discharge of the loan.

Counsel for plaintiff contend that this was "a formal admission of the fact" that there was then \$100,000 fully due from the defendant to the plaintiff. I am unable to understand how that can be true. At that time not even the suit of Poly, Heilbron & Co. against the Fresno Canal & Irrigation Company had been affected by any disposition of the suit of Clark against Poly, Heilbron & Co., for the latter case was then still pending. Not one of the suits pending against the canal company when the contract was entered into had then been ended; and, even if the agreement under which the plaintiff contributed to the expenses of the Clark-Heilbron suit be as contended by the plaintiff, the payment from defendant to plaintiff had not become due, because that suit was then still pending and undisposed of. It is plain, therefore, that counsel for plaintiff are in error in saying that the bond transaction of March 17, 1890, was an admission by defendant of the fact that the deferred payment was then due from him to plaintiff. To the contrary, the receipt which the plaintiff on March 17, 1890, indorsed on the original contract for the \$25,000 in bonds, expressly declared that it was "an additional payment on the hundred thousand dollars due when all litigation is ended." Manifestly, that was a recognition of the fact that the litigation was not then ended. But the recognition did not stop there; it contained the further agreement by plaintiff "to accept at any time within the next seven months seventy-five of the bonds of the Fresno Canal and Irrigation Company now issued, in payment in full for all sums now due or to become due to me in accordance with this agreement." Evidently, both plaintiff and Dr. Perrin then thought the bonds were good, for the latter agreed to accept 75 of them at any time within the next ensuing seven months in full for all sums then due or to become due him under the contract, and Dr. Perrin loaned him \$20,000 in gold on the 25 bonds he received on the 17th of March. This transaction, as has been said, is wholly inconsistent with the plaintiff's claim that the deferred payment of \$100,000 was then due. The plaintiff, as the evidence shows, was in need of money, and, to get it, was willing to make the agreement in respect to the bonds. It turned out afterwards that the bonds could not be negotiated, although Dr. Perrin went to Europe in the effort to dispose of them, and brought back, at his own expense, an agent of foreign capitalists to investigate them, who, upon the advice of an attorney, based upon the fact of the pending litigation, reported adversely to their purchase. That issue was consequently abandoned.

During all of this time the relations between the plaintiff and defendant and Dr. Perrin continued friendly, and plaintiff continued in the management of the company's business, and to take an active part in the litigation in which it was engaged. In the latter part of 1890 he refused to pay any further expenses of the litigation against the canal company, and then the trouble between the par-

ties began. As early as December 23, 1889, the plaintiff was asking for the balance of the purchase money for the stock, although not even the Clark-Heilbron suit had then been ended. On that day he caused the following letter to be written to Dr. Perrin:

"Fresno, Cal., Dec. 23, 1889.

"Dr. E. B. Perrin—Dear Sir: I am requested by my uncle, M. J. Church, who is himself very busy, to write a few lines to you. He was very much disappointed that he did not get to see you while you were here. He has arrived at a point where he feels justified in calling on you for his money. He has been waiting now for three years, without any interest, and you have had the annual assessment, and sold about two hundred and fifty thousand dollars worth of water rights; and, as the suits are so nearly settled, he now applies to you. He wants the suit set for trial immediately, and pushed to a settlement. Lawyers tell him that he has more than complied with his agreement now, but he is disposed to stand by the company until the last enemy is put down. His interest in the matter would not abate any if he were to get his money now. He has commenced another enterprise that will add to the prosperity of Fresno county, and that you, as well as all other property holders, cannot help but be greatly interested in. To carry out these plans, he must have means, and he is in hopes that you will not deprive him of the use of his money any longer. He has made no demands on you in the past, but has patiently waited until the suits were all practically settled; and he does not propose to stop here, but continue, but must have means to go on with his Sanitarium. The work has been commenced, and it is a reproach on the county to have it stop. When completed, thousands will visit from all over the country, and Fresno will be sought for health, instead of being denounced as a sickly place. M. J. feels that he must have some money in the next few weeks and days if he can get it.

"Yours Respt.,

L. H. Church,

"Written by request."

In the summer of 1890, as has been said, a compromise was arranged between Mrs. Clark and Poly, Heilbron & Co., an essential condition of which was that defendant, Cheape, should acquire the Laguna de Taché Rancho; defendant, through Dr. Perrin, having previously secured an option for its purchase from Mrs. Clark. Accordingly, he did acquire it for the canal company for \$780,000. A certain cash payment was made thereon, and a deed therefor was placed in escrow, to be delivered upon the making of the deferred payments. In December, 1890, defendant contracted to sell to a Mr. Menzies, of England, one-fourth of the capital stock of the canal company for \$250,000; and in the early part of 1891 the agreement was changed to one-third of the stock, for \$333,000. Fifty thousand dollars was paid by Menzies to defendant in cash, and \$200,000 was agreed to be paid by him on the 1st of July, 1891. In May, 1891, the canal company authorized the issuance of bonds on its property to the extent of \$1,000,000, the main purpose of which was to realize by their sale the money with which to pay for the Rancho Laguna de Taché. At that time the plaintiff was very sick, and had put his claim in the hands of his attorney, Mr. Firman Church, for the purpose of bringing suit thereon against the defendant. Since their disagreement, in the latter part of 1890, he had been demanding of defendant that the deferred payment be made in full, claiming that it was fully due, and threatening to bring suit therefor. Dr. Perrin went several times to plaintiff's house, to see him respecting

the matter. On one occasion, the defendant, Cheape, accompanied him; on another, Robert Perrin; and, on another, it is claimed on the part of the plaintiff that neither of them was along. On that occasion, as well as on the other occasions referred to, plaintiff says Dr. Perrin talked the matter over with him, and said that he ought not to bring suit; that, if he did, he would be kept out of his money a longer time; that the money was due and overdue; and that he felt as badly about the matter as plaintiff did. "But," continued the witness, "he says: 'If you bring the suit,—we are trying to bond this canal, and if you bring the suit, it will stop the bonding. We expect to get a million of money on the bonds, and we expect to pay you right out in full. But, if you go on with this suit, it will so cripple us and embarrass us that we cannot bond the canal, and consequently you won't get your pay.'" Plaintiff testified that, certain members of his family having come into the room during this conversation, and one of them (his daughter) having started to go out, Dr. Perrin said:

"'Look here. I want you to stop. I want to repeat now,' says he, 'in the presence of your people. You are the heirs,' he says, 'will be the heirs, to your father's estate, and,' says he, 'if your father should die, I want you to know just exactly the situation.' He says: 'This money is due, due Mr. Church, and was due on the settlement of that quieting of that title on the Jeremiah Clark case, and,' he says, 'it is due, and ought to have been paid long ago, and if your father was to commence a suit, which he talks of doing, why he might not get his pay.' It would make Cheape mad. That he would never pay. That is, he said it would be ten years. He said he could put up counterclaims against me that would keep me out of it ten years; and he went through with his story. He says: 'Cheape and me has talked this matter all over between ourselves, and we are perfectly satisfied that the litigation is all off and ended. All that amounts to anything is ended, and was ended when the Jeremiah Clark case was settled.' I spoke then, and says I: 'Now, Mr. Perrin, you know what the agreement was between you and me. Do you feel perfectly satisfied that the suits are all ended?' 'Yes,' he says, 'I do.' He says: 'There is some little suits, but they don't amount to nothing.' He says: 'We have the land and the water. We can manage them all.'"

The substance of this testimony of the plaintiff is corroborated by that of his wife, his daughter, Mrs. Fanning, and his son, George F. Church. It is explicitly denied by Dr. Perrin, whose testimony in regard to that matter is, in effect, that what he said and agreed to was that if Menzies paid the money he had contracted to pay, of which he felt sure, then, and in that event, defendant would, as a compromise and settlement of plaintiff's claim, the amount of which was in dispute by reason of the plaintiff's refusal to continue the payment of the expenses of the litigation in which the canal company was engaged, pay plaintiff on the 1st of July, 1891, \$60,000 in cash. This testimony on the part of Dr. Perrin is supported by that of defendant, Cheape, and of Robert Perrin, in respect to the conversations heard by them between plaintiff and Dr. Perrin in plaintiff's house; in which those witnesses say that on those occasions the expressed and distinct understanding was that \$60,000 should be paid the plaintiff in money on the 1st of July if Menzies made the payment he had contracted to make, and then only as a compromise and full settlement of plaintiff's claim.

Firman Church testified on behalf of the plaintiff that in May or June, 1891, he met Dr. Perrin on the street in Fresno, and told him that plaintiff was urging him (the witness) to commence suit for the money claimed by plaintiff, and that Dr. Perrin said it was unnecessary. "We are going to pay Mr. M. J. Church sixty thousand dollars." That Capt. Cheape was standing a little way off, and Dr. Perrin called him, and said, "I want to say this before Captain Cheape." "Calls Captain Cheape up there," continued the witness, "and 'now,' says he, 'I want to say in your presence to Mr. Firman Church that we are going to pay Mr. M. J. Church sixty thousand dollars on this claim.'" Being asked by plaintiff's counsel the question, "This sixty thousand dollars, I believe you said, was to be on the demand?" the witness answered: "Well, since I think of it, Dr. Perrin said they were negotiating for the Laguna de Taché Rancho, and that matter would be closed up somewhere during the first days of July, and that, as soon as that was closed up, they would be ready to pay these sixty thousand dollars."

The testimony of the defendant, Cheape, is that he has no recollection whatever of having been called up by Dr. Perrin, or to have heard the conversation referred to by Mr. Firman Church. Both Dr. Perrin and Robert Perrin testify that the latter was present at the conversation that was had between Firman Church and Dr. Perrin, but that the conversation was not that \$60,000 would be paid the plaintiff on account of his claim, but that, if Menzies made the payment on the purchase he had contracted to make, \$60,000 would be paid to him in settlement of it.

In the sharp conflict of testimony, to which reference has been made, resort must be again had to corroborating circumstances, and to the probabilities of the case. In respect to the testimony of Mr. Firman Church, one strong circumstance tending to support the version given by the Perrins is that, at the time of the conversation with him, the only pending negotiation in regard to the Rancho Laguna de Taché was that pending with Menzies for the purchase by him of an interest in it, together with the other property of the canal company, on which he had agreed to pay \$200,000 the 1st of July; so that it must have been that transaction to which Dr. Perrin referred when, according to the testimony of Firman Church, he told him: "They were negotiating for the Laguna de Taché Rancho, and that that matter would be closed up somewhere during the first days of July, and, as soon as that was closed up, they would be ready to pay the \$60,000."

And in respect to the contention on the part of the plaintiff that Dr. Perrin said to him that he and defendant, Cheape, had agreed that all of the litigation in which the canal company was engaged was practically ended, and that the balance of the purchase price of the stock was due, it seems, apart from the denials of that testimony by the defendant and the Perrins, almost incredible, in view of the facts in regard to that litigation, that they could have agreed that the litigation was practically ended. Not a single one of the suits that were pending when the contract was entered into had been disposed of, or, so far as the record shows, has yet been disposed of,

except the suit brought by Poly, Heilbron & Co. against the canal company. Two of the other cases then pending against the canal company have since been decided by the trial court adversely to its contentions, and are now pending on motions for new trial. Two of the others (those brought by Heinlen) are based upon a claim precisely similar in its nature to the suit brought by Poly, Heilbron & Co.; namely, that of a riparian proprietor, asserting the right to prevent the diversion of any of the water of Kings river. In view of these facts, it is in the highest sense improbable that defendant or Dr. Perrin agreed that the litigation was practically ended; and when to this is added the testimony of the defendant and of the Perrins that what was agreed to was that if the Menzies agreement was consummated, as was confidently counted on, and he should pay the money he agreed to pay the 1st of July, then, as a compromise of the dispute that existed between the parties here, defendant would pay plaintiff \$60,000 in cash, I think there is no room for doubt that the agreement was as stated on the part of the defendant. Without regard, therefore, to the point made by counsel that the contract as testified to by plaintiff is at variance with the allegations of the complaint, there must be findings and judgment for defendant.

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INTERSTATE COMMERCE COMMISSION v. CINCINNATI, N. O. & T. P. R. CO. et al.

(Circuit Court, S. D. Ohio, W. D. November 30, 1894.)

No. 4,748.

1. INTERSTATE COMMERCE COMMISSION—QUASI JUDICIAL POWERS.

The interstate commerce commission is not a court, but an administrative body, lawfully created, and lawfully exercising powers which are quasi judicial, as are the powers exercised by the commissioner of patents, and, in many respects, by the heads of the various departments of the executive branch of the government. Its rulings and decisions are entitled to the highest respect of the federal courts, and they are justly so regarded. *Commission v. Brimson*, 14 Sup. Ct. 1125, 154 U. S. 447, 474, 489.

2. SAME—INJUNCTION.

A preliminary injunction to compel a carrier to obey an order of the interstate commerce commission in reference to freight rates should be denied where the answer denies that the rates defendant charges, and which were passed on by the commission, were unreasonable or unjust. *Shinkle, Wilson & Kreis Co. v. Louisville & N. R. Co.*, 62 Fed. 690, followed.

3. SAME—PAYMENT OF EXCESS INTO THE REGISTRY OF THE COURT.

Upon motion for a preliminary injunction to restrain certain carriers from violating an order of the interstate commerce commission, the complainant made the alternative suggestion that, if the defendants be allowed to charge and receive present rates, they be required to keep an account with every shipper, and to pay into the registry of the court the excess, same to be disposed of after the hearing as the court may order. *Held*, that this was in fact an application for a rule nisi, which ought not to be granted unless there was a very strong showing of right in favor of the complainant, which would authorize the granting of a preliminary injunction, and, on the other hand, sufficient showing of probable injury to the defendant to authorize an alternative order, as, for illustration, to give bond and keep and file an account.

**4. SAGE—TRANSCRIPT OF EVIDENCE.**

Evidence taken before the interstate commerce commission is not a part of the record, and it is not necessary, in proceedings to enforce compliance with an order of the commission, to file in the circuit court, with the petition, a transcript of the evidence. Either party, however, may introduce and use as evidence any testimony taken before the commission which is competent and relevant to the matters embraced in the petition.

Motion for a preliminary restraining order in proceedings to enforce compliance with an order of the interstate commerce commission.

Harlan Cleveland, U. S. Atty., George F. Edmunds, and L. A. Shaver, for complainant.

Ed. Baxter, Geo. P. Harrison, East & Fogg, J. D. B. De Bow, Harmon, Colston, Goldsmith & Hoadly, Dorsey, Brewster & Howell, Lawton & Cunningham, Leigh R. Watts, and W. A. Henderson, for defendants.

SAGE, District Judge (orally). The motion for a preliminary restraining order, to continue in force until the hearing and decree in this case, must be overruled for the following reasons:

1. A like motion, made upon the filing of the petition in the case of Shinkle, Wilson & Kreis Co. v. Louisville & N. R. Co., 62 Fed. 690, on the same order of the commission as is here involved, was overruled by Judge Lurton, of the circuit court, after full argument.

2. Independently of the fact that Judge Lurton has passed upon the question involved, this is not a case for a preliminary injunction. The question to be considered and decided is whether the defendant railroad companies are trespassing upon the rights of their shippers by charging freights in excess of the order of the interstate commerce commission. That question has not yet been judicially determined. It has been held that the interstate commerce commission is not a court. It is an administrative body (see *Commission v. Brimson*, 154 U. S. 447, 474, 489, 14 Sup. Ct. 1125), lawfully created, and lawfully exercising powers which are quasi judicial, as are the powers exercised by the commissioner of patents, and, in many respects, by the heads of the various departments of the executive branch of the government. Its rulings and decisions are entitled to the highest respect of the federal courts, and they are justly so regarded. Nevertheless, the questions involved in the petition and answers in this cause are now for the first time presented for judicial determination. A court of equity will not ordinarily grant an injunction to prevent a trespass, before it has been found to be a trespass by a court, or a court and jury. Even in patent causes, for infringement, preliminary injunctions are not granted unless the exclusive right of the patentee has been determined by the adjudication of a court of competent jurisdiction, or has been so long and generally acquiesced in by the public as to remove, practically, any serious doubt upon the subject. They are issued to prevent injury to a clear right. To grant the motion in this case would be like allowing execution before judgment. The question of right, upon



which it depends, is the very question which is to be heard and decided in the further progress of this case.

3. It is a well-settled principle with reference to the granting of preliminary injunctions that the comparative inconvenience and injury to parties must be looked at, and that they will not be granted where the injury to the defendant is likely to be greater than the benefit to the complainant. In this case, if the defendants are restrained from charging or collecting freight in excess of the rates fixed by the commission, they will be practically without remedy, if at last the order of the commission should be held to be unlawful. On the other hand, if the shippers continue to pay the rates hitherto paid the excess will be distributed among them, and the injury to each will be comparatively slight. Moreover, if these companies be compelled, pending this litigation, to lower their rates from 20 to 25 per cent. (which, it is stated, would result from the issuing of a preliminary injunction), the understanding being that if the order of the commission should be set aside the former rates will be re-established, the result would be to stimulate excessive and speculative shipments, which are always productive of injury to legitimate business.

4. The section of the act to regulate commerce, under which this petition is filed, directs that there shall be a speedy hearing and determination of the matter. It will be the duty of this court to enforce that direction. The cause will be brought to a speedy hearing. There will be no considerable delay. Within 60 days the hearing will be had, and no great hardship will result from leaving matters as they are in the meantime. The alternative suggestion, that if the defendants be allowed to charge and receive present rates they be required to keep an account with every shipper, and to pay into the registry of this court the excess, the same to be disposed of after the hearing as the court may order, does not commend itself to the approval of the court. This is, in effect, an application for a rule nisi, which ought not to be granted unless there is a very strong showing of right in favor of the complainant, which would authorize the granting of a preliminary injunction, and, on the other hand, sufficient showing of probable injury to the defendants to authorize an alternative order, as, for illustration, to give bond and keep and file an account.

The question has also been submitted to the court whether the transcript of the evidence taken before the commission is a part of the record, and therefore to be filed and used in this court, as a matter of right, by the commission or by the defendants. Section 12 of the act (24 Stat. 379) empowers the interstate commerce commission to require the attendance and testimony of witnesses, and authorizes the taking of depositions. Section 14 makes it the duty of the commission, whenever an investigation shall be made by it, to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the commission are based, and such findings shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found. The commission is authorized to provide for the publication of its re-

ports and decisions, and such publications are made competent evidence of such reports and decisions in all federal and state courts, without further proof or authentication. It is provided in section 17 that every vote and official act of the commission shall be entered of record; and in section 16, which provides for petition to United States courts in cases of disobedience of orders of the commission, it is further provided that on the hearing the findings of fact in the report of the commission shall be prima facie evidence of the matters therein stated. It is also provided that the court shall have power, if it think fit, to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as it may think needful to enable it to form a just judgment in the matter of the petition. Now, it is argued that as every vote and official act of the commission is to be entered of record, and as the requirements of the attendance and testimony of witnesses, and orders for the taking of testimony by deposition, are official acts, the testimony and deposition become part of the record of the commission. It would be a strained construction which should so extend the provision referred to as to compel the commission to have a copy of every deposition, and a full report of the testimony of every witness, entered upon its records. It was evidently the intent of congress to provide that there should be a record, not only of every vote, but of every order and direction, made by the commission. Therefore, an order requiring the attendance and testimony of witnesses, or the production of books, papers, and documents, or the taking of testimony by deposition should be entered of record. But that is quite different from entering of record the testimony or the depositions taken under the order. It might, with equal force, be argued that a copy of every document, paper, or book produced under the order of the commission should be spread upon the records of the commission. That would be burdening the commission with an enormous expense, which could not have been intended by congress, and which would be altogether unnecessary and useless. My opinion is that it is not necessary to file with the petition the transcript of the evidence. The findings of fact in the report of the commission are made prima facie evidence of the matters therein stated. Those findings, therefore, are sufficient to make out a prima facie case, so far as the companies are concerned, in favor of the commission. I have no doubt, however, that either party may introduce and use as evidence any testimony taken before the commission, and which is competent and relevant to the matters embraced in the petition. But the commission ought not to be put to the trouble or expense of filing with every petition a transcript of the evidence. On the other hand, the evidence, having been taken under lawful authority by the commission,—the defendants having been present or represented, with full opportunity for cross-examination,—may be introduced by either party and used upon the hearing of the petition. The court may reject any portion which is irrelevant or incompetent. If any evidence has been taken ex parte in the proceedings before the commission, the court may require that there shall be full opportunity for cross-examination before it will be received or considered. The

court is to sit as a court of equity, without the formal proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises. It is so provided in section 16 of the act. The intention of congress evidently was to vest in the court a large discretion. By analogy to the proceedings in equity upon appeal, the testimony used before the commission can properly be brought to the consideration of the court upon the hearing of the petition. Apart from the view above expressed, the court could, in pursuance of the authority conferred upon it by section 16 of the act, direct that the testimony be produced, and could examine it by way of looking into the grounds upon which the findings of fact were made by the commission. Those findings are not conclusive, but only prima facie, evidence of the facts; that is to say, rebuttable. That the testimony does not necessarily belong to the proceedings under the petition is further manifest from the consideration that the entire contest, in many cases, may turn upon the question whether the order of the commission was authorized by the findings of fact, which findings might not be at all in dispute. The order in this case will be that the transcript of testimony taken before the commission, and which has been placed upon the files, shall there remain, and, subject to objections for irrelevancy and incompetency, may be used at the hearing. The answers in this case are such as to warrant the taking of testimony by the defendants, and, if necessary, taking of further testimony on behalf of the commission. Until the 1st of January, 1895, will be allowed for that purpose. The hearing will be set for Monday, the 14th of January, 1895. The engagements of the court are such as to prevent an earlier date.

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UNITED STATES NAT. BANK OF NEW YORK v. FIRST NAT. BANK  
OF LITTLE ROCK et al.

(Circuit Court of Appeals, Eighth Circuit. December 10, 1894.)

No. 507.

1. **BILLS AND NOTES—ACCOMMODATION INDORSEMENT—NOTICE.**

The fact that notes, offered for discount to a bank by another bank, its correspondent, are payable to the president of the offering bank individually, and bear his own indorsement, followed by that of the bank, affixed by him as president, is not sufficient to give notice to the discounting bank that such notes are the individual property of such president, and not of the bank, and that the bank's indorsement is for accommodation only, or to put the discounting bank on inquiry, especially when the negotiations for the discount have been carried on by letters written, in their official capacity, by the president and cashier of the offering bank.

2. **PRACTICE ON APPEAL—POINT NOT RAISED BELOW.**

A defense abandoned at the trial, and upon which no valid exception to a judgment against the defendant could have been based, cannot be invoked to support a judgment in his favor, rendered upon another ground, which was clearly erroneous.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

This was an action by the United States National Bank of New York against the First National Bank of Little Rock, Ark., and S. R.

Cockrill, its receiver, upon five notes indorsed by the Little Rock Bank. On the trial in the circuit court a verdict was directed for the defendants. Plaintiff brings error.

This was an action which was brought by the plaintiff in error, the United States National Bank of New York, against the First National Bank of Little Rock and Sterling R. Cockrill, its receiver, to enforce the liability of said First National Bank of Little Rock as an indorser of five promissory notes. For convenience the two banks above mentioned will be referred to hereafter as the "New York Bank" and the "Little Rock Bank." Three of said notes were in the following form:

"\$5,000.

Little Rock, Ark., Dec. 7th, 1892.

"Four months after date we or either of us promise to pay to the order of G. R. Brown and H. G. Allis five thousand dollars, for value received, negotiable and payable, without defalcation or discount, at the First National Bank of Little Rock, Arkansas, with interest from maturity at the rate of ten per cent. per annum until paid.

City Electric St. Ry. Co.

"H. G. Bradford, Pt."

The three notes aforesaid, when received for discount by the New York Bank, bore the following indorsements:

"George R. Brown.

"H. G. Allis.

"First National Bank, Little Rock, Ark.

"H. G. Allis, Pt."

Two of said five notes were in the following form, except that one was made payable five months after date instead of four months after date:

"\$5,000.

Little Rock, Ark., Dec. 7, 1892.

"Four months after date we or either of us promise to pay to the order of James Joyce five thousand dollars, for value received, negotiable and payable, without defalcation or discount, at the First National Bank of Little Rock, Arkansas, with interest from maturity at the rate of ten per cent. per annum until paid.

McCarthy & Joyce Co.

"Geo. Mandlebaum, Secty. & Treas."

The notes last aforesaid, when received for discount by the New York Bank, were indorsed as follows:

"James Joyce.

"H. G. Allis.

"First National Bank, Little Rock, Ark.

"H. G. Allis, Pt."

Business relations between the New York Bank and the Little Rock Bank were inaugurated in pursuance of the proposition contained in the following letter written by the second assistant cashier of the New York Bank to the cashier of the Little Rock Bank, to wit:

"New York, June 21, 1892.

"W. C. Denny, Esq., Cashier, Little Rock, Ark.—Dear Sir: Can we not do business with your good bank? We should like to enroll your name upon our books, and we think the relation, if once established, could be made satisfactory to you in every particular,—at any rate, it would be our earnest endeavor to make it so. We will give you two per cent. on your daily balances, granting you our best collection facilities, taking all your foreign items east of the Mississippi river, and crediting them to your account immediately without charge. If you will send on \$50,000 of your good, short-time, well-rated bills receivable, we will be pleased to place them to your credit at four per cent. We are anxious to do business with your bank, having warmly and favorably known of it, and should be pleased to hear from you in reference to the above proposition.

"Yours, very truly,

J. W. Harriman, 2nd Asst. Cashier."

In response to said letter, negotiable paper to the amount of \$50,728 was forwarded to the New York Bank to be discounted for and on account of the

Little Rock Bank. The letter transmitting such paper was dated June 24, 1892, and was signed by H. G. Allis, as president of the Little Rock Bank. This paper was all indorsed by the Little Rock Bank, and the proceeds of the discount were placed to the credit of that bank. On July 9, 1892, negotiable paper to the amount of \$50,301.88, duly indorsed by the Little Rock Bank, was forwarded to the New York Bank for discount, and the same was discounted, and the proceeds were placed to the credit of the Little Rock Bank, at its request. Further transactions of the same kind took place between the two banks on July 26, 1892, and on October 31, 1892. Between June 24 and November 25, 1892, paper to the amount of \$175,476 appears to have been thus discounted by the New York Bank for and in behalf of the Little Rock Bank, all of which paper bore the indorsement of the latter bank. On November 25, 1892, the following letter was written by the Little Rock Bank:

"The First National Bank of Little Rock, Ark., Nov. 25, 1892.

"United States National Bank, New York City—Gentlemen: Kindly advise us if you can give us \$25,000 more in discounts. We have not decided whether we will make further discounts this year, although it is more than probable that we will have to, as our cotton men do not want to sell at present. We believe the advance in price will cover shortage of crop, and that our collections will be equal to those of last year. If our cotton men continue to hold their cotton, it will be necessary for us to make further rediscounts, and we want to know what we can do in case they refuse to sell. If you can grant us this favor, kindly let us know what rate of interest you will want. Your immediate reply is requested.

"Yours, very truly,

W. C. Denny, Cashier."

The proposition contained in this letter was accepted by the New York Bank on November 28, 1892, and on the 13th day of December the following letter was written:

"Little Rock, Ark., Dec. 13, 1892.

"United States Nat. Bank, New York City—Gentlemen: In accordance with our letter of the 25th ult., and your reply of the 28th ult., we find that we shall need some more money, as our cotton men are not shipping out any cotton. It seems to be the inclination of all of them to hold for a better price, and we are now carrying \$175,000 in demand loans on cotton, which we may have to carry two or three months longer. We inclose herein paper as scheduled below. Kindly wire us proceeds to our credit, and oblige,

"Yours, very truly,

H. G. Allis, President."

Among the notes inclosed and scheduled in the foregoing letter of December 13, 1892, were the five notes now in suit and two other notes made by the Dickenson Hardware Company, the whole remittance amounting to \$32,500. On the 16th day of December, 1892, the Little Rock Bank was duly notified by the New York Bank that the paper sent to it on December 13, 1892, had been received and discounted, and that the net proceeds thereof, amounting to \$31,871.27, had been placed to its credit. The receipt of this notice was duly acknowledged by the Little Rock Bank by the following letter written by its cashier, to wit:

"The First National Bank of Little Rock, Ark., December 20, 1892.

"United States National Bank, New York City—Gentlemen: We have your favor of the 16th inst., inclosing the Dickenson Hardware Company note for completion, which we herewith return. We charge your account with \$31,871.27, proceeds of \$32,500.00 of discounts.

"Yours, very truly,

W. C. Denny, Cashier."

During the trial of the case it was shown that the five notes in suit, aggregating \$25,000, had never passed the scrutiny of the discount board of the Little Rock Bank, and that they had never been entered upon the books of that bank as forming part of its bills receivable. It was further shown that as soon as the New York Bank had discounted the paper, and had given notice of that fact, the amount realized from the discount was placed to the credit of the individual account of H. G. Allis on the books of the Little Rock

Bank, pursuant to the order of said Allis, given to the bank's bookkeeper. Allis' individual account was at the time overdrawn to the amount of some \$10,000 or \$11,000. The credit thus given canceled the overdraft. There was no evidence that the New York Bank had any knowledge of the facts last aforesaid. It was shown, however, and the fact is undisputed, that the proceeds of the discount of the five notes in question were placed to the credit of the Little Rock Bank on the books of the New York Bank, and that they were subsequently drawn out on checks issued by the former bank.

On the foregoing state of facts the jury was directed to return a verdict in favor of the defendants, which was accordingly done, and the plaintiff has sued out a writ of error.

W. C. Ratcliffe and John Fletcher, for plaintiff in error.

Sterling R. Cockrill and Ashley Cockrill, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The action of the circuit court in directing a verdict for the defendant seems to have been predicated upon the ground that the form of the notes in suit was such as to give notice to the plaintiff, when it received the same for discount, that they belonged to Allis; that they were not the property of the Little Rock Bank; and that said bank was merely an accommodation indorser for Allis. This view was clearly stated in the following instruction, which was given to the jury:

"The court tells you upon this branch of the case that it conceives it to be its duty to tell you that the paper sued upon is of such a character, from its inception to its final delivery, or final indorsement by Allis and delivery to the United States National Bank of New York, as should have put that bank upon notice of Allis' want of authority. These notes, it appears clearly in evidence, were accommodation notes, every one of them. They were made payable, three of them to George R. Brown and H. G. Allis, payable at the bank. There is nothing upon the face of this paper to show that the bank ever had anything to do with them, or that they were ever in the bank, except the indorsement of Allis, president, upon the back of them. They are made payable to the order of Brown and Allis,—three of them, and they are indorsed upon the back, 'George R. Brown and H. G. Allis.' So if it appears from the testimony, as it does, that they were accommodation paper given to Brown and Allis, and indorsed by Brown and then by Allis, and then indorsed by Allis as president of the bank, the court tells you that that was sufficient to put any bank upon notice that he was certifying, or indorsing rather, the paper as president of the First National Bank, without authority to do so; he was indorsing his own paper, and that was enough to put any bank upon notice. That being the case, the court instructs you to find a verdict for the defendant."

As the trial court, in giving the foregoing instruction, did not lay stress on any fact other than the mere form of the notes, and as it is not pretended that the plaintiff had any information that they were accommodation notes, or any knowledge with reference to Allis' relation to the paper, except such as was conveyed by the notes themselves, the substantial question presented by the record is whether the notes were, in fact, in such form that the plaintiff ought to have known that they were the property of Allis, and that the defendant bank was merely an accommodation indorser. It will be observed that the paper showed that Allis was one of the payees in three of the notes, and that his name appeared as indorser on all

of the notes immediately preceding the indorsement of the Little Rock Bank. No other fact is disclosed by the notes themselves that can be regarded as having any special significance. On the other hand, it appears from the correspondence, heretofore quoted, that the request to discount the paper in controversy was contained in two letters written in behalf of the defendant bank by its cashier and president respectively. These letters were clearly official letters, such as had previously been written by the bank when other paper to a large amount had been offered by it for discount to its eastern correspondent; and we are unable to discover any statement in either of the letters, or any circumstance connected with the writing of the same, which was known to the plaintiff, that would lead any one to suspect that the paper tendered for discount was not held and owned by the Little Rock Bank, or that the discount was not sought for its benefit.

Such being the undisputed facts of the case, in deciding as to what information was given to the plaintiff by the form of the notes we must apply the well-known rule that a person purchasing negotiable paper is entitled to assume, in the absence of knowledge to the contrary, that the actual relation of every party thereto, and his interest therein is what it seems to be from the face of the paper. In the present case, the notes, when presented to the plaintiff for discount, were so drawn and indorsed as to create a presumption, on which the plaintiff was entitled to act, that they had been indorsed by Allis to the Little Rock Bank, and that the bank was the holder of the same for value. And this presumption, created by the notes themselves, was confirmed by the correspondence between the two banks in relation to the proposed discount to which we have heretofore adverted. It is suggested in argument, however, that even if the notes did create the presumption that Allis had sold and indorsed them to the bank of which he was president, yet that this transaction was in itself suspicious, and should have put the purchaser of the paper upon inquiry. With reference to this suggestion, it is sufficient to say that it is not unlawful for a bank to purchase commercial paper from a person who happens to be connected with it as an officer or a director. We are not aware of any authority which maintains that a bank cannot discount paper for its officers or directors, especially if it is paper executed by a third party, and, as a matter of practice, we believe that it frequently happens that such discounts are sought and obtained. Because a man is a member of the board of directors or an officer of a given bank, it does not follow, we think, that he must carry his custom elsewhere, and that he must transact his banking business with some other bank. That, in our judgment, would be an unreasonable rule, which no court ought to prescribe. It is doubtless true that a bank officer, who offers paper for discount to the bank with which he is connected, cannot himself represent the bank in such negotiation nor in any other transaction with the bank in which he has a personal adverse interest. He ought not to assume, and he cannot lawfully assume, the dual role of seller and purchaser; in the nature of things, there must be some disinterested person to repre-

sent the bank in such a transaction, as, under the law of agency, a person while acting as agent for another cannot enter into a contract with himself. *Claffin v. Bank*, 25 N. Y. 293; *Mercantile Mut. Ins. Co. v. Hope Ins. Co.*, 8 Mo. App. 408. But, conceding the foregoing doctrine to be sound, it does not follow that the plaintiff was bound to assume, when it purchased the notes in controversy, that they had been unlawfully sold and indorsed to the defendant bank, and that the transaction between it and Allis, its president, was perhaps voidable. As the Little Rock Bank had an undoubted right to purchase the notes even from its president, the plaintiff was entitled to act upon the presumption, in the absence of knowledge to the contrary, that they had been lawfully acquired through the agency of some disinterested person or persons who were authorized to represent the defendant bank. So far as we can see, there was nothing on the face of the notes, or in the correspondence relating to the same, which tended to rebut such presumption or to put the plaintiff on inquiry.

For these reasons we are forced to conclude that the circuit court erred in instructing the jury, as it did, in substance, that the notes in suit gave notice to the plaintiff when it received them for discount, that they were the property of Allis, and that he had indorsed them in the name of the defendant bank, for his own benefit, and probably without authority. That view of the case, which was the sole reason that induced the trial court to instruct the jury to return a verdict for the defendants, derives no support from the case of *West St. Louis Savings Bank v. Shawnee County Bank*, 95 U. S. 557, on which much reliance appears to have been placed by the trial court. In the latter case, the cashier of a bank borrowed money from another bank on his individual note for his own benefit, and indorsed the note in the name of the bank with which he was connected. The bank from whom the money was borrowed understood at the time that the money was to be used by the cashier for his own benefit, and that the indorsement placed on the note was an accommodation indorsement. It was held that the indorsement created no liability against the corporation whose name had been thus placed upon the paper as indorser, without authority, by its cashier. It is hardly necessary to observe that no such case is presented by the present record. In the suit at bar, the defendant bank itself offered the notes in suit for rediscount; the request for the discount was made by its president and cashier, each acting in an official capacity; the offer was accompanied with a satisfactory excuse for seeking a rediscount,—such an excuse as would naturally disarm suspicion. Moreover, the paper offered for rediscount appeared to have been regularly indorsed to the defendant bank; it was ostensibly in its possession, and the proceeds of the discount were passed to its credit and were subsequently paid out on its checks. Under these circumstances, it cannot be said that the plaintiff acted in bad faith, or that it was affected with notice that the Little Rock Bank was merely an accommodation indorser. *Murray v. Lardner*, 2 Wall. 110, 121; *Hotchkiss v. Bank*, 21 Wall. 354, 359.

It is insisted, however, that the judgment of the circuit court was



for the right party, and that it ought not to be disturbed, even though the theory upon which the instruction was given was erroneous, and even though the plaintiff had the right to assume, when it discounted the notes in suit, that they belonged to the defendant bank and were being discounted for its benefit. The substance of the argument in this behalf is as follows: It is said that the transaction between the two banks, whereby the plaintiff bank acquired the paper, was either a loan to the defendant bank of \$31,871.27, that sum being the proceeds of the discount of December 16, 1892, or that the transaction was a rediscount; that, in either event, the transaction was so far outside of the usual course of banking business, as ordinarily conducted, that neither the president nor the cashier of the defendant bank had any authority to enter into the negotiation without the prior sanction of its board of directors. Hence it is urged that the plaintiff's title is defective; that it did not acquire the paper in the usual and ordinary course of business; and that it is not a bona fide holder, because the board of directors of the Little Rock Bank did not authorize the loan or rediscount or subsequently ratify it. The proposition last stated appears to be mainly founded on the decision in *Bank v. Armstrong*, 152 U. S. 346, 14 Sup. Ct. 572, which decides, in substance, that the borrowing of money by a national bank, though not illegal, is so much out of the course of ordinary and legitimate banking business as to require those making the loan to see to it that the officer or agent acting for the bank has special authority to borrow money. With reference to this contention, and, as a reason for refusing to consider it upon the merits at this time, we remark, in the first place, that no such question appears to have been considered and decided by the trial court, and, in the second place, that the answer filed by the defendants did not, as we think, fairly present such a defense. The answer undoubtedly raised the issue that was decided by the circuit court, that is to say, it denied that the notes described in the plaintiff's complaint were ever indorsed and delivered to the defendant bank; it denied that said notes were ever the property of or in the possession of said bank; it denied that said bank ever indorsed or delivered the notes to the plaintiff, or that said bank ever received any consideration for the indorsement and delivery of the same. On the other hand, the defense attempted to be made in this court is of a contradictory character, in that it concedes the ownership and possession of the paper by the defendant bank, and attempts to avoid the sale of the notes to the plaintiff, on the ground that its president and cashier acted without authority, express or implied, in making the sale. We think that the answer was insufficient to raise a defense of this character, and that the judgment cannot be supported in this court upon the ground last above stated.

An attempt is also made in this court to sustain the judgment below on account of certain alleged defects in the proceedings taken at the maturity of the notes in suit, to fix the liability of the defendant bank as an indorser thereon. The notes were each made payable at the First National Bank of Little Rock, Ark. The answer averred that, at the maturity of the paper, said bank had ceased to do business, that the makers of the notes resided in Little Rock, and that no

demand was made upon them for payment, and that no notice of dishonor was given to any person who was authorized to receive such notice for and in behalf of the defendant bank. While the answer contained this allegation as to the insufficiency of the demand and notice of dishonor, yet the defense so pleaded seems to have been abandoned at the trial. No objection was made to the several certificates of protest when they were introduced in evidence, and no instructions were either asked or given touching the adequacy of the proof to fix the liability of the defendant bank as an indorser. If, instead of a verdict in its favor, a judgment had been rendered against the defendant, it is clear that the alleged defect in the proceedings taken to fix the indorser's liability, which is now relied upon to sustain the judgment, would not have been available in this court as a ground for reversal. We think, therefore, that, under these circumstances, the supposed defect last mentioned will not serve to support a verdict that is otherwise clearly erroneous. It is a mistake to suppose that a defense which was clearly abandoned at the trial can be invoked in an appellate court to sustain a judgment that was rendered in pursuance of an erroneous view as to the merits of some other defense. For the reasons heretofore indicated, the judgment is reversed, and the case is remanded, with directions to award a new trial.

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UNION TRUST CO. OF NEW YORK v. ATCHISON, T. & S. F. R. CO.

KEENAN et al. v. RECEIVER OF ATCHISON, T. & S. F. R. CO.

(Circuit Court, N. D. Illinois. November 26, 1894.)

**CARRIERS—LIVE STOCK SHIPMENTS—TERMINAL CHARGES—LOCATION OF DEPOT.**

A carrier's rates from one station to another must be a single charge, and where live stock is shipped to Chicago the carrier cannot make a terminal charge for delivery at the stock yards, which are off its line, where, by its universal practice, for many years, it has made the stock yards its depot for delivery of live stock.

Proceedings by Wilson T. Keenan and others against the receiver of the Atchison, Topeka & Santa Fé Railroad Company, appointed in the suit against that road by the Union Trust Company of New York, to determine the legality of terminal charges made by the receiver.

Green & Robbins, for petitioners.

E. A. Bancroft, for receiver.

GROSSCUP, District Judge. The petition of Wilson T. Keenan, and the subsequent petition of Dowd & Keefer and others, with the answers of the railroad company thereto, raise the question of the legality of certain so-called "terminal charges" demanded by the defendant. The petitioners are commission merchants at the Union Stock-Yards & Transit Company's yards, and have been engaged for many years in receiving consignments of cattle from the West and Southwest. The railroad company is a common carrier, engaged, among other things, in transporting live stock from Kansas City and other points to Chicago. In association with other railroad com-

panies, the defendant had, until June, 1894, been delivering to the stock yards, at a single freight rate, its live-stock cars. The stock yards are not on the line of its track, but are only reached over a line owned by the Union Stock-Yards & Transit Company. Until June last, no charge was imposed upon the railway by the stock-yards company for the use of its tracks, but since that date a charge of 40 cents a car, each way, has been demanded and collected. To meet these expenses, and the additional cost and labor of transporting the cars from its own line, over that of the stock-yards company, into the yard, the defendant road, along with the other railways centering in Chicago, in June last, issued a circular letter adding to the freight rate from Kansas City to Chicago ( $23\frac{1}{2}$  cents a hundred) then in force an additional charge of \$2 per car, as a terminal charge, and since that date the defendant road has been demanding and receiving this additional charge. The petitioners, Dowd & Keefer and others, challenge the legality of this charge, and ask the court to instruct the receiver to discontinue it for the future. The petition of Keenan shows the shipment from Kansas City, by his consignor, of four cars of live stock to the railway company's Chicago station, for which all the charges have been paid, except this terminal charge of \$2 per car, and asks the court to instruct the receiver to deliver to the petitioner the cattle shipped in these cars, notwithstanding his refusal to pay this terminal charge. Both petitions, however, in the end, turn upon the legality or illegality of the so-called "terminal charge." The railway company has at Twelfth street yard, room enough to establish a delivery station, and some facilities in that direction; but it was not claimed upon the hearing that these yards had been for many years used for such purposes, or that they could be now used, until additions and modifications were made.

The specific question raised is this: Is the railway company, under its freight rate of  $23\frac{1}{2}$  cents per 100, required to transport the live stock delivered to it at Kansas City to the stock yards without further charge? The question is not one of contract between the petitioner and the railway company, but is a question of right between it and the public. The defendant is a common carrier, and the petitioners are entitled to the same rate that the public can demand. Their particular contract or special knowledge, therefore, is inconsequential, for common carriers are required to serve all alike, and may not exact—even by contract—from one what it cannot rightfully impose upon all. It is a servant of the public, entitled to charge for its services what the law permits, but not allowed to discriminate between shippers; and that, too, irrespective of whether such discrimination is the result of oppression and duress, or of voluntary contract. Stability of business conditions and fairness in business competition require that each man's expenses at the hands of the carrier shall be the same as those accorded to all others,—no more and no less,—and the law will not permit that such equality should ever be disregarded by the carrier, or voluntarily waived by the shipper. What charge, then, can the defendant company lawfully impose upon the general public for the transportation of live stock from Kansas City to the stock yards in Chicago?

The duty of the carrier is to furnish facilities for loading, carrying, and unloading. Its custody of the stock remains, and its obligation is not discharged until the shipper is furnished with proper facilities to unload. The carriage includes the delivery, and there can be no delivery, except at such a place as is suitable to the delivery of the particular thing carried. A delivery of live stock in the company's passenger station or freight platforms, unattended with suitable chutes, yards, etc., would be no delivery at all. It is the duty of the carrier, therefore, as said in the Covington Stock Yards Case, 139 U. S. 128, 11 Sup. Ct. 461, to furnish these facilities to the shipper.

The freight demanded covers the entire service of the carrier from depot to depot. It is in law the compensation, not only for the actual carriage, but also for the facilities furnished for loading and unloading. The service is a single one, and the compensation is likewise single. The law will not permit the charge for such single service to be divided. A carrier cannot make up its bill of charges in items,—one for loading, one for carriage, one for personal service of attendants, one for delivery, etc. The freight is not an aggregate of separate charges, but a single charge. This policy of the law is not because a particular shipper might not deal with the carrier as intelligently in the case of one method as in the other, but because the public is not so likely to deal intelligently with a series of items as with a single freight rate. The shipper may be intelligent or unintelligent, ignorant or educated, accustomed to business, or inexperienced in such affairs, deliberate and careful, or hasty and uninquiring. The service of the carrier is for one as well as the other. A single charge presents to him at once the whole problem. A series of charges might confuse him, and leave uncertain what, in the end, the aggregate would be. For illustration, many roads centering in Chicago reach their passenger stations over other lines. Would it be tolerable to permit them to sell tickets from New York or Louisville to Chicago at a single rate, and then impose a further terminal charge at this end of the line? Would such practice be made less intolerable by the fact that the company actually carried the passenger on its own line within the corporate limits, thus fulfilling the letter of the contract, or by the fact that the additional terminal charge was posted, along with other rates, in the station of departure? The practical objection is that the public generally knows or ascertains the locality of the company's station within the city of destination, but in few instances consults the posted passenger rates. If the public did consult the posted rates, it would only be confused by any method other than that of a single rate, for travelers do not usually carry pencils and tabs, and the majority would be unable to figure out satisfactorily the results of tabulated statements. The law comes to their rescue by requiring the carrier to name, under a single and definite item, the cost of its entire undertaking, from station to station. It may be admitted that the reasons for a single charge in the case of freight traffic are not so cogent as in that of the carriage of passengers, but they are of the same character, and are calculated to safeguard the public against miscalculations and mistakes. Any other rule would expose those who are entitled to

the service of the carrier to hardships and injustice that can easily be avoided, and open up opportunities to dishonest or tricky carriers that should not be tolerated.

The duty of the defendant company, in this case, therefore, is to carry the live stock offered to it at Kansas City to its station of delivery in Chicago at a single charge, without the imposition of other charges, under any name or pretext. This does not exclude additional charges for services beyond the defendant's undertaking, or change the obligation of defendant with respect to goods or stock accepted for delivery at its Chicago station, when delivery is made, or offered to be made, at that station. It sometimes happens that a further service is required. The shipper may not wish his goods delivered at the station, but at some other point in the city, reached, perhaps, over another railroad's tracks, or by some other method of transportation. A terminal charge for this service is proper, both because it is not included in the carrier's undertaking, as held out to the public generally, and because such additional service to a special shipper, without charge, would be unfair to his competitors. In such cases the law permits, and the interstate commerce act expressly recognizes, the right of a terminal charge. The only limitations are that the additional charge be reasonable, and that the amount be announced in advance, so that the particular shipper wishing the additional service may be advised of the amount of his increased obligation.

The inquiry then resolves itself to this: Do the chutes and sheds at the stock yards constitute the defendant's Chicago station for the delivery of live stock, or are they at a point beyond or different from the station? If the former, a terminal charge cannot be imposed; if the latter, it may. The fact that the defendant may have some place on its line of road in Chicago where stock could be delivered is not absolutely controlling. The construction and the maintenance of yards unused would not necessarily establish the locality of the station. The question is practical, not technical, and is to be solved, not so much by what the carrier might pretend to do, as by what it actually does. The attention of the public is arrested by actualities, and its understanding of the carrier's undertaking is derived from what the carrier commonly does. To circumvent that understanding by a pretense of maintaining yards where they are not used might be worse than boldly disregarding the law itself, for the rule of law requiring a single charge from the point of acceptance to the point of delivery has no reason for existence, save that the reasonable understanding of the public may not be disappointed. Neither is it a sufficient answer that the practice of the company in this case does not differ from that of carriers where terminal charges are allowed, except that in respect of live stock the deliveries of this company to a point off its line are universal, while in the cases where terminal charges are allowed such deliveries are only special and occasional. The universality of delivery at a certain place, or something approaching that, may be the very thing that constitutes that place the company's depot. If the practice of the carrier is of such a character that the public is reasonably led to understand a certain place to be the com-

pany's depot, the carrier should be held to that understanding. Terminal charges are allowed in particular cases where the delivery is to be somewhere else than at the carrier's depot, but that does not allow the carrier to establish its depot at some place off the line, and then add terminal charges. Where, then, in contemplation of law, is the defendant's station for the delivery of live stock in Chicago? The petitions and the answer, and the admissions at the hearing, leave me in little doubt that it is, and has been for a long time, at the stock yards. At no other place have car loads of stock, so far as I am advised, been delivered or unloaded for years. At no other place in Chicago could the company accomplish the delivery of the live stock that comes over its line, except by extensive creation of facilities. There has been nothing in the carrier's practice upon which the shippers at Kansas City could form a belief that the cars would go anywhere else in Chicago than to the stock yards. Lay aside, for illustration, any consideration of rate, and view this case as if it turned upon the right of the shipper to have his live stock delivered at the stock yards, and nowhere else. What would be his right in that respect, on the facts disclosed? He certainly had a right to a delivery at some particular place in the city. Chicago covers a large area, and it cannot be within the power of the carrier to discharge the cargo anywhere within the city limits. The right of delivery at a fixed depot—the depot in contemplation at the time of shipment—is as much a right, under the conditions that prevail in this city, as the right of delivery within the city limits at all. An unloading at Twelfth street might be as great an injustice, in view of the shipper's reasonable understanding, as an unloading 25 miles in the country. At what depot, then, can he insist upon a delivery? Certainly, in my judgment, at that place the carrier has held out as the depot. Now, why is that true? Not because the carrier has expressly so agreed. Its contract makes no mention of any place except the Chicago station. It is simply because the law, by implication, makes that a term of the understanding, which the conduct of the parties reasonably imports into it. If such practice makes the stock yards the depot of the company, for the purpose of fixing the right of the parties in respect of the locality of delivery, is there any reason why defendant may not likewise make it the depot for the purpose of ascertaining the legality of the rates? If it is the actual depot, in view of which all shipments are made, it is also the local depot, in view of which all rates must be adjusted. To say that, contrary to the prevailing practice, the company could deliver anywhere it pleased, except upon special arrangement, would be to deny the plainest implication of the law. To admit that the delivery, except in specially understood cases, must be at some fixed place, but deny that such place was the depot of the company for such, would amount to saying that the company's obligation was to deliver at some place other than its depot. I am impressed with the belief that the practice of the defendant has made the stock yards its depot for the delivery of live stock. The fact may, on further proof and consideration, be seen to be otherwise, but I am convinced I should enter an order in consonance with present impressions. The court cannot suffer its receiver

to impose doubtful charges. An order will accordingly be entered requiring the receiver to deliver to Keenan the four cars of stock in question without the payment of further charges, and also instructing the receiver, until the further order of this court, to discontinue the levying of the additional terminal charge upon live stock between Kansas City and Chicago. Nothing in this order, of course, will prevent the defendant company from changing its freight rates between these two points, or from establishing, in good faith, any depot in Chicago, other than at the stock yards, for the delivery of live stock, provided such a change would be good business policy.

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ST. LOUIS ELECTRIC LIGHT & POWER CO. v. EDISON GENERAL ELECTRIC CO.

(Circuit Court, E. D. Missouri, E. D. December 17, 1894.)

No. 3,651.

**1. AGENCY—ACCEPTING EMPLOYMENT WITH COMPETITOR OF PRINCIPAL.**

One G. made a contract with the S. Co. to act as its agent in the state of Missouri in the sale of electric motors manufactured by it. By said contract it was provided that the S. Co. should not sell any motors in that state, except through G.; that G. would prosecute the business diligently, and not engage in any other, except the furniture, business, in which he was then engaged, or be interested in the sale of any other motors. Shortly after making this contract, G. made another with the L. Co., which was engaged in the business of furnishing electric power, and thereby assigned to it the proceeds of his contract with the S. Co.; agreed that he would not sell the S. Co.'s motors within a certain important district in the city of St. Louis, Mo., and that he would give his active personal management to the business of the L. Co., for which he was to receive a salary from that company. G. did not inform the S. Co. of the making of this contract. *Held*, that the making of such contract with the L. Co. was a breach of G.'s prior contract with the S. Co., and was also forbidden on grounds of public policy by his relation of agency for the S. Co., and it was immaterial that the S. Co. had in fact suffered no damage.

**2. PRACTICE—REFEREE'S FEES.**

Upon a motion to fix referee's fees, it appeared that the referee was engaged not more than seven weeks in hearing the evidence, which was voluminous, but was taken by a stenographer, who was paid by the parties, and in preparing his report. The amount in controversy was about \$37,000. *Held*, that an allowance of \$2,000 would be excessive, but \$1,200 would be allowed.

This was an action by the St. Louis Electric Light & Power Company, assignee of one D. W. Guernsey, against the Edison General Electric Company to recover commissions alleged to be due under a contract. The case was sent to a referee and on the coming in of his report both parties filed exceptions.

This controversy grows out of a contract made on the 12th day of April, 1887, between the Sprague Electric Railway & Motor Company (hereinafter called the "Sprague Company"), a New York corporation, and one D. W. Guernsey, constituting said Guernsey agent for said company for the sale of electric equipments for railways and stationary motors, etc. The action is to recover commissions alleged to be due and owing to said Guernsey by the defendant company as the successor of said Sprague Company, under an alleged contract of novation. The case was referred by the court to Edward T. Farish, as referee, to make report thereon. On the coming in of his report

both parties filed exceptions thereto, and defendant more especially. These exceptions were heard by the court, both on oral arguments and printed briefs.

Boyle, Adams & McKeighan and Geo. W. Taussig, for plaintiff.  
Seddon & Blair, for defendant.

PHILIPS, District Judge. A vital question lies at the threshold of this controversy, raised by the pleadings and evidence, which disposes conclusively of the plaintiff's action, if the defendant's contention in this particular obtains. By the provisions of the contract of agency between said Sprague Company and said Guernsey it is stipulated in the third paragraph that the Sprague Company should not, during said agency term, sell, furnish, rent, lease, or license, in the state of Missouri, any of its motor machinery apparatus, or permit any other person to make such sale, etc., or permit any other person to take the same into said territory. By the eighth paragraph it is provided that:

"Said party of the second part further agrees faithfully and diligently, at its own cost and expense, to prosecute said business of selling motors, machinery, and apparatus for said party of the first part in said territory, devoting such time thereto as he reasonably can, considering the other business in which he is now engaged (furniture business); and further agrees that, during the continuance of this contract, he will not engage in any other business, without the written consent of the party of the first part."

By the tenth and eleventh articles it further provided:

"(10) Said party of the second part further agrees that he will not be engaged or interested directly or indirectly in the introduction or sale of any other electrical motor, or system of electrical transmission of power. (11) It is further mutually agreed, by and between the said parties, that, in case of any breach of this contract by either party hereto, the aggrieved party may terminate the same by sixty (60) days' notice in writing given to the party committing the breach."

This contract was entered into April 12, 1887. Afterwards, on June 1, 1888, Guernsey entered into a contract with the plaintiff company which recited, *inter alia*, that whereas, said Guernsey is the authorized agent of said Sprague Company, under a certain contract, "and whereas, the said party of the second part is desirous of securing to itself the benefits, profits, and advantages now enjoyed by the said party of the first part [Guernsey] under said contract and power of attorney, and also of securing the active services of the said party of the first part [Guernsey] in the management and prosecution of its business,"—"said party of the first part [Guernsey] agrees and hereby assigns, transfers, and sets over, unto said party of the second part [the plaintiff company], all the profits, benefits, and commissions coming and accruing to him under and by virtue of his said contract with said Sprague Company to said party of the second part for and during the term of five years from the date hereof. Said party of the first part also agrees that he will not himself sell, let, or dispose of motors commonly known as the 'Sprague Motor,' or become interested in any person, partnership, or corporation whose object is the sale or renting of such motors, for use to persons or corporations within the following described district of the city of St. Louis." (Then follows a description by metes and bounds of certain streets and avenues in the city of St. Louis.) "And that he will give such



active personal management to the conduct of the business of said St. Louis Electric Power Company as is necessary to the successful prosecution thereof. Said party of the second part agrees to pay to the said party of the first part the sum of \$1,800 per annum, in equal monthly installments of \$150 each, on the first day of each month hereafter and during the continuance of this contract, to wit, until June 1, 1893, and that it will defray traveling expenses of said party of the first part when engaged in the prosecution of the business of said party of the second part."

It does not admit of debate that, without more, this contract on the part of Guernsey was wholly incompatible with and antagonistic to his prior engagement with the Sprague Company. For the express contract of the first engagement was that, with the single specified exception of his private business as a furniture merchant, he was faithfully and diligently to give his time and services to the prosecution of the business interests of the Sprague Company, and that during the continuance of the contract he would not engage in any other business without the written consent of the Sprague Company; whereas, by his contract with the plaintiff company, he not only assigned and transferred to the plaintiff company all the profits, benefits, and commissions from the Sprague Company, but it boldly recites that the St. Louis Company, as his new liege lord, desired to secure, not only the benefit of his agency, but the active services of Guernsey in the management and prosecution of its business. Nor was this all, but he obligated himself to abandon to the St. Louis Company that part of the territory in the city of St. Louis which of right, under his contract with the Sprague Company, belonged to the latter company for the sale and placing of motors; and, as evidence conclusive that both he and the St. Louis Company understood and believed that the services to be rendered by Guernsey to the latter company were most valuable, he was to receive a salary of \$1,800, in monthly installments, and his traveling expenses when engaged in the prosecution of the business of the St. Louis Company; "and that he will give such active personal management to the conduct of the business of said St. Louis Electric Power Company as is necessary to the successful prosecution thereof." Aside from the express terms of the contract between Guernsey and the Sprague Company, his relation of agency for the latter company absolutely forbade him, upon grounds of sound public policy, from entering into another agency contract with another company engaged in a similar business, binding him to activity in the prosecution of his new master's business, and consenting to abandon a part of the field which he had engaged to occupy for the first master. The plaintiff recognizes this inflexible rule of public policy and justice by relying upon certain matters by way of avoidance. It is claimed, first, that it was not intended by either of the parties to the latter contract to preclude Guernsey in selling the Sprague motors, etc., within the prescribed district, and claiming that the same was not in force, but that Guernsey continued to sell the same therein; and, second, that by reason of the plaintiff's engaging in said business it served to create a larger demand for said Sprague motors in the city of St. Louis,

and that property was billed and charged to said Guernsey, and that the plaintiff company was the only one in St. Louis that could run the Sprague motors in supplying power to commercial customers, and that Guernsey, during the life of said contract, sold in said district a large number of such motors; and, third, that the Sprague Company and defendant knew of said contract and services Guernsey was rendering the plaintiff without objecting thereto.

The reply is somewhat *sui generis*. It is rather an argument than a statement of facts constituting a good defense. The argument is that, notwithstanding the contract obligated Guernsey, without the written consent of the Sprague Company, to wholly abandon to the use of the St. Louis Company certain territory in an important business portion of the city of St. Louis, yet there was no actual breach of the contract of agency between Guernsey and the Sprague Company, because the St. Louis Company did not in fact carry into effect that part of the agreement. It does not plead, nor is it claimed, that this provision of the contract between Guernsey and the plaintiff was abrogated, but simply because there was a nonuser it constituted no infraction of Guernsey's contract of agency with the Sprague Company. I do not so understand the law. The law will not tolerate contracts and transactions which place one under obligations to do wrong, or which subjects him to wrong influences. On grounds of public policy, the law denounces such conduct, because of its direct tendency to induce fraud upon the rights of others. "One employed by another to transact business for him has no right to enter into a contract with a third person which would place it in his power to wrong his principal in the transaction of the business of the latter, and which would tempt a bad man to act in bad faith towards his employer. The interests of the defendant's employers and those of the plaintiff's, as buyers and sellers, were antagonistic, and defendant could not serve two masters in a matter in which there was such a conflict of interests." *Pegram v. Railroad Co.*, 84 N. C. 696; *Atlee v. Fink*, 75 Mo. 103, 104. And, when we turn to all the facts disclosed by the evidence in the record, we find that they do not justify this attempted avoidance. It is true that Guernsey may have sold for the Sprague Company motors, etc., which may have been used in the prescribed district, but he was acting in fact in the interest of the St. Louis Company, in which he got a discount, on the plea that it was a purchase for himself; so that he occupied the attitude of an agent for the Sprague Company, for which he received the benefit, and turned the purchase over to the St. Louis Company, which presumably obtained its profit, and which profit went to swell the cheque of Guernsey as a stockholder in the St. Louis Company. Guernsey did not thereafter sell a single motor directly to any purchaser within the restricted district, but he sold them for the St. Louis Company. It is no justification to say that, by reason of the arrangement made by Guernsey under his contract with the St. Louis Company, the interests of the Sprague Company may have been promoted as the sum of the final result. The law will not permit an agent thus violating the express terms of his contract of agency to say, if it ultimately turns out that his employer was not in fact dam-

aged, there was no breach of his contract, as the authorities hereinafter declare.

The other matter relied upon by the plaintiff in this contention is of the nature of a waiver on the part of the Sprague Company and the defendant company. It is elementary law that, to constitute a waiver, the party upon whom it operates must have full knowledge of all the essential or material facts of the acts and conduct of the other party, and, with such knowledge, consents to proceed notwithstanding; and the party relying upon such waiver assumes the burden of proof as to the knowledge of the party making the waiver. *Bigelow, Estop. tit. "Waiver,"* p. 660; *Dyas v. Hanson*, 14 Mo. App. 364. An examination of the evidence wholly fails to show that the Sprague Company, much less the defendant company, had any knowledge whatever of the facts either that Guernsey had made the character of assignment recited in his contract with the St. Louis Company, or that he had obligated himself therein to retire from the designated territory in St. Louis, or that he was receiving from the St. Louis Company the sum of \$1,800 per year for his services, with expenses added for travel in prosecuting the business of the latter company. When pressed on this matter as to what knowledge the Sprague Company had, Guernsey simply testified that his letter heads, used in correspondence with the Sprague Company, showed that he was president of the St. Louis Company, and that the company knew he was largely interested in the St. Louis Company. He said:

"I don't know that he knew how much interest I had in it, but my letter head showed that I was president of the company. We didn't talk about that that I know of, particularly; but he knew that I was president of the company, and knew that I was largely interested, and it was more at his suggestion than that of anybody else that I was to install a hundred horse power before I was to receive the agency on the formation of the company."

All the persons representing the Sprague Company and the defendant company testified that they did not understand Guernsey's relation to the St. Louis Company, the extent and particulars thereof. The contract expressly providing that he should not engage in any other business without giving written notice to the Sprague Company, it became his imperative duty, in good faith, before entering into such apparently antagonistic relations with another company, to notify his principal thereof and obtain its consent thereto. The fact that he not only failed to do this, but did not at any time inform his first principal of the whole provisions of his contract, is most persuasive evidence that it was a studied concealment. It is incredible to believe that had the Sprague Company known that its agent had bound himself not to solicit business in an important business portion of the city of St. Louis, and that he was actually receiving from another company, in whose favor he abdicated as to such territory, his salary for his active services in prosecuting the business of the new company, it would not either have refused its assent, or demanded that he turn over the pay he was receiving for services under his contract, which of right belonged to the Sprague Company; and, as to the defendant company, his concealment of even the existence of his contract with the St. Louis Company from Mr. Herrick, the representative of the defendant company, in March, 1890, when he was

advised by Mr. Herrick that it was the policy and purpose of the defendant company to get rid of the agents of the old Sprague Company, and to do the business directly itself without the intervention of such agency, is most indefensible. When thus notified by Mr. Herrick, he planted himself squarely upon the provision of the contract with the Sprague Company, which entitled him to a year's notice to quit; whereas, had he disclosed the facts of his contract with the St. Louis Company, there can be no question but that the defendant company would have exercised the right secured by the other provision of the contract, which authorized the termination of the agency on sixty days' notice; and, in view of the fact that the claim for commissions is based largely on transactions occurring after the defendant's alleged succession, gives especial force to the last criticism.

The report of the referee in respect of this issue is argumentative and apologetic in extenuation of Guernsey's bad faith. In respect of the assignment of Guernsey's benefits and compensations under the Sprague Company contract, the referee says it was not unlawful, nor a breach of his agency contract. This is a mere conclusion of law, without any reference to the recited fact in the contract that the inducement to the assignment was that the St. Louis company desired to secure both the benefit of Guernsey's agency and his active services in the management and promotion of its business. This was an express division of Guernsey's services between the two companies, and a dividing of his allegiance which he had contracted theretofore to give wholly to the Sprague Company. And it ought to follow that as by the express terms of Guernsey's contract with the Sprague Company he was to give his undivided services to the Sprague Company, with the single specified exception as to the furniture business, his earnings from the St. Louis Company should of right belong to his first master.

The referee also finds that it ought to be a sufficient answer to the concealment by Guernsey of the contract that he was receiving \$1,800 from the St. Louis Company; that his furniture business had collapsed; and that the quantum of time given to his new master was, perhaps, not greater than that which would otherwise have been given to his furniture establishment. As the only reservation of time on the part of Guernsey made in the contract with the Sprague Company from attention to its business was the specified furniture business, when that ceased the law is that the Sprague Company became entitled to his whole time and services. He could not substitute any other service without notice to and consent by his principal. Neither does the referee find the fact to be that either the Sprague Company or defendant had knowledge of the fact, even, of the existence of the written contract, or of the assignment of its benefits and commissions under the contract with the Sprague Company, or of the exclusion of Guernsey from the prescribed territory in St. Louis for the sale of motors, or that he was receiving from the St. Louis Company a salary for his services rendered to it. Nor does the referee make report of finding of the real facts respecting the manner in which the goods of the Sprague Company were admitted, through the St. Louis Company, into said restricted terri-

tory. He merely undertakes to show how the Sprague Company was not in fact, as the result of the transaction, injured by Guernsey's contract with and services rendered to the St. Louis Company.

The referee seems to have ignored the just rule of law laid down repeatedly by the courts, that "where the double employment exists, and is not known, no recovery can be had against the party kept in ignorance, and the result is not made to turn on the presence or absence of designed duplicity and fraud, but is a consequence of established policy. It matters not that there was no fraud meditated and no injury done; the rule is not intended to be remedial of actual wrong, but preventive of the possibility of it." "The danger of temptation from the facility and advantage for doing wrong, which a particular situation affords, does, out of mere necessity, work a disqualification." *Scribner v. Collar*, 40 Mich. 375; *Everhart v. Searle*, 71 Pa. St. 256; *Rice v. Wood*, 113 Mass. 133; *De Steiger v. Hollington*, 17 Mo. App. 382. The referee draws the inference of knowledge as the predicate for a waiver from the mere fact that the Sprague Company knew that Guernsey was president of the St. Louis Company and interested therein, and the like. The conclusion of law made by him is a non sequitur. It is an indispensable rule of pleading on a breach of contract that the plaintiff should aver that he himself has fully kept and performed the contract on his part. This the plaintiff's counsel recognized in his petition, which makes this necessary averment. As said recently by the federal court of appeals in this district through Sanborn, J., in *Cattle Co. v. Martindale*, 11 C. C. A. 33, 63 Fed. 84:

"The rule is general that he who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure to perform, and it rules this case."

Again, the learned judge says:

"The reason why the vendor could not recover was that he had committed the first breach of the contract, and that released the vendee from subsequent performance on his part. \* \* \* If a default on the first installment by one party relieves the other contracting party from the performance of all the stipulations of the contract, by so much the more will a default on a later installment relieve one from all subsequent performance. It is the first breach which he commits, and not the number of the particular installments to which it relates, that defeats the plaintiff in this action."

It is not questioned that had Guernsey or the plaintiff advised in form or effect the Sprague Company and the defendant of the substantive provisions of his contract with the St. Louis Company, and, with a knowledge thereof, the Sprague Company and its alleged successor had continued thereafter to recognize Guernsey's agency in their dealings with him, they would have been estopped from denying their liability to him under the contract of agency. But it does seem to me that to permit the plaintiff to recover in this case would be to render it of no avail to a party to put in his contract an express provision requiring notice, in writing or otherwise, that his agent was taking active service under another principal, and that the courts, instead of respecting and enforcing explicit contracts between parties, may disregard and nullify them. In view of the conclusion thus reached, it is unnecessary to discuss other exceptions made to the referee's report, as it must result that the plaintiff cannot recover.

The referee asks for an allowance of \$2,000 in compensation for his services herein. It appears that prior to the filing of his report, upon request made by him, each of the parties hereto advanced him the sum of \$500, to be accounted for in the final adjustment. There does not appear to be any specific provision in the federal statute for a referee in law actions. On the contrary, it has been expressly held that without the consent of both parties the United States circuit court cannot compel the parties to submit to a referee in an action at law, for the obvious reason that the law entitles the party to a trial by jury. *U. S. v. Rathbone*, 2 Paine, 578, Fed. Cas. No. 16,121; *Machine Co. v. Edwards*, 15 Blatchf. 402, Fed. Cas. No. 6,784. With the consent of both parties, such reference may be made. *Canal Co. v. Swann*, 5 How. 83-89; *Heckers v. Fowler*, 2 Wall. 123. How far the mode of procedure under such reference may or shall conform to the provisions of the local state statute concerning references, it is not necessary here to decide. It is apparent, from the preliminary action taken by the referee, in qualifying, and in his subsequent proceedings, he evidently conceived that the state Code applied. The state statute (section 2158) provides, in the absence of any agreement special, the compensation of the referee shall be fixed by the court, "not exceeding ten dollars per day." Neither of the parties insist that this limitation of compensation shall be applied in this instance. But it is objected that the amount asked for by the referee is unreasonable, and so the court thinks. From the best information furnished, it does not appear that the referee was occupied over seven weeks in hearing the evidence and preparing his report. The evidence, it is true, is quite voluminous; but the evidence was taken by a stenographer, and transcribed by him, for which I assume the parties paid. The report does not indicate that it could not have been prepared within five days or a week. It is true the matters in controversy were large, involving in actual dispute about \$37,000, but compensation ought always to be regulated by the quantum of actual work, rather than by the speculative disputes of the parties or the sums involved to the disputants. Courts are always plagued by bad precedents; so that large and fanciful allowances to masters in chancery and referees are hurtful in two directions: They beget struggles for such appointments because of their undue rewards; and they put such burdens on the litigants, in the matter of costs to the unsuccessful litigant, that attorneys, with due regard to the interest of their clients, will decline to consent to such references, thereby lessening the opportunities of the courts to relieve themselves of almost insupportable burdens by calling to their aid the assistance of masters and referees. In this case I should have deemed \$1,000 as a sufficient remuneration to the referee; but, out of deference to his earnest contention, it is ordered that his compensation be taxed at \$1,200. It results that the exceptions to the report of the referee on the part of the defendant must be sustained, for the reason that the plaintiff is not entitled to recover, and the exceptions on the part of the plaintiff are overruled. Judgment for the defendant that the plaintiff take nothing by its action.

## CARTER v. WELLS, FARGO &amp; CO.

(Circuit Court, S. D. California. December 10, 1894.)

No. 561.

**NEW TRIAL—INADEQUACY OF DAMAGES.**

Where, in an action for personal injuries, the jury finds, in effect, that the plaintiff has been injured through the negligence of the defendant, without any contributory negligence on his own part, and the evidence, without conflict, shows that his injuries were substantial, yet the jury awards him practically no damages at all, the verdict will be set aside and a new trial awarded.

This was an action by James A. Carter against Wells, Fargo & Co. for damages for personal injuries. The jury gave a verdict for the plaintiff for one dollar. Plaintiff moves for a new trial.

Wellborn & Hutton, for plaintiff.

Pillsbury, Blanding & Hayne and Graves, O'Melveny & Shankland, for defendant.

ROSS, District Judge. This action was brought to recover damages in the amount of \$10,000 for personal injuries alleged to have been sustained by the plaintiff by the negligence of the defendant. The verdict of the jury in favor of the plaintiff necessarily included a finding that the defendant was negligent, and that there was no contributory negligence on plaintiff's part, as set up in defense of the action. There was much evidence in the case tending to show that there was no negligence on the part of the defendant, and, further, that there was such contributory negligence on plaintiff's part as should prevent a recovery by him; and, had the verdict been in favor of the defendant on either or both of those propositions, there would be no interference with it by the court, for the evidence in respect to those matters was substantially conflicting, and the issues in respect thereto were for the determination of the jury, under appropriate instructions from the court, which were given. But the verdict being, in effect, that plaintiff was injured by the defendant's negligence, without contributory negligence on his own part, he was manifestly entitled at the hands of the jury to substantial damages. The evidence was without conflict that the collision which caused the plaintiff's injury threw him from a scaffold eight or ten feet high (on which he was at the time working, for two dollars per day) to the ground, his head and shoulder striking on a large rock, from which he was picked up in an unconscious condition; and that, after regaining consciousness, he was carried to the county hospital, where he remained about five weeks, two weeks of which time he was confined to his bed. These facts of themselves entitled the plaintiff, under the verdict, to substantial damages, and not to the merely nominal sum of one dollar. The head and neck of the plaintiff were, at the time of the trial, much bent to one side, and his walk was that of a paralytic. The defendant introduced many witnesses who testified that his appearance and movements were about the same prior to the injury complained of as they were at the time of the trial, and that they could see no difference in them. This testimony on the part of the defendant was

controverted by many witnesses for the plaintiff. The exhibition, however, that was made of the plaintiff's person in court, and the tests that were there made by Dr. Hughes, amounted, I think, to ocular demonstration of the fact that the plaintiff could not possibly have at that time stood upon the plank and performed the work the evidence without conflict showed that he was doing at the time of the accident.

Accepting, as the court must for the purposes of this motion, the facts to be that the plaintiff, without fault of his own, was injured by the negligence of the defendant, it cannot permit a verdict to stand that awards him damages in name only. While the court should and always will be careful not to usurp the functions of the jury, it is, nevertheless, its duty to protect parties from improper verdicts, rendered through misconception, prejudice, passion, or other wrong influences. *Lancaster v. Steamship Co.*, 26 Fed. 233; *Gaither v. Railroad Co.*, 27 Fed. 545; *Muskegon Nat. Bank v. Northwestern Mut. Life Ins. Co.*, 19 Fed. 405; *Kirkpatrick v. Adams*, 20 Fed. 292. In *Field on Damages* (page 886) it is said:

"It is less usual for the court to interfere with the finding of the jury for inadequate than for excessive damages, though it has the power to do so.  
\* \* \* But a verdict may generally be set aside for inadequacy, upon the same grounds that warrant the court in interfering where they are excessive."

To the same effect is *Gaither v. Railroad Co.*, 27 Fed. 545.

And in *Sedgwick on Damages* (volume 2, p. 656) it is said:

"The forbearance of the court to interfere with the jury is so great that, in actions of tort, the general rule is that a new trial will not be granted for smallness of damages. But it seems that if the jury so far disregard the justice of the case as to give no damages at all where some redress is clearly due, the court will interpose. So where, in a case for negligence for defendant's servant driving against the plaintiff, it appeared that the plaintiff's thigh was broken, and considerable expense incurred for surgical treatment; the plaintiff obtained a verdict, damages one farthing; a new trial was granted on payment of costs; and Lord Denman said: 'A new trial on a mere difference of opinion as to amount, may not be grantable; but here are no damages at all.'"

In the present case the amount awarded the plaintiff by the jury was practically no damages at all; yet the jury at the same time found, in effect, that the plaintiff was injured through the negligence of the defendant, without any contributory negligence on his own part. The evidence, without conflict, showed that his injuries by the fall were such as, under those circumstances, entitled him to substantial damages. For these reasons the motion for a new trial is granted.

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#### ROSS v. CITY OF FT. WAYNE.

(Circuit Court of Appeals, Seventh Circuit. December 14, 1894.)

No. 147.

#### MAINTENANCE—WHAT CONSTITUTES—ASSIGNMENT OF CAUSE OF ACTION.

One who, having an interest in the subject-matter of a suit, buys up the interest of the plaintiff pending suit, and thereafter prosecutes the suit himself, is not guilty of maintenance.



On rehearing. For former opinion and statement of facts, see 63 Fed. 466.

WOODS, Circuit Judge. The court did not overlook the question of the insufficiency of the bill for the failure to aver that the alleged invention had not been "patented or described in any printed publication in this or in any foreign country." The court below had declared the bill amendable in that respect, as it clearly was, if defective, and we deemed it an immaterial question. If we had considered it, and had come to one conclusion or the other, our decision upon the appeal would have been the same. The question upon which the judgment of the court below turned was the question which we deemed it important to decide. We do not think it necessary to consider minutely whether the bill was defective in particulars which were amendable. Now, as before, our opinion is that the facts stated in the bill made "a case for equitable relief."

But finally it is urged that the logical effect of our conclusion is "to set aside the doctrine of maintenance and its effects, and to open wide a door to what have heretofore been considered undesirable practices." The case comes from Indiana, where, as elsewhere in this country, the doctrines of the common law in respect to maintenance are not in full force. *Stotsenburg v. Marks*, 79 Ind. 193, and cases cited; *Allen v. Frazee*, 85 Ind. 283; *Board of Com'rs v. Jameson*, 86 Ind. 154; *Burnes v. Scott*, 117 U. S. 582, 6 Sup. Ct. 865. In *Board of Com'rs v. Jameson*, it is said:

It is clear, however, that the rule does not and cannot prevail in this state in its full extent since the Code of 1852, for it makes radical changes in the common-law rule upon the subject of assignment of choses in action. The common-law rule is limited in its operation by several provisions of the Code, but we deem it unnecessary to notice them. Many of the courts where the Code system prevails have denied its force altogether, and the tendency of modern decisions in America is to restrict, rather than enlarge, the operation of the rule. *Mathewson v. Fitch*, 22 Cal. 86; *Cain v. Monroe*, 23 Ga. 82; *Allard v. Lamirande*, 29 Wis. 502; *Bentinck v. Franklin*, 38 Tex. 458; *Roberts v. Cooper*, 20 How. 467; *Stoeber v. Whitman*, 6 Bin. 416; *Coughlin v. Railroad Co.*, 71 N. Y. 443; *Orr v. Tanner*, 17 Am. Law Reg. (N. S.) 759. The rule has often been criticized by the English courts; even as early as *Master v. Miller*, 4 Term R. 320 (vide page 340), unfavorable criticism was made. But our decisions, as we have seen, declare the rule to be in force in this state, although the extent to which it prevails has not been defined. It may, however, be safely assumed that the rule is narrowed, rather than extended, since to hold otherwise would be to oppose the letter and spirit of our Code, as well as the general principles of what Austin calls our "judge-made law." *Patterson v. Nixon*, 79 Ind. 251.

Besides, it appears in this case that Ross had an interest with Walker in the patent and in the cause of action when the suit was commenced, and it was therefore not forbidden him by the law of maintenance, however broadly applied, to acquire the title and interest of Walker pending the suit. Petition denied at cost of appellee.